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WITH

REFERENCES IN CONNECTION WITH THE TEXT TO THE CASES CITED IN
CALIFORNIA AND THE PACIFIC COAST STATES, AND A

TABLE OF CASES REPORTED,

SHOWING WHERE THEY ARE DIGESTED IN THESE VOLUMES.

BY

JAMES H. DEERING.

IN THREE VOLUMES.

VOL. III.

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DIGEST

OF THE

REPORTS OF THE SUPREME COURT

OF

CALIFORNIA.

VOLUMES 1 TO 100 INCLUSIVE.

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I. What Agreements Constitute.

1. Actual intention is necessary to constitute a partnership *inter se*. (*Wheeler v. Farmer*, 38 Cal. 203.)

2. Where there is no community of interest in capital stock, profit, or loss, there is no partnership. (*Wheeler v. Farmer*, 38 Cal. 203.)

3. Mere joint ownership in personal property does not constitute a partnership; nor was a partnership created by an agreement to divide the income of a business carried on by a third party with the joint property of the plaintiff and defendant, and paid to the latter for the joint use of himself and the plaintiff. (*Quackenbush v. Sawyer*, 54 Cal. 439.)
Cited 76 Cal. 48.

4. An agreement on the one side to perform certain services, and on the other to convey an interest in the property in relation to which the services were performed, in consideration of such services, does not constitute a partnership. (*Barber v. Cazalis*, 30 Cal. 92.)
Cited 89 Cal. 535.

5. A joint contract in writing, entered into by several persons with another, in which they agree to furnish certain materials and perform certain labor for such other, and which does not fix or define the relations of such persons among themselves, or as to third persons, and which does not show any community of interest between them in the profits to be realized, nor the losses to be sustained, does not of itself, by legal intentment, establish a partnership between them in reference to the work undertaken. (*Smith v. Moynihan*, 44 Cal. 53.)

6. If two persons enter into a joint contract, in writing, to perform certain labor and furnish certain materials for another, which contract does not define the relations of such persons between themselves, and if, by the understanding between themselves, one is to perform one part of the labor and the other another, and each is to receive a proportional sum of the money paid for the whole, the relation of partners does not exist between them. (*Smith v. Moynihan*, 44 Cal. 35.)

7. Agreement for working of quarry by two persons, one of whom is to manage the business and the other to give his whole time thereto, the net profits to be divided, constitutes a strict (as contradistinguished from a mining) partnership. (*Quinn v. Quinn*, 81 Cal. 14.)

8. In consideration of the right granted him by plaintiff, to make, use, and vend at his (the defendant's) own expense, and on his own account, within the British dominions, certain machines of which the plaintiff was the inventor, and to sell the right to others to make, use and vend the same, the defendant undertook and agreed to procure from the British authorities letters patent to the plaintiff for said machines, and to pay over, quarterly, to the plaintiff one-half the proceeds of all sales made him. Held, not a contract of partnership. (*Wheeler v. Farmer*, 38 Cal. 203.)
Cited 54 Cal. 468; 89 Cal. 535.

9. A and B entered into an agreement in which it was stipulated that A should advance twelve thousand dollars for the purpose of putting up a brick house on property of B, held by lease, and B was to convey to A one-half interest in the leased premises; the balance of the costs of the building was to be borne in equal proportion. When completed B was to rent the same, and pay over to A one-half of the rents. Building was erected at a cost of forty-eight thousand dollars, thirty thousand dollars paid by A, and eighteen thousand dollars by B. B conveyed one-half of premises to A. Held, that A and B. were co-partners. (*Laffan v. Naglee*, 9 Cal. 662.)

10. Plaintiff and defendant purchased certain lands jointly for purpose of farming and eventually selling the same. Some time after such purchase the parties entered into an agreement by which the plaintiff was to conduct the farming operations, and the defendant to attend to shipping and selling the produce, the parties to share expenses equally, and, after paying a reasonable compensation to the plaintiff for his services and the use of

his teams and tools, to divide the net proceeds equally between them. Held, that these facts constituted a partnership between the parties with respect to the lands and the farming of the same. (*Fisher v. Sweet*, 67 Cal. 228.)

11. In order to constitute partnership in farming and threshing business, there must be an agreement to carry on the business together and divide the profits, and the fact that one of the agreeing parties is to receive one-half of the net profits of the business will not make him a partner therein, if it is agreed that he is to receive the same only as compensation for the use of personal property let by him to be used by the other party in the prosecution of such business in his own name, and solely on his own account. (*Vanderhurst etc. Co. v. De Witt*, 95 Cal. 57.) Cited 97 Cal. 79.

12. Agreement by which one gives a right of way over his land for a ditch and is to pay for one-fourth the expenses, having in return a proportionate interest in the ditch, does not create a partnership between the parties so as to create a lien in favor of the one advancing more than his proportion. (*Fitzell v. Leaky*, 72 Cal. 477.)

13. Where one person secures a right of way from the plaintiff across the lands of the latter for the purpose of constructing a water ditch, and on the same day grants plaintiff a one-fourth interest on condition he bear the proportionate expense, the transaction did not create a partnership between the plaintiff and Kelly, either in the ditch as a mere conduit, or in the water flowing through it, so as to create a lien thereon in favor of one of the partners advancing more than his proportion of the capital; nor did it constitute them tenants in common of the land traversed by the ditch so as to prevent the plaintiff from filing a declaration of homestead thereon. (*Fitzell v. Leaky*, 72 Cal. 77.)

14. A contract between A and B, by which A transfers to B the possession of a flock of sheep, upon the terms that B should herd and take care of them for three years, at the end of which time he was to return to A the original number of sheep intrusted to him, and the increase be equally divided between them, does not constitute a partnership between A and B in the sheep. (*Robinson v. Haas*, 40 Cal. 474.) Cited 89 Cal. 535.

15. Where a broker buys wheat for E. & H. with their funds, and an agreement is made between the three that the broker shall dispose of the wheat, and that the profits shall be equally divided, the broker is neither partner nor joint owner of the wheat. (*Hanna v. Flint*, 14 Cal. 73.)

16. Business relation between several persons associated together for the purpose of organizing, controlling, and operating railroad and other corporations, and who repose a great confidence in each other in respect to the business, if it does not constitute a partnership, is nevertheless a fiduciary relation between the associates, subject to the ordinary rules governing trust relations. (*Colton v. Stanford*, 82 Cal. 351.)

17. When two parties, residing in different places, agree, the one to buy and ship wool, and to pay for the same to draw on the other, and the other to pay the drafts and sell the wool in a home or foreign market, charging interest for his advances, the two to share equally the losses or to divide equally the net profits, the parties are partners in the venture. (*Clark v. Gridley*, 49 Cal. 105.)

18. A, being the owner of an invoice of goods in the city of New York, sold one half interest therein to B, with an arrangement that the latter should proceed to San Francisco, and there dispose of the same on joint account; held, that this constituted a partnership between them, and that B was not subject to arrest in an action by A to recover a part of the proceeds of the sales. (*Soule v. Hayward*, 1 Cal. 345.)

19. Hillegass (defendant's intestate), at Philadelphia, in 1849—being about to start for California—entered into a written contract with the plaintiffs, then his partners, under which they were to have a certain proportion of the proceeds of his mining and other business, after first deducting fifteen hundred dollars advanced by the firm. Held, that the contract created a partnership, there being both a community of interest in the original capital and in the profit and loss. (*Harris v. Hillegass*, 54 Cal. 463.)

20. If A enters into a partnership with B, and puts into the concern as his share money belonging to a third person, which he holds as agent, that fact does not make such third person a partner of B, nor does it make A any the less the partner of B, even if A used the money without the authority of B, the owner; and in an action brought by A against B to wind up the partnership, such facts have no relevancy. (*Harper v. Lamping*, 33 Cal. 641.)

21. The evidence held to show that the money sued for was loaned to the defendants, and was not advanced on account of a proposed purchase by her of an interest in the defendants' business. (*Evans v. De Lay*, 81 Cal. 103.)

Coexecutors are not partners. See Executors and Administrators, 499.

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II. Evidence of.

22. It is the business of one who alleges a partnership to show it affirmatively. The burden of proof is on him. (*Smith v. Moynihan*, 44 Cal. 53.)

23. It is error to admit evidence to prove

partnership by general reputation. (*Sinclair v. Wood*, 3 Cal. 98.)
Cited 6 Cal. 455.

24. Common report can only be admissible to prove a partnership: (1) In corroboration; and (2) to prove knowledge of it on the part of the plaintiff. (*Turner v. McIlhane*, 8 Cal. 575.)

25. In an action against a partnership, and in order to prove that one of the defendants was a partner, it is incompetent to ask a witness whether, from what he saw while working for the firm, and from the acts of the particular defendant during that time, he was a partner. It does not amount even to evidence of common report. (*Turner v. McIlhane*, 8 Cal. 575.)

26. Partnership must be proved like any other fact, and cannot be established by mere surmise or innuendo. (*Hudson v. Simon*, 6 Cal. 453.)

27. Upon the trial of an issue joined as to the fact of partnership, the declaration of an alleged partner, made in the absence of the party denying the partnership, cannot, as against the absent one, be used to establish the fact of partnership. (*Vanderhurst etc. Co. v. De Witt*, 95 Cal. 57.)
Cited 97 Cal. 79.

28. Declarations of one defendant, to the effect that another defendant and he were partners, made in the absence of such other defendant, are incompetent, as against the latter, to establish the fact of partnership, when such fact is in issue. (*Salinas City Bank v. De Witt*, 97 Cal. 78.)

29. In an action of assumpsit against a firm, where the answer of one of the defendants denies that he was a member of the firm, it is error to admit in evidence, as against that defendant, a letter admitting the indebtedness, signed in the firm name, without proof that defendant wrote the letter, or authorized it to be written. (*Hudson v. Simon*, 6 Cal. 453.)

30. In an action of trover against a partnership, a certified copy of the certificate of partnership which tends to show that some of the defendants are members of the firm is competent evidence to prove the partnership, where there is nothing to show that any new certificate has been filed. (*Mortimer v. Marder*, 93 Cal. 172.)

31. Books of account kept by a party are not competent evidence, in an action for goods sold and delivered, to prove a copartnership between defendant L. and the other defendants, to whom certain lumber had been sold, L. not having dealt directly with plaintiffs. (*Severance v. Lombardo*, 17 Cal. 57.)
Cited 73 Cal. 209; 82 Cal. 166.

32. On an issue as to whether one of several persons sued as partners was a member of the partnership when the transactions in question took place, the books of the firm, in the absence of other evidence, are not admissible to prove his connection with the partnership. But evidence tending to show that he was a member being first introduced, and it appearing that he had access to the books during a considerable period covering the dates at

which the transactions occurred, and that he examined them on several occasions, and caused balance sheets to be taken from them and rendered to him, the books and the entries in them are competent to be submitted to the jury. (*Bryce v. Joynt*, 63 Cal. 375.)

33. The sufficiency of the preliminary proofs to justify the admission of the books is a question for the court, and it is not error to reject evidence offered before the books are admitted to contradict these proofs. The rejection of evidence thus offered does not preclude its introduction at a subsequent stage of the trial in order to obviate the effect of the books. (*Bryce v. Joynt*, 63 Cal. 375.)

34. The rights of the defendant in such a case are properly guarded by an instruction to the jury not to consider the books at all as evidence unless they believe from the evidence that the defendant knew their contents, and consented to the entries made in them, or knowing of them assented to them afterwards. (*Bryce v. Joynt*, 63 Cal. 375.)

35. A brought an action against B to recover for the value of services alleged to have been rendered by A, for B, in keeping a hotel. The defense was, that A and B were partners. On the trial, B, after introducing some evidence, which tended to show a partnership, offered in evidence the books of the hotel as further evidence of the partnership. Held, not to be error, and that if the books afforded any evidence of a partnership, the entries were admissible. (*Hale v. Brennan*, 23 Cal. 511.)
Cited 63 Cal. 377.

36. Books of partnership are evidence in actions between the partners, where the question is whether the parties were partners, and when kept subject to the inspection of each, must be admitted as correct until the contrary is shown. (*Hale v. Brennan*, 23 Cal. 511.)

37. A party who sues two persons as partners, one of whom answers, denying the partnership, cannot, to prove the partnership as against the defendant denying it, introduce in evidence an answer of the defendant admitting the partnership, filed in another case between the two defendants. (*Etchemende v. Stearns*, 44 Cal. 582.)

38. The return of a sheriff on a summons, that he had served it on one Pendleton, one of the partners and associates of the company, is prima facie evidence that Pendleton was such partner and associate. (*Wilson v. Spring Hill Quartz Min. Co.*, 10 Cal. 445.)

Evidence to show one to be a secret partner. See post, IX, 11.

Affidavits are not admissible to prove. See Evidence, 27.

III. Verbal Agreement of; Breach of Contract to Form Partnership.

39. When a verbal contract of partnership is made for the term of more than one year, and the parties act upon it, and conduct the partnership business upon the terms agreed upon, and in the firm name, neither party can afterwards avoid the obligations of the contract, as to past transactions under it, on the ground that it was a contract not to be performed within one year from its date, and

therefore within the prohibition of the statute of frauds. (*Pico v. Ouyas*, 47 Cal. 174.) Cited 47 Cal. 180.

40. Where two persons made an agreement to form a partnership, but such partnership was never launched, and one of the parties proceeded to conduct the enterprise in his own name, at his own cost, and for his own exclusive benefit, excluding the other, and repudiating the partnership agreement, held, that an action by the latter to establish his right as a partner, and for an accounting, would not lie, his only remedy in such case being an action at law for breach of contract. (*Powell v. Maguire*, 43 Cal. 11.)

Verbal agreement to form partnership to deal in realty. See post, V.

IV. Universal Partnerships.

41. Parties may form universal partnership, but the same would not be held to exist unless the intention was clearly expressed; the evidence to establish such a partnership after the death of one of the alleged partners should be clear and full, and not subject to doubt. (*Gray v. Palmer*, 9 Cal. 616.) Cited 95 Cal. 484.

V. Partnerships to Deal in Real Estate.

42. A partnership may be formed for the purpose of dealing in lands, by buying and selling lands generally, or it may be limited to a speculation upon a single venture; and like any other contract of partnership, it is an agreement to share in the profit and loss of certain business transactions, and does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands, other than a pecuniary interest, and need not be in writing under the statute of frauds, but may be formed by oral agreement and proved by parol evidence. (*Bates v. Babcock*, 95 Cal. 479.)

43. Though such partnership agreement does not of itself create any interest or estate in land, and a bill for the conveyance of lands could not be maintained thereunder, yet by the subsequent acts of the parties, rights are acquired in reference to lands purchased in pursuance of the agreement which a court of equity will protect against any attempt to make the statute of frauds an instrument of fraud, by raising an equity superior to the legal title, and controlling the legal title in subordination thereto. (*Bates v. Babcock*, 95 Cal. 479.)

44. If a partnership is proved between the parties upon sufficient evidence, they would have an interest in the lands acquired which forms a portion of the assets of the partnership by reason of a trust resulting by operation of law as an incident to such partnership, but that fact would not constitute a reason for excluding parol evidence to establish the existence of the partnership. (*Bates v. Babcock*, 95 Cal. 479.)

45. A partnership agreement, the object of which is to deal in real estate and share the profits, is not within the statute of frauds. (*Coward v. Clanton*, 79 Cal. 23.) Cited 95 Cal. 484, 487, 488; 20 Or. 138.

46. A partnership may exist in the purchase and sale of lands, but such a partnership can only exist where the contract is reduced to writing. It is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the partners are afterwards mingled; but they must be jointly concerned in the future sale. (*Gray v. Palmer*, 9 Cal. 616.) Cited 79 Cal. 28; 14 Col. 387; 3 Mont. 32; disapproved 95 Cal. 484.

47. In an action by one of the partners for an accounting of the profits realized under an agreement to deal in real estate and share the profits after the same has been executed, a partner who has received the entire profits is estopped from claiming that the agreement was void under the statute of frauds. (*Coward v. Clanton*, 79 Cal. 23.) Cited 95 Cal. 484, 487; 20 Or. 138.

48. An oral agreement for a partnership in the purchase and sale of lands to be acquired and sold in the name of one partner, with an express provision that the net proceeds of each sale were to be equally divided immediately after the sale, is not merged or superseded as to such provision by a subsequent memorandum, made after certain lands were acquired under it, which consisted of a mere written acknowledgment by the partner who had acquired the title to the land that he had acquired it, and that it was understood and agreed that the other partner was to share equally in the net profits of the land, without stating the time of division. (*Carpenter v. Hathaway*, 87 Cal. 434.)

49. It does not matter in whose name real estate is held; he is only a trustee for the partnership; and for the purpose of disposal and distribution, it is to be treated as personal estate. (*Gray v. Palmer*, 9 Cal. 616.)

50. Where a partnership agreement to deal in land provides that one of the partners shall furnish the money to buy the land, and the other shall contribute his skill in selling it, the profits to be equally divided, and in pursuance thereof a tract of land is purchased and a part of it is sold at a profit, but for less than the purchase price paid for the entire tract, no profits are earned, within the meaning of the agreement, in which the partner contributing his skill is entitled to share. (*Coward v. Clanton*, 79 Cal. 23.) Cited 81 Cal. 333.

51. Lands acquired by a partnership for partnership uses constitute partnership assets, and will be treated in equity as personalty, whether the partnership was formed by oral or written agreement; and the same principle applies when the object of the partnership is to deal in lands which are purchased with partnership assets. (*Bates v. Babcock*, 95 Cal. 479.)

52. Upon the refusal of the partner holding the legal title to account, after a sale by him of part of the partnership lands, an action will lie in favor of the other copartner for a dissolution of the partnership and an accounting of the profits of the land sold, and to establish his interest in all the unsold lands acquired under the verbal agreement. (*Carpenter v. Hathaway*, 87 Cal. 434.)

53. An allegation that defendants agreed upon certain terms to become equal partners with the plaintiff in certain real property, which the complaint elsewhere shows was held by plaintiff upon a dry, naked trust for third parties, and was purchased from the beneficiaries and transferred to another person as trustee for plaintiff and defendants, does not necessarily imply an agreement for a conveyance of the property to the defendants; and taken in connection with the other averments of the complaint, and with an averment immediately following, that they were to share equally all sums received for the property, and all profits and losses accruing on account thereof, shows that the agreement was for a partnership in the profits that might result from dealing in the land, and had no necessary relation to the ownership of the land. (*Bates v. Babcock*, 95 Cal. 479.)

54. In an action for division of the proceeds after a sale of lands under an oral partnership agreement to deal in lands, the statute of frauds is not allowed as a defense thereto; and the same principles which apply to such an action are applicable in an action to subject land which has become a portion of the assets of such a partnership to a sale and distribution of proceeds among the partners by a court of equity. (*Bates v. Babcock*, 95 Cal. 479.)

55. Interest, if not stipulated for in the partnership agreement, cannot be allowed on the purchase money of the lands bought for the partnership. (*Carpenter v. Hathaway*, 87 Cal. 434.)

56. No provision for future taxes need be made in decree establishing plaintiff's interest in the partnership lands, the legal title of which was in the defendant, as the plaintiff's interest is taxable to himself alone, and not to the defendant, after the date of the decree. (*Carpenter v. Hathaway*, 87 Cal. 434.)

57. Partnership realty being regarded as personality, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance due him. (*Gray v. Palmer*, 9 Cal. 616.)

58. A surviving partner, being entitled to the possession and control of the partnership effects, can proceed directly in the district court to obtain control, and to have a partition of the real estate belonging to the partnership, but standing in the name of his deceased partner. (*Gray v. Palmer*, 9 Cal. 616.)

59. It was necessary to file this bill, and make the administrator, the widow, and the infant, parties, to rebut the presumption of ownership on the part of the estate, arising from the fact that the real estate stood upon the record in the name of the deceased, and the administrator had possession of the personal property. These objects could only be accomplished by proceedings in the district court, as the probate court did not possess the judicial means of giving relief. (*Gray v. Palmer*, 9 Cal. 616.)

Dormant partnership in purchase and sale of real estate. See post, IX, 11.

VI. Mining Partnerships.

1. What Constitutes; Distinction Between and Ordinary Partnerships.

60. Parties owning mining claim as tenants in common, and engaged in working same, are partners. (*Dougherty v. Creary*, 30 Cal. 290.)

Cited 7 Col. 133; 1 Mont. 227; 2 Utah, 218.

61. Where several owners of mine unite and co-operate in working the same, they form a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but which has some rules peculiar to itself. (*Skillman v. Lachman*, 23 Cal. 199.)

Cited 28 Cal. 578; 35 Cal. 369, 370, 372; 42 Cal. 641; 89 Cal. 369; 5 Col. 112; 14 Col. 354; 2 Utah, 218.

62. If two or more persons acquire mining claim for purposes of working claim and extracting the mineral therefrom, and actually engage in working the same, and share, according to the interest of each, the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners or to share the profits and losses. (*Duryea v. Burt*, 23 Cal. 569.)

Cited 30 Cal. 300; 35 Cal. 369; 65 Cal. 49; 7 Col. 133, 134; 14 Col. 354; 1 Mont. 227; 4 Mont. 112; 2 Utah, 218.

63. Agreement between one or more persons, who claim undeveloped mine, and another person that if the latter will devote his labor and skill in exploring and developing the mine the former will furnish him with tools and provisions and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes one of those qualified partnerships, common in California, known as mining partnerships. (*Settembre v. Putnam*, 30 Cal. 490.)

Cited 35 Cal. 370; 65 Cal. 49; 77 Cal. 12; 7 Col. 133; 4 Mont. 112; 2 Utah, 218.

64. Where a person claiming an undeveloped mine agrees with another that, if he will devote his labor and skill in its development, the former will furnish him with tools and provisions and give him an equal interest in the mine in case it shall prove valuable, the latter is entitled to an equal interest in the mine when it becomes valuable if he devotes his labor and skill until that time. (*Settembre v. Putnam*, 30 Cal. 490.)

65. Mining partnerships, where there are no partnership articles, are governed by the law of ordinary partnerships, except so far as the general usage of persons engaged in similar pursuits or the established practice of the particular company has established a different rule, the only differences generally existing being such as flow from the fact that in such partnerships there is no delectus personarum. (*Jones v. Clark*, 42 Cal. 180.)

Cited 89 Cal. 369, 370.

66. Where two persons entered into an agreement to engage together in a mining adventure, under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine, and paid a note given

in the firm name for a portion of the price, held, that the contract was one of partnership, in the ordinary sense, as distinguished from what is known as a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership. (*Decker v. Howell*, 42 Cal. 636.)
Cited 81 Cal. 16.

Agreement for working quarry constitutes strict partnership, when. See ante, 7.

Defense that defendant is not a partner, conclusiveness of finding. See post, VI, 7.

Mining partnerships. See Mines and Mining, XIII.

2. Power of Superintendent to Bind.

See Mines and Mining, XV.

67. Managing superintendent cannot bind mining partnership, except upon such contracts as are usual and necessary in the ordinary prosecution of the work, unless specially authorized. (*Jones v. Clark*, 42 Cal. 180.)

68. A promissory note, purporting to have been executed for and on behalf of a mining partnership, and signed by the superintendent as such, is binding on the partnership, provided the superintendent had authority to execute it, or it has been subsequently ratified by the company. (*Jones v. Clark*, 42 Cal. 180.)

69. Where a promissory note, purporting to be executed for and on behalf of a mining partnership, and signed by the superintendent as such, was given in payment for property which the partnership was using, and such use was a beneficial one, and all the members knew soon after the execution of the note of its existence, and believed it to be a company note, and acquiesced in paying interest upon it until long after the original debt would have been barred if the note were held invalid, held, that the members of the partnership should be estopped from disputing its validity. (*Jones v. Clark*, 42 Cal. 180.)
Cited 89 Cal. 372, 635.

3. Power of Member to Bind Firm by Contract.

70. Where a contract in writing purported to have been made by a mining partnership in its firm name through its secretary, and it appeared that such contract had been authorized by a vote of a majority of the shares at a meeting of the company, and after being assigned by the secretary had been ratified and approved in the same manner, and it further appeared that, though there were no written regulations or by-laws, the company usually did business in this way, held, that the recognized and established usage on the part of the firm should be taken as a part of the contract of partnership. (*Taylor v. Castle*, 42 Cal. 367.)

71. One of the rules governing mining partnerships is that the law does not, in case of a mining partnership, imply any authority, either to a member of such partnership or to its managing agent, to bind the company or its individual members by promissory note, or a contract of indebtedness, executed in the name of the company; but it is incumbent on the party claiming to hold the company for such

indebtedness to show that the person executing or contracting the same in the name of the company had power and authority to do so. (*Skillman v. Lachman*, 23 Cal. 196.)
Cited 42 Cal. 194.

72. Where one of mining company acted as salesman of firm, it cannot be pretended that he was a dormant partner, whose acts would not bind the firm. (*Rich v. Davis*, 6 Cal. 163.)

73. Where B authorizes A to do all acts in his name concerning their mining operations, followed by the authority to sign B's name to any company articles, this does not authorize A to sign B's name to a promissory note, even where the money was used in carrying on their joint mining operations. (*Washburn v. Alden*, 5 Cal. 463.)

74. The authority to sign his name in this particular instance is a limitation upon what might otherwise be considered a general power. (*Washburn v. Alden*, 5 Cal. 463.)

75. Where Howell and Haynes entered into a strict partnership for the purpose of purchasing, holding, and working a mine, and while such partners Howell gave a firm note for money borrowed in the name of and for the use of the firm, and afterwards conveyed all his interest to Haynes, held, that the note was valid as a firm note, and could be collected of Haynes. (*Decker v. Howell*, 42 Cal. 636.)

76. The rule that in "mining partnerships" one partner has no authority to bind the firm by a promissory note is based upon the reason that in such partnerships there is no delectus personæ, and that, consequently, the membership is continually subject to changes beyond the control of the partners; but there is nothing in the nature of mining which forbids a contract of strict partnership; and when it appears that the confidential relations of an ordinary partnership are established, and the firm not subject to the intrusion of other partners at will, the reason of the rule fails, and with the reason the rule itself. (*Decker v. Howell*, 42 Cal. 636.)

Power of partner to bind firm. See ante, 66.

4. Fiduciary Relation of Partners; Property of Firm Purchased by Partner.

77. Whether associates in mining claim are general partners, not decided; but if they are, still the rule qualifying the right of trustees and guardians as to purchasing from their cestui que trust and wards does not apply. (*Bradbury v. Barnes*, 19 Cal. 120.)

78. The mining ground belonging to and worked by a mining partnership and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property. (*Duryea v. Burt*, 28 Cal. 569.)
Cited 80 Cal. 327; 12 Nev. 295.

79. If two or more persons as mining partners claim and develop a mine situated upon land owned by a third person, and the partners authorize one of their number to purchase the land of the owner for the benefit of

all, and he buys the same in his own name, he holds the legal title of his partners' proportion in the mine in trust for them. (*Settembre v. Putnam*, 30 Cal. 490.) Cited 35 Cal. 487; 81 Cal. 333; 6 Cal. 293; 14 Cal. 367; 3 Mont. 21.

80. B., a member of Quartz Mining Company, received as the proceeds of quartz rock belonging to the company and crushed in their mill seven thousand and seventy-three dollars and ninety-eight cents. Subsequently, the mill, lead, and ditch of the company were sold at sheriff's sale, under execution on a judgment in favor of A. against the company, for two thousand five hundred and fifty-eight dollars, C. becoming the purchaser for two thousand seven hundred and fifty-six dollars and two cents, funds furnished by B., receiving the sheriff's certificate, and then assigning the same to B. Still later, W. obtained judgment against the company for two thousand three hundred and ten dollars and ninety-seven cents, and under execution thereon the same property was sold by the sheriff to C., who received the certificate and assigned it to B., C. having bought the claim before judgment for two thousand two hundred and fifty-four dollars with funds furnished by B. Plaintiff, a member of the company, sued to cancel these certificates, prevent a sheriff's deed to B., and to hold him, on a dissolution of the company, as trustee for the company of the interest bought at the sheriff's sale. Held, that the conduct of B. was grossly inequitable, and that, if the company is willing to affirm his purchase as done for its benefit, the money paid should be credited to him on his indebtedness, and the title of the property go to or remain in the company, unaffected by the transaction. (*Bradbury v. Barnes*, 19 Cal. 120.)

81. If B. paid the judgment against the company in such case, he, as a member, would be entitled to recover of his associates contribution for their proportion; but that he could not make this payment through the process of an assignment and then enforce the judgment against the company by selling out the property and buying it in, especially as he had in hand at the time more money of the company than he paid for the judgments. (*Bradbury v. Barnes*, 19 Cal. 120.)

5. Formation of Trading Partnership by.

82. Where a mining company, not incorporated, forms a trading partnership with an individual under a firm name, each member of the mining company is a member of the firm. (*Rich v. Davis*, 6 Cal. 163.) Cited 65 Cal. 48.

Agreement to divide profits of mining and other business. See ante, 19.

6. Sale by Partner, Effect of: Rights of Purchasers and Creditors.

83. One of the partners in a mining partnership may convey his interest in the mine and business without dissolving the partnership. (*Duryea v. Burt*, 28 Cal. 569, cited 5 Cal. 112, 4 Mont. 113; *Skillman v. Lachman*, 23 Cal. 198, cited 4 Mont. 113.)

84. As a sale of an interest in a mining partnership by a partner to a stranger does

not dissolve the partnership, such stranger, by his purchase, presumptively becomes a partner, though he takes no part in the management of the partnership affairs, and does not hold himself out to the world as a partner. (*Taylor v. Castle*, 42 Cal. 367.)

85. If one of several partners in a mine holds the legal title in the same in his own right to the extent of his interest, and in trust for his copartners to the extent of their interests, a sale made by him, without the consent of his associates, of an undivided interest not exceeding in amount the interest held in his own right, to one who had no notice of the trust, will convey only the title of the grantor and not the interests of the cestuis que trust. (*Settembre v. Putnam*, 30 Cal. 490.)

86. If a member of a mining partnership sells his interest in the mine, the purchaser takes it subject to any lien existing in favor of a copartner for debts due the creditors, or advances made for the uses of the concern, unless he becomes a purchaser in good faith for a valuable consideration, without notice of such lien. (*Duryea v. Burt*, 28 Cal. 569.) Cited 42 Cal. 194, 642; 14 Cal. 367.

87. Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for moneys advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist. (*Duryea v. Burt*, 28 Cal. 569.)

Cited 73 Cal. 392.

88. If, in the case of a mining partnership, a retiring partner still continues bound for a partnership debt, he nevertheless parts with his equity to have the partnership debts paid out of the partnership property. (*Jones v. Clark*, 42 Cal. 180.)

89. If, while a mining company is engaged in working its mining grounds as partners, one partner sells his interest in the mine, the purchaser will be deemed to buy with notice of any lien resulting from the relation of the partners to each other and to the creditors of the partnership. (*Duryea v. Burt*, 28 Cal. 569.)

90. If a promissory note is binding upon a mining partnership as a valid contract, such partnership continues liable, at least to the extent of the partnership assets, though some members of the company may have parted with their interest, the new members having purchased with knowledge and subject to the payment of partnership debts. (*Jones v. Clark*, 42 Cal. 180.)

Right to purchase from copartner. See post, VIII, 5.

7. Actions Against.

91. Where, on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true and that said defendant was a member of the company as to plaintiff, the finding supports a judgment for plaintiff. (*Parke v. Hinds*, 14 Cal. 415.)

92. An objection that the finding is qualified by the words "as to plaintiff," and that the facts showing this special relation to him ought to have been found, should have been taken below, and cannot be raised for the first time on appeal. (*Parke v. Hinds*, 14 Cal. 415.)

Services for partnership, recovery for value of. See Agency, 321.

8. Death of Partner.

93. It is well established that in mining partnerships there is usually no delectus personæ, and as a consequence that such a partnership is not dissolved by the death of a partner, or a sale of an interest by a partner to a stranger. (*Taylor v. Castle*, 42 Cal. 367.) Cited 89 Cal. 369.

94. A mining partnership is not dissolved by the death of a partner, nor has a surviving partner any right to take control of the property as survivor, this right only applying where the delectus personæ exists. (*Jones v. Clark*, 42 Cal. 180.)

9. Actions Between Partners; Action for Accounting and Dissolution.

95. In ejectment for an interest in a mining claim, the answer being a general denial, defendant cannot defeat the action by showing the claim to be partnership property. Any rights defendant may have in the premises, growing out of the partnership, must be asserted in equity, particularly as the legal title in this case is in plaintiff. (*Lowe v. Alexander*, 15 Cal. 296.) Cited 44 Cal. 362.

96. Where two of three partners in a mine make a contract with a person not interested in the same, by which he becomes entitled to a share of their interest, and a like share of the profits of their interest, the two are the only necessary parties defendant in an action brought by the person they contract with to determine his right to a share in the mine and a corresponding share of the profits on their interest. (*Settembre v. Putnam*, 30 Cal. 490.) Cited 65 Cal. 455; 74 Cal. 444; 85 Cal. 500.

97. In an action to take an account of a mining partnership and dissolve the same, and sever the interests of the several partners, all those owning interests in the partnership are necessary parties. (*Settembre v. Putnam*, 30 Cal. 490.)

98. If, in a case in equity to dissolve a mining partnership, it appears on the trial that a complete determination of the controversy cannot be had without the presence of other parties, the court may, on its own motion, under section 17 of the Practice Act, order them to be brought in before a final disposition of the case. (*Settembre v. Putnam*, 30 Cal. 490.)

99. Retiring partner, though he may be a proper, is not a necessary, party. (*Jones v. Clark*, 42 Cal. 180.)

100. Where, in a suit in equity for dissolution of a copartnership, for an accounting and for the setting aside of certain transfers of stock in a mining corporation, on the ground of fraud practiced by an alleged copartner defendant, to which the mining corporation was

made a party defendant, the complaint alleged that, although the title to the mine stood in the name of the corporation, the copartners as such owned and worked it, and that the partnership still existed, and that the corporation was a mere name and agent of the partnership and not the owner of the mine, and the court found the allegations to be true and rendered a judgment in favor of the plaintiff, the court was authorized to make an order appointing a receiver to take charge of and manage and work the mine, and a writ of prohibition will not be granted by the supreme court to restrain the receiver from acting under such order. (*Fischer v. Superior Court*, 98 Cal. 67.)

101. Where the title to a mine belonging to a partnership stands in the name of a mining corporation, which possesses no interest in the property, the property is assets of the copartnership, and the court is authorized to appoint a receiver to take charge of and work the mine, in an action for dissolution and accounting of the partnership, notwithstanding the legal title is in the corporation. (*Fischer v. Superior Court*, 98 Cal. 67.)

102. If, in an action brought against two of several mining partners to establish the plaintiff's right to an interest in the mine, under a contract with the defendants, and for a conveyance and an account and a dissolution of the partnership, the plaintiff is content with a judgment establishing his right and directing a conveyance, and waives an account and dissolution, the court may grant that relief and give judgment, without making the other partners parties defendant. (*Settembre v. Putnam*, 30 Cal. 490.)

103. Where a party institutes an action against a portion of his associates in a mining partnership to establish a disputed right to an interest in a mine, and a conveyance of the interest claimed is a part of the relief sought, a court of equity may give judgment establishing the right and directing a conveyance to be made without dissolving the partnership. (*Settembre v. Putnam*, 30 Cal. 490.)

104. In suit for accounting and dissolution the decree directed an accounting and sale of the property of the company, etc., and this court held that portion of the decree ordering a sale to be premature, and therefore modified it by directing the account first to be taken showing how the concern stands, what is due, and what the assets, before the property is ordered to be sold. (*Bradbury v. Barnes*, 19 Cal. 120.)

Sale by partner does not dissolve partnership. See ante, VI, 6.

Death of partner does not dissolve. See ante, VI, 8.

Partner, lien of. See Mines and Mining, 452.

Venue of action to dissolve. See Venue, I, 3, d.

Arbitrators to settle difficulties, powers of. See Arbitration and Award, 45, et seq.

VII. Contract of Partnership Between Lessor and Lessee, Effect of.

105. The lessor, after he has leased a hotel to the lessee, may enter into a contract of partnership in keeping the hotel with the

lessee, with an agreement that the rent reserved shall be a charge upon the firm, and if the latter contract is separate from the first, it does not work a surrender of the lease, and in an action by the lessor to recover the rent, the lessee may prove the partnership as a defense, if pleaded. (*Pico v. Cuyas*, 47 Cal. 174.)

106. Under such contract of partnership, the lessor remains the lessor, and his claim for rent under the lease continues, but the rent must be paid out of the net profits of the partnership, and he cannot bring an action at law to recover the rent. (*Pico v. Cuyas*, 47 Cal. 174.)

VIII. Mutual Rights and Duties of Partners.

1. Right of Possession.

107. Partners or tenants in common are equally entitled to possession of partnership or common property. This equality of right continues after a dissolution of the partnership. (*Morganstern v. Thrift*, 66 Cal. 577.)

108. One partner cannot, by a sale of his interest in the partnership property, deprive his copartner of the right of possession thereto. (*Myers v. Moulton*, 71 Cal. 498.)

2. Firm Assets, What are; Purchases Made by Partner.

109. When a copartnership is formed for the manufacture of hay-presses, for which a patent is afterward obtained by one partner, and the hay-press was put in as part of the capital stock, the patent so obtained is partnership property, and it is of no consequence that there was no written assignment of a half interest in the patent to the other copartner. Such copartner became in equity the owner of one-half of the patent, though the agreement was by parol. (*Hill v. Miller*, 78 Cal. 149.)

110. A finding that certain real estate standing in the individual names of the partners is partnership property is warranted by the evidence, when it appears that the property was purchased and used for the benefit of the firm in its business, was paid for out of the firm assets, and was assessed to it. (*Roberts v. Eldred*, 73 Cal. 394.)

111. The rights of parties in relation to the rents and profits of property which had belonged to a partnership, but which had accrued intermediate to the entry of a decree of dissolution in the lower court and the decision of an appeal to the supreme court, must be determined in the same manner and by the same rule by which they would have been determined had they accrued prior to the decree of dissolution. (*Olark v. Jones*, 50 Cal. 425.)

112. A member of a partnership engaged in the business of stock-raising upon land belonging to the state, who, during the existence of the partnership, acquires the legal title to the land from the state, does not hold the same in trust for his copartners by reason of the fact that certain improvements had been erected on the land with partnership funds and for partnership purposes. (*Burges v. Rice*, 74 Cal. 590.)

113. Where one of two holders of the leasehold, holding in partnership, purchases the fee in his own name and with his own money, it inures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. (*Laffan v. Naglee*, 9 Cal. 682.)

114. In such case, as the relation sustained by the tenant purchasing the fee to his cotenant or partner is one of confidence, the proof that the latter had waived his right must be clear, and the burden of proof rests upon the tenant purchasing. (*Laffan v. Naglee*, 9 Cal. 682.)

115. One member of a firm composed of several copartners, after the death of one of them, falsely and with the intent to prevent a proposed settlement, represented to his surviving copartners that he had become the owner of the interest of the deceased, and thus prevented a purchase by them of such interest. Held, that he cannot, by compromise of a suit brought by one to whom the interest of the deceased was transferred and assigned against all of the surviving copartners for an accounting, acquire the interest of the deceased and maintain for his own benefit a suit against the remaining members of the firm to enforce the claim for the full amount of the profits which would have been due to the estate of the deceased copartner. The purchase of the interest of the deceased was made for the benefit of the plaintiff and defendants; and, after repaying the amount expended by the plaintiff in compromising the claim, the residue of the profits should be divided among all of the surviving copartners according to their respective interests. (*Warren v. Schainwald*, 62 Cal. 56.)

Judgment in action by firm is firm assets. See post, 203.

3. Sale by Partner of His Interest in Firm Property.

116. Copartnership is the result of agreement between the parties, and one of the firm cannot sell out his interest in the same, nor can a stranger buy in the same at pleasure. Where such purchase or sale is made with the consent of the firm it works a dissolution of the partnership and necessitates the final closing out and settlement of the old firm. (*Bradley v. Harkness*, 26 Cal. 76.) Cited 28 Cal. 587; 35 Cal. 369; 42 Cal. 642.

117. The fact that the partnership property in question was in the hands of a receiver at the time of the sale, pending a suit for dissolution of the partnership and for an accounting, did not prevent the sale of the interest of one of the parties, the other party consenting to such sale; nor did it prevent the receiver from restoring it to the parties in interest, or to such third person as they should direct, upon a settlement of their dispute, especially when his act in so doing was approved by the court and he was regularly discharged. Even if the receiver had retained possession, the sale of one partner's residuary interest in the property would be valid and binding. (*Schurtz v. Romer*, 82 Cal. 474.)

Power of partner to dispose of his interest. See post, 175.

118. If a partner sells his interest in the partnership property to his copartner, but there is a dispute whether the sale included a settlement of the partnership accounts, and, in an action brought for their settlement, the issue as to whether such sale included such settlement is submitted to a jury, the jury, in determining it, cannot take into consideration the amount which the purchasing partner paid his copartner, or the amount which he sold the purchased property for. (*Warden v. Marcus*, 45 Cal. 594.)

119. P. and K. were partners in the business of carriage-making, and the firm owned, among other property, an interest in certain real estate evidenced by a contract of sale, in accordance with which most of the purchase money had been paid. P. agreed to sell out his interest in the firm to K., and tendered a written bill of sale of all his interest in the firm property, but did not offer a deed specially to convey his interest in the real estate. Held, in assumpsit by P. against K. for the sum agreed to be paid by K., that the evidence would not support a finding that a sufficient tender had been made by P. (*Plath v. Kitzmuller*, 52 Cal. 491.)

120. In such a case, it is not necessary to plead the statute of frauds. (*Plath v. Kitzmuller*, 52 Cal. 491.)

Fraud in purchase of interest of copartner. See ante, 115.

121. The mere purchase of the interest of the estate of a deceased partner in the partnership property does not create a new partnership between the purchaser and the surviving partner of the old firm. (*Noonan v. Nunan*, 76 Cal. 44.)

122. In order to render one who has purchased the interest of a partner in a firm liable upon a note executed by the firm prior to his purchase it must be shown that, in some way, he assumed the obligation created by it; and, in the absence of such showing, a nonsuit is properly granted in an action against him upon such note. (*First National Bank of San Luis Obispo v. Simmons*, 98 Cal. 287.)

123. If one of two partners sells to a third person his interest in the goods owned by the partnership the sale dissolves the partnership, and the purchaser cannot maintain an action to recover his interest in the goods, but must sue for an accounting, and will recover whatever his assignor would have been entitled to upon a settlement of the partnership accounts; and, until the affairs of the partnership are thus wound up, the partner who did not sell is entitled to the possession of the property. (*Miller v. Brigham*, 50 Cal. 615.) Cited 23 Or. 547.

124. Where one partner, without the consent of his copartner, conveys his interest in the partnership property to another, the latter becomes a tenant in common with the copartner, and the claim of a creditor of the firm can only be asserted to the property as against the third party in possession, in a court of equity. (*Stokes v. Stevens*, 40 Cal. 391.)

125. Where a partner sells his interest in the partnership to a third person, under a

parol agreement for a certain cash price and the assumption of one-half of the firm liabilities by such third person not to exceed a certain sum, and a written bill of sale is executed purporting to sell such interest to such third person and another copartner jointly for the same cash consideration and the assumption by them of all the firm indebtedness not exceeding the same sum, such third person cannot escape liability in an action of assumpsit for the consideration, upon the ground that he had not obtained the interest bargained for, if there is no attempt to reform the instrument. The question of the extent of interest as between the purchaser and the other partner can only be considered when it arises, if ever, between them. (*Schurtz v. Romer*, 82 Cal. 474.)

126. The purchaser of partnership property who pays or becomes liable for partnership debts, equal in amount to the value of the property, has a valid defense against a suit in equity brought to foreclose a mortgage executed by one of the partners for his individual debt on his interest in the partnership property. (*Jones v. Parsons*, 25 Cal. 100.) Cited 73 Cal. 392.

127. Where one of two partners sells to a third person his interest in a stock of goods belonging to the partnership there must be an immediate delivery and continued change of possession as required by section 3440 of the Civil Code, or the sale will be void as to creditors, and it is immaterial that the business of the partnership is conducted under a fictitious name. (*Newell v. Desmond*, 63 Cal. 243.)

Sale of interest by partner does not affect right of possession. See ante, VIII, 1.

Sale under execution against partner. See post, IX, 10.

Purchase of copartner's interest, right of creditor. See post, 253, 254.

Action against a partner after sale of interest. See post, 386.

4. Fraud of Partner.

128. M. & S. were partners until September 24, 1880, when the firm was dissolved by mutual consent. M. being the owner of a house upon which there was a mortgage, his wife, on September 16, 1880, filed a declaration of homestead thereon, and on the next day M. secretly and surreptitiously drew from the assets of the firm a sum of money (there being at the time nothing due from the firm or from S.), out of which he, on September 27th, paid off and discharged the mortgage lien. In an action by S. against M. and wife, to obtain a decree adjudging a lien upon the land paramount to the homestead right for the amount paid in discharging the mortgage, held, that the plaintiff was entitled to the relief demanded. (*Shinn v. Macpherson*, 58 Cal. 596.)

Fraud of partner in purchase. See ante, 115.

Fraud of partner as defense in action on note given to copartner. See post, 152, et seq.

Power of partner over realty where copartner absconds. See post, IX, 4.

Fraud of copartner in sale of all firm property, rights of purchaser. See post, 178.

Wrongful acts of partner. See post, XIII, 1.
Wrongful act of partner, remedy for. See post, 359.

Reopening account for fraud. See post, XIII, 10.

5. Purchase from Partner; Right to Purchase Judgment or on Execution Against Copartner.

129. Partners occupy a confidential relation towards each other in respect to firm business, but this does not prevent one from buying of another when both have an equal opportunity and means of knowing the value of the property and its condition. (*Bradbury v. Barnes*, 19 Cal. 120.)

130. A partner has a right, generally, to buy the whole or a portion of the interest of his copartner in real estate at private sale. (*Bradbury v. Barnes*, 19 Cal. 120.)

131. There is no principle of equity which forbids a partner from purchasing, with his own funds and outside of the partnership business, a judgment or other evidence of indebtedness against his copartner, or prohibits him from enforcing its collection by a levy upon and sale of the interest of the other in the firm assets. (*McKenzie v. Dickinson*, 43 Cal. 119.)

132. The obligations of copartners inter sese, whatever may be their nature and extent, refer only to the conduct of the business in which the firm is engaged; beyond and outside of such business there is no restraint upon the right of either partner to traffic for his own profit. (*McKenzie v. Dickinson*, 43 Cal. 119.)

133. A partner may purchase with his own funds and on his own account the interest of his copartner in real estate at sheriff's sale, if there be no circumstances of fraud or of trust, apart from the partnership relation, and hold the property so purchased as a stranger could hold it. (*Bradbury v. Barnes*, 19 Cal. 120.)

134. The fact that a sheriff's sale is open and public is prima facie proof that no advantage is taken by the partner purchasing of his copartner. (*Bradbury v. Barnes*, 19 Cal. 120.)

Purchase of copartner's interest in business. See ante, VIII, 3.

Purchases by partner on execution sale against the firm. See ante, 80, 81.

Purchase by partner at tax sale. See Taxation, 722.

Purchase of judgment against copartner after dissolution. See post, 341.

6. Actions at Law Between Parties.

135. One partner cannot sue the other in an action at law. The remedy is by bill in equity for a dissolution and an account. (*Barnstead v. Empire Min. Co.*, 5 Cal. 299.)

136. The only remedy upon a contract of partnership is by bill in equity to dissolve the partnership and obtain an account. (*Nugent v. Locke*, 4 Cal. 318.)
Cited 1 Wash. Ter., N. S., 317.

137. Partners cannot sue one another at law for any of the business or undertakings of the partnership. This can only be done in chan-

cery, by asking for a dissolution and an account. (*Stone v. Fouse*, 3 Cal. 292.)

138. One partner cannot sue another for a partnership transaction, without praying for an account and a settlement of the partnership transaction. (*Russell v. Ford*, 2 Cal. 86.)
Cited 1 Wash. Ter., N. S., 317.

139. A partner cannot maintain an action at law against his copartner to recover his proportion of the partnership proceeds until the accounts of the firm have been settled. (*Fisher v. Sweet*, 67 Cal. 228.)

140. One partner cannot sustain an action against his copartner, for the delivery of personal property belonging to the partnership. (*Buckley v. Carlisle*, 2 Cal. 420.)
Distinguished 61 Cal. 236.

141. No action at law can be maintained, nor can an attachment be sued out, by one partner against another for any matter touching the partnership affairs. (*Wheeler v. Farmer*, 38 Cal. 203.)

142. If a contract contained a covenant for stipulated damages, and by the same contract the parties were constituted partners, plaintiffs cannot sue on this contract in any form, without seeking an account and dissolution. (*Stone v. Fouse*, 3 Cal. 292.)

143. If lessor of hotel, after lease is made, enters into contract of partnership with lessee in keeping the same, the lessor cannot sue at law for the rent reserved in the lease, but must sue in equity for a partnership accounting. (*Pico v. Ouyas*, 47 Cal. 174.)

144. Section 74 of the Practice Act, which provides for the arrest of a debtor in certain cases, does not apply in the case of one partner suing to recover money received by another. (*Soule v. Hayward*, 1 Cal. 345.)

145. If a copartner, even by consent, retires from the firm of which he is a member, a suit at law cannot be maintained against him by the members who remain in the firm, for money alleged to be due from him to them in the copartnership transactions, unless there has been a final settlement of all the firm accounts and a balance has been struck. (*Ross v. Cornell*, 45 Cal. 133.)
Cited 75 Cal. 521; 13 Nev. 501; 1 N. Dak. 151.

146. In such case if there are two or more members who remain in the firm they cannot maintain a joint action at law against the member who retired from the firm. (*Ross v. Cornell*, 45 Cal. 133.)

147. It may not be necessary, in order to enable a partner to maintain an action at law against a copartner or one who has been such, to show an express promise to pay a sum ascertained as a balance due, but the balance itself must be one which has been ascertained by the act of all the partners and agreed to as constituting such balance. (*Ross v. Cornell*, 45 Cal. 133.)

148. Where one partner borrows money from another for the purpose of putting it into the firm, and does put it into the firm, the loan is not a partnership transaction, and the lender can sue for the money without a settlement of the partnership accounts. (*Bull v. Coe*, 77 Cal. 54.)

149. Action will lie on note given by part-

ner to his copartners after dissolution of the firm and in consideration of a sale by plaintiffs to defendant of their interest in the remaining partnership property. (*Clark v. Fowler*, 57 Cal. 142.)

150. Where the plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a certain sum of money and materials for a sawmill, which they did, and the defendants removed the materials furnished by plaintiffs, and appropriated the same, including the money, to their own use, held, that the plaintiffs had a right to sue therefor at law, and for damages caused by defendant's violation of the partnership contract. (*Crosby v. McDermitt*, 7 Cal. 146.)

151. The acts of the defendant dissolved the copartnership. Even if this did not, the plaintiff would still be entitled to recover under the peculiar circumstances of the case. (*Crosby v. McDermitt*, 7 Cal. 146.)

152. It is no defense to a note, given by one partner to the other for his interest in land held jointly by both, that the payee of the note had deceived his partner (the maker) in the division of partnership stock, and was indebted therefor in an amount equal to, or greater than, the sum due on the note. (*Case v. Maxey*, 6 Cal. 276.)
Cited 1 Idaho, 234.

153. As such a division has nothing to do with the consideration of the note, it cannot be set up as a counterclaim or defense to the action on the note. (*Case v. Maxey*, 6 Cal. 276.)

154. If the defendant has been deceived in the division of the stock he should file his bill for a discovery and account. (*Case v. Maxey*, 6 Cal. 276.)

155. When such a defense was set up in the answer in an action on the note, held, that all of the answer, except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out. (*Case v. Maxey*, 6 Cal. 276.)

Action for contribution for debts paid in excess of share. See post, XIII, 11.

Action at law for damages for wrongful act. See post, 359.

Action for amount found due on settlement. See post, XIII, 11.

Arrest in action for proceeds of venture. See ante, 18.

Gaming, partners in, actions between. See Gaming, 11.

Unlawful detainer, partner cannot maintain action of against copartner. See Forcible Entry and Unlawful Detainer, 40, et seq.

Limitation of actions between partners. See Statute of Limitations, VI, 4, j.

Limitation of actions on partnership agreement. See Statute of Limitations, VI, 4, j.

Findings must follow complaint. See Findings, 178.

Suit to quiet title between pending action for dissolution. See Quieting Title, 44.

Appealability of orders and decrees in actions between partners. See Appeals, II, 11.

IX. Powers and Liabilities as Regards Third Persons.

1. Power to Draw or Indorse Note or Waive Grace; Ratification of.

156. M. and J. were partners, and in the regular course of their business as storage merchants, of which M. had the management, received from plaintiff for storage a lot of grain, M. receipting for it in the firm name. Afterwards, the grain having been lost or converted, M. executed to plaintiff a firm note for its value. In an action upon this note, J. defended for himself, averring that the note was in effect the individual note of M., and not binding on the firm, and introduced as evidence certain accounts respecting the transaction kept by M., purporting to be between plaintiff and M. individually, and also letters from M. to plaintiff, showing that M. had separate dealings with plaintiff, and had designedly kept J. in ignorance respecting the grain transaction. Held, that the note, from the circumstances under which it was made, was the note of the firm, on which J. was liable; that the onus was on him to show a discharge from this liability, and that the evidence introduced was insufficient for this purpose. (*Pierce v. Jackson*, 21 Cal. 636.)

157. When a partner makes a note in the name of the partnership, it will render all the partners liable to a bona fide holder, although it has no relation to the partnership business, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by their partner. (*Rich v. Davis*, 4 Cal. 22.)
Cited 6 Cal. 142; 77 Cal. 574.

158. A promissory note made in the firm name of a partnership, but for the private uses of the partner making it, is binding on the firm, in the hands of an innocent holder, though not in the hands of one having knowledge of the fraud. The finding of the district court on the question of knowledge of the fraud, and as to the question of payment, will not be disturbed when the cause comes up a second time for consideration. (*Rich v. Davis*, 6 Cal. 141.)
Cited 77 Cal. 574.

159. The mere fact that a partner, upon being informed that his copartner has given a firm note for his individual debt, does not deny his liability thereon, does not, per se, amount in point of law to a ratification or adoption of the note. (*Reubin v. Cohen*, 48 Cal. 545.)
Cited 85 Cal. 105.

160. Where one of two partners indorses a note in the name of the firm as an accommodation for a third person, without the authority or consent of the other partner, such other partner is not bound by the indorsement as to any party taking the note with notice that the indorsement was made in the character of surety; and in such case the burden of proving the authority or consent of the copartner rests on the person holding the note. (*Hendrie v. Berkowitz*, 37 Cal. 113.)
Cited 85 Cal. 105.

161. If a note is indorsed by a member of a firm, in the firm name, and a third person

finds it in the hands of the maker, this is notice that the firm indorsement was for the accommodation of the maker. (*Hendrie v. Berkowitz*, 37 Cal. 113.)

162. One partner may waive grace upon a firm note made by him, and where such note is made payable on demand without grace, an action upon it commenced the next day after its execution is not prematurely brought. (*Pierce v. Jackson*, 21 Cal. 636.)

Power to draw note for individual debt. See post, IX, 12, a.

Note given by partner, when without consideration. See Bills and Notes, 38.

Indorsement by partner. See Bills and Notes, VII, 1.

Acceptance by partner. See Bills and Notes, 128.

2. Power to Mortgage, to Contract to Pay in Gold, to Receive Deposit of Money.

163. One joint owner of a crop raised by a farming partnership cannot mortgage the other joint owner's interest in the crop. (*In re Bregard*, 84 Cal. 322.)

164. Until such crop is harvested and sold, one joint owner has as much interest in the crop as the other, and has the right to insist upon its being sold to the best possible advantage. (*In re Bregard*, 84 Cal. 322.)

Mortgagee of interest of partner, right to possession. See Mortgages, 991.

Mortgage by partner for individual debt, right of purchaser of interest. See ante, 126.

165. One member of a partnership may bind the firm, by a contract in writing signed with the firm name, to pay a debt of the firm in a specific kind of money. (*Meyer v. Kohn*, 29 Cal. 278.)

166. Where money was deposited with the managing member of the partnership, who had full power to borrow money for the use of the firm and sign notes in the name of the firm, and who deposited it with the firm funds and gave a receipt therefor in the name of the firm, and used the money for the benefit of the partnership, the firm is liable in an action for money had and received, although the other partner was absent at the time the deposit was made, and had no knowledge of the transaction, and the receipt of the money was outside the regular business of the partnership. (*Dammon v. Beecher*, 97 Cal. 530.)

3. Power to Release or Submit to Arbitration.

167. Where a partnership exists between two persons in the purchase of goods, and they subsequently bring suit to recover their value from a trespasser who has seized them, held, that one partner is competent to execute a release in the name of himself and copartner. (*Perlberg v. Gorham*, 10 Cal. 120.)

Evidence of release by partner, where not pleaded. See Release, 11.

168. One partner cannot bind his copartner by a submission of partnership matters to arbitration, but such a submission would be good against the partner agreeing to it. (*Jones v. Bailey*, 5 Cal. 345.)

Power to compromise debt after dissolution. See post, XII, 4.

4. Power to Convey Realty.

169. Where two partners purchased in the firm name, with firm funds and for partnership purposes, a lot of land, and one then absconds with all the available funds of the firm, leaving his copartner without sufficient means to pay the debts of the copartnership, and he in good faith first exhausts the personal property to pay debts of the concern, and this is insufficient, he may then convey in the firm name the interest of the firm in the lot to pay debts, and the grantee can in equity compel a conveyance of the legal title to the undivided half of the lot, standing in the absconding partner's name, from him or from parties taking a conveyance from him with notice of its partnership character. (*Dupuy v. Leavenworth*, 17 Cal. 262.)

170. This rule is not in conflict with the doctrine that real property of a copartnership may be conveyed by one partner, on his individual account, to the extent of his legal title, so as to cut off the equitable rights of the copartnership, or its liability to the payment of the copartnership debts. A bona fide purchaser, for a valuable consideration, without notice of the partnership character of the property, will take the title in such cases freed from the equitable claims of others, upon grounds of policy. (*Dupuy v. Leavenworth*, 17 Cal. 262.)

171. The civil law would, under the special circumstances of this case, reach the same result. (*Dupuy v. Leavenworth*, 17 Cal. 262.)

Deed by partners, failure of one to sign. See Deeds, 9.

5. Power of One Partner to Convey Entire Property of Firm.

172. One partner has power to transfer the entire property of the firm, if the other has wholly abandoned the business to him. (*Quinn v. Quinn*, 81 Cal. 14.)

173. One partner in a water right acquired by appropriation cannot convey the interest therein of his copartner. (*Henderson v. Nicholas*, 67 Cal. 152.)

174. A stallion owned by partners engaged in the business of stock-raising, and kept for breeding purposes, is not merchandise within the meaning of section 2430 of the Civil Code, preventing one partner from disposing of the whole of the partnership property at once, unless it consists entirely of merchandise. (*Myers v. Moulton*, 71 Cal. 498.)

175. Copartner has authority to convey copartnership property in any transaction, within scope of the partnership, and each copartner has an unlimited power of disposal of his share of the partnership property, subject only to the claims of creditors of the firm, and of the other copartners on a settlement of the partnership affairs, unless he be restrained from so doing by the terms of the copartnership; but the claims of such creditors and copartners, being only in the nature of an equitable lien on the partnership property, can only be enforced in a court of equity. (*Stokes v. Stevens*, 40 Cal. 391.)

Cited 44 Cal. 362.

176. The fact that one of the partners in a

firm is temporarily absent from the state at the time of the sale of the entire partnership property by his copartner does not render him incapable of acting, within the meaning of section 2430 of the Civil Code, nor of itself constitute an abandonment of the business to his copartner, and the sale of the entire partnership property by the latter is in excess of his authority as a member of the firm, and does not pass the absent partner's interest in the property to the purchaser. (*Carrie v. Cloverdale Banking etc. Co.*, 90 Cal. 84.)

177. Where a partnership is formed for the purpose of dealing in cattle, and one partner sells the whole property of the firm in fraud of the rights of his copartner, a purchaser in good faith does not become a tenant in common with the other partner, but acquires title to the whole property. (*Crites v. Wilkinson*, 65 Cal. 559.)

178. A sale of the entire partnership property made by one partner, without the authority or consent of the others, passes title to the interest of the partner making the sale, and is valid in reference to the whole property as against every person except the non-consenting partner or the successor to his right of action therefor, and neither the non-consenting partner nor the assignee of the firm can maintain an action for the conversion of the whole partnership property upon the ground that the partner making the sale exceeded his authority in so doing. (*Carrie v. Cloverdale Banking etc. Co.*, 90 Cal. 84.)

179. Measure of damages in action of trover for the conversion of interest of one partner in partnership property is the value of his undivided share in the property converted, irrespective of the question whether or not the partnership was solvent, and without regard to the state of the partnership accounts. (*Carrie v. Cloverdale Banking etc. Co.*, 90 Cal. 84.)

6. Liability of Partner for Fraud of Copartner.

180. In case of a debt fraudulently contracted by partnership firm by one member alone, the others being ignorant of the fraud, while all the members will be bound in an action brought on the contract or to recover the property so fraudulently obtained, yet the liability to an action for the fraud, which is essentially different and involves moral turpitude, is limited to the partner committing the same, unless the others assented to the fraud, or ratified it by adopting the act of the fraudulent partner, or retaining its fruits with knowledge of fraud. (*Stewart v. Levy*, 36 Cal. 159.)

7. Conveyances of Land to Partners.

181. When a deed is executed to four persons, naming them, and then describing them as composing the firm of "Graff, Fulton & Co.," and the four persons compose a partnership, and the property conveyed is paid for with partnership funds, and used for partnership purposes, the deed is not void as to either of the grantees, under the statute of frauds, but conveys the legal title to an undivided one-fourth of the property to each of the four grantees, encumbered only by an

equitable lien in favor of the other partners. (*McCauley v. Fulton*, 44 Cal. 355.) Cited 54 Cal. 18; 7 Mont. 219.

8. Actions Against Partners.

182. In an action to enforce a joint partnership liability, all the partners must be made defendants, unless they are sued collectively by their firm name, under section 388 of the Code of Civil Procedure. (*Harrison v. McCormick*, 69 Cal. 616.)

183. Where the plaintiff had no knowledge, until the trial, that a third party was a secret partner of the defendant, the nonjoinder of such third party cannot be objected to by the defendant. (*Tomlinson v. Spencer*, 5 Cal. 291.)

184. The complaint in an action on a promissory note, after alleging that the defendants at all the times therein mentioned were partners, averred that "the said defendants, copartners as aforesaid," executed the notes in question. Held, a sufficient averment that the notes were executed by the defendants as copartners. (*Alpers v. Schammel*, 75 Cal. 590.)

185. In an action against partners upon a promissory note signed by their individual names, and not by the firm name, the complaint alleged, and the court found, that the defendants were partners, and that they executed the note. Held, there was no sufficient allegation or finding that the note was executed by the makers as partners, or for a consideration which passed to the partnership. (*Freeman v. Campbell*, 55 Cal. 197.) Cited 69 Cal. 620.

186. In an action for breach of an agreement to purchase personal property the complaint alleged that the defendants were partners, doing business under the firm name of M. & G., and that they agreed to purchase the property. Held, that a denial in the answer that the defendants now are or ever were partners did not raise a material issue. (*Hunter v. Martin*, 67 Cal. 365.)

187. If one of two partners assigns to a third person his interest in a promissory note belonging to the firm, and the other partner collects the full amount due on the note, and is sued by the assignee for half the amount collected, he must, if he has an equitable lien on the same on account of money advanced by him to the partnership, set up such lien in his answer, or he cannot enforce it. (*Marks v. Sayward*, 50 Cal. 57.)

188. A partnership alleged to be composed of two persons, doing business under the firm name of McCormick & Lewis, and a partnership alleged to be composed of three persons, doing business under the firm name of McCormick, Lewis & Co., will not be presumed to be the same firm, in the absence of any allegation or proof of their identity. (*Harrison v. McCormick*, 69 Cal. 616.)

189. In an action to enforce a promissory note executed to the plaintiffs as a copartnership, neither the makers of the note nor their personal representatives can dispute the firm relationship. (*Wise v. Williams*, 72 Cal. 544.)

190. Where three persons are sued on a

promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership, or the authority of the party making the note to bind all, and one of the parties is nonsuited and judgment taken against the other two, held, that there is no error in such judgment. (*Stoddard v. Van Dyke*, 12 Cal. 437.)

191. If three defendants are jointly sued on a demand against them as partners, the court should not enter a judgment against two of them only. (*Curry v. Roundtree*, 51 Cal. 184.)

192. In a suit against partners, judgment can be taken only against those served with process. (*Ingraham v. Gildermester*, 2 Cal. 88.)

Cited 16 Cal. 68.

193. In an action against alleged partners, in which only one is served with summons or appears, a judgment rendered against all the defendants, with a direction that it may be enforced against the joint property of all, and against the separate property of the one served, is not void as to the latter. (*Stewart v. Spaulding*, 72 Cal. 264.)

194. In suit on an account against "Randall & Inos," partners, the former only being served with process, a joint judgment was rendered against both. Held, that the judgment is void as against the party not served. (*Inos v. Winspear*, 18 Cal. 397.)

195. Where an action is brought against two defendants alleged to be partners, but sued by their individual names, to enforce a partnership liability, and the summons is served on only one of them, who makes default, the plaintiff is not entitled to a judgment against both defendants as provided in section 388 of the Code of Civil Procedure. (*Feder v. Epstein*, 69 Cal. 456.)

196. In an action against copartners on a partnership obligation, where the names of all the individuals composing the firm are set forth both in the caption and the body of the complaint and summons, with the addition that they are doing business under a firm name, judgment cannot be rendered, under section 388 of the Code of Civil Procedure, against those defendants who have not been served with process and have not appeared; but a judgment entered in such action against those who have been served will not be vitiated as to them because the other defendants are included therein. (*Davidson v. Knox*, 67 Cal. 143.)

Cited 69 Cal. 458; 73 Cal. 391, 392.

197. In an ordinary action against a partnership to enforce a firm liability, in which all the partners are made defendants, but some of them are not served with summons and do not appear, a judgment rendered therein, although purporting to be against the joint property of all the defendants, cannot be enforced against the interests in the firm property of the partners who were not served and did not appear, but is only a lien on the individual interests therein of those served. Such a lien is not entitled to priority as against a prior mortgage of their interests, executed by the partners who were served. (*Golden*

State etc. Iron Works v. Davidson, 73 Cal. 389.)

198. The action was brought against three defendants constituting a partnership, on certain promissory notes executed by them as partners. Two of the defendants appeared and answered. The other did not appear, and no default was entered against him for not answering, and the record did not affirmatively show that he had been served. The record showed, however, that he died two days after the commencement of the action. The jury returned a general verdict in favor of the plaintiff, on which judgment was entered against all the defendants. Held, that the verdict and judgment, so far as they purported to be against the defendant not appearing, were erroneous, and should be modified accordingly. (*Alpers v. Schammel*, 75 Cal. 590.)

199. Proceedings under sections 989 to 994 of the Code of Civil Procedure, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment; neither the pleadings nor the judgment in the original action can be amended. (*Waterman v. Lipman*, 67 Cal. 26.)

Service of summons on firm. See Summons, 31.

Codefendant, right of to testify to fact of partnership. See Witnesses, 107, et seq.

Books of account, admissibility in action against firm for barley sold a member. See Evidence, 163.

Deficiency judgment against firm on suit against members. See Mortgages, 726.

Default in action against partners jointly. See Default, 86.

Firm property, exemption of. See Exemptions, II, 6.

Damages for improper levying of execution. See Executions, 407, et seq.

9. Actions by Firm or Individual Members; Filing Certificates of Partnership.

200. In an action by a partnership, a showing in the caption of the complaint that the plaintiffs are partners is not indispensable, if in the body of the complaint it be specifically averred that the plaintiffs are in fact partners, and it appear from the facts alleged that the obligation sued on was created in favor of the partnership. (*Wise v. Williams*, 72 Cal. 544.)

201. The complaint alleged that the "plaintiffs, for several years last past, have been and now are copartners, doing business under the firm name and style of A. Pfister & Co." Held, that the copartnership was sufficiently averred, and that the defendants, if they desired a more specific allegation as to the time of its formation, should have raised the objection by a motion to make the complaint more specific. (*Pfister v. Wade*, 69 Cal. 133.)

202. A complaint which contains no other designation of the party plaintiff than the name of a copartnership firm is defective; but such defect can only be made available to defendant by demurrer for defect of parties, or by denial in the answer of any cause of action and objection thereunder to evidence

in support of the claim. (*Gilman v. Cosgrove*, 22 Cal. 356.)

Cited 69 Cal. 621; 6 Mont. 232.

203. Where two persons sue, as partners in possession, for a trespass on firm property, the judgment in their favor is firm assets. The fact of joint title, as partners, to the damages, is in issue and adjudicated. (*Collins v. Butler*, 14 Cal. 223.)

204. The action in which the judgment was rendered was brought in Nevada, and the complaint therein described the plaintiffs as partners. Pending the action, the partnership was dissolved, and the judgment was rendered in favor of the plaintiffs individually. Held, that the judgment was valid, and that its admission in evidence in the present action was not a variance. (*Stewart v. Spaulding*, 72 Cal. 264.)

205. A firm name composed of the surnames of all the partners is a "designation showing the names of the persons interested as partners," and not a "fictitious name," within the meaning of section 2466 of the Civil Code; and no certificate stating the names in full of all the members of the partnership is required to be filed or published in such case before an action can be maintained for services rendered by the partnership. *Works, J.*, dissenting. (*Pendleton v. Cline*, 85 Cal. 142, cited 88 Cal. 601, 647; *Carlock v. Cagnacci*, 88 Cal. 600; *McLean v. Crow*, 88 Cal. 644.)

206. Sections 2466 and 2468 of the Civil Code, which provide that partnerships doing business in this state, under a designation not showing the names of the partners, must file a certificate with the clerk, etc., or shall not be allowed to maintain an action, etc., are not applicable to partnership firms which are the signers of a petition in involuntary insolvency. (*Matter of Denny*, 89 Cal. 101.)

207. Section 2468 of the Civil Code, forbidding the maintenance of actions by partners who have failed to file the certificate required by that section, does not apply to actions for torts. (*Ralph v. Lockwood*, 61 Cal. 155.) Cited 89 Cal. 106.

208. In the title of a complaint the names of the plaintiffs appeared without being described as partners, but in the body of the complaint it was averred that they were such; and on the trial a partnership contract was proven, and it was objected and proven that the plaintiffs had not filed or published the certificate required by section 2466 of the Civil Code. Held, the plaintiffs claiming that the action was brought by them in their individual capacities, and that the allegation of of partnership was surplusage, that the court was inclined to agree with them, but that proof of a partnership contract could not sustain that theory of the complaint. (*McCord v. Seale*, 56 Cal. 262.) Cited 72 Cal. 547; 78 Cal. 257; 82 Cal. 584.

209. The object of section 2466 of the Civil Code, requiring the filing and publishing of a certificate by partnerships doing business under a fictitious name, and that the certificate shall state their names in full, is that public notice shall be given and a public record made of the individual members of such partner-

ships, with such definiteness and particularity that those dealing with them may know with whom they are dealing; and a certificate which states the names of each of the partners with the initials by which they are generally known is sufficient. (*Meads v. Lasar*, 92 Cal. 221.)

210. An attorney in fact, having a general power to commence and prosecute suits and to execute and acknowledge all instruments, and to do any other matter or thing appertaining or belonging to the principal, has authority to sign and acknowledge in the name of his principal the certificate of copartnership required to be filed by sections 2466-2468 of the Civil Code, before the partners can maintain any action on a partnership demand. And this is so, although the power of attorney was given prior to the enactment of such sections. (*Goldtree v. Swinford*, 74 Cal. 586.)

211. No particular form of acknowledgment is required by section 2468 of the Civil Code; but any form is sufficient which indicates that the partners have acknowledged, before the proper officer, the instrument to be theirs. (*Fabian v. Callahan*, 56 Cal. 159.) Cited 67 Cal. 636.

212. The provision of the statute requiring the publication of partnership certificates "once a week for four successive weeks" is satisfied by one publication in each of four successive weeks, and any act depending upon such publication may be performed at any time after the expiration of four weeks from the first of such publications. (*Meads v. Lasar*, 92 Cal. 221.)

213. A partnership doing business under a designation not showing the names of the partners cannot commence an action until they have filed the certificate and made the publication required by the Civil Code. The commencement of an action is a part of maintaining it. (*Byers v. Bourret*, 64 Cal. 73.) Cited 67 Cal. 636; 70 Cal. 195; 74 Cal. 155.

214. In an action by partners doing business under a fictitious name, upon a contract made or a transaction had in their partnership name, the complaint, if sufficient in other respects, does not fail to state a cause of action merely because it contains no averment that a certificate of partnership had been filed by the plaintiffs, as required by section 2466 of the Civil Code. The objection that no such certificate had been filed is an objection to the legal capacity of the plaintiffs to sue, and must be taken by demurrer, if the grounds for it appear upon the face of the complaint, or by answer if they do not; otherwise the objection is waived. (*Phillips v. Goldtree*, 74 Cal. 151.)

Cited 77 Cal. 72; 80 Cal. 69, 70, 336.

215. The plaintiffs were partners doing business under a designation which did not show the names of the partners. This fact appearing on the face of the complaint, it was alleged that the plaintiffs had filed a certificate as required by section 2468 of the Civil Code. The complaint counted upon a contract made by them in their partnership name. The allegation as to the filing of the certificate was denied by the answer, and the certificate given in evidence did not comply with the

statute. Held, that the allegation was essential to the sufficiency of the complaint, and that the plaintiffs could not recover without proving it. (*Sweeney v. Stanford*, 67 Cal. 635.)

Cited 74 Cal. 155, 156.

216. If the facts alleged in the complaint do not bring the case within the provisions of the statute requiring a certificate, the failure to file it is only available by setting it up in the answer as a defense to the action. (*Sweeney v. Stanford*, 67 Cal. 635.)

Cited 80 Cal. 70.

217. An objection to an action by partners, on the ground that the plaintiffs had not filed a certificate of partnership, as required by section 2468 of the Civil Code, should be taken by answer, and not by demurrer to the complaint for failing to state that the certificate was filed. (*Carlock v. Cagnacci*, 88 Cal. 600.)

218. Effect of failing to file certificate when required is merely to abate the action. After complying with the statute, a new action may be brought. (*Sweeney v. Stanford*, 67 Cal. 635.)

Cited 70 Cal. 195.

219. Where the title of an action designates the plaintiffs as partners doing business under a fictitious name, but it does not appear either by the complaint or answer that the cause of action of the plaintiffs is upon or on account of any contract made or transaction had by them in their partnership name, an allegation in the answer that the plaintiffs had not complied with the law requiring the filing and publishing of a notice of the partnership is immaterial, and no finding thereon is necessary. (*Lee v. Orr*, 70 Cal. 398.)

220. The sections of the Civil Code prohibiting persons doing business as partners from maintaining any action upon or on account of any contracts made or transactions had in their partnership name, until they have filed and published a certificate showing the names and residences of all the members of the partnership, does not preclude the assignee of such partners from maintaining an action thereon. (*Wing Ho v. Baldwin*, 70 Cal. 194.)

221. Section 2468 of the Civil Code, requiring partners doing business under a fictitious name to file and publish a certificate of co-partnership before they can maintain an action on a partnership demand, does not prevent the assignment by them of a valid partnership claim, although they have not filed or published the required certificate. (*Cheney v. Newberry*, 67 Cal. 126.)

Cited 70 Cal. 196; 74 Cal. 154.

222. When one partner sues for an injury to the partnership property, and makes his co-partner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury. (*Nightingale v. Scannell*, 6 Cal. 506.)

223. Whether such nonjoinder of parties plaintiff is permissible, query? (*Nightingale v. Scannell*, 6 Cal. 506.)

224. A deed conveying title to the members of a firm enables one partner to maintain ejectment against an intruder. (*Smith v. Smith*, 80 Cal. 323.)

225. A and B were in partnership. B took forcible possession of the partnership property and sold it to C and D. Held, that A cannot maintain an action for the partnership property and profits against B, C, and D. (*Mason v. Tipton*, 4 Cal. 276.)

226. In an action by a copartner on a promissory note alleged to have been executed to the firm, one of the plaintiffs cannot recover a personal judgment upon proof that the note was executed to him individually. (*Weinreich v. Johnston*, 78 Cal. 254.)

Cited 82 Cal. 584.

10. Execution Against Partner and Sale Under.

See ante, VIII, 5.

227. The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners. (*Jones v. Thompson*, 12 Cal. 191.)

Cited 38 Cal. 615; 58 Cal. 49; 65 Cal. 527.

228. If a sheriff has an execution against the property of one member of a partnership it is his duty to levy on the interest of that partner in the partnership effects, and in order to effect a sale of the same he may take possession of the entire property; and, if he only sells the interest of the partner against whom the judgment was rendered, he is not liable to the other partners for damages. (*Clark v. Cushing*, 52 Cal. 617.)

229. The sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. (*Jones v. Thompson*, 12 Cal. 191.)

230. In such case, the decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale is dangerous as a precedent, and liable to great abuse in practice. (*Jones v. Thompson*, 12 Cal. 191.)

231. The purchaser, under execution sale, of the interest of one partner in the real estate of a partnership, acquires the legal title and not a mere equity, and is entitled to be let into possession as a tenant in common with the other owners. (*McCauley v. Fulton*, 44 Cal. 355.)

Cited 73 Cal. 392.

232. Partnership property can be seized under an execution against one of the partners, for his individual debt, and sold; but the interest which passes by the sale is only the interest of the debtor partner in the residuum of the partnership property, after the settlement of the partnership debts. (*Robinson v. Tevis*, 38 Cal. 611.)

Cited 58 Cal. 49, 50; 65 Cal. 527; 90 Cal. 569.

Levy on firm property on execution against one partner. See *Sheriffs*, 58.

Execution, how enforced against member of. See *Executions*, 118.

Sale of partner's interest under execution. See *Statute of Limitations*, 361.

Sale of whole property on purchase of partner's interest on execution. See *Statute of Limitations*, 197.

Purchase of partner's interest at execution sale. See *Cotenancy*, 29.

Rights of purchaser of partner's interest at execution. See Executions, IX, 6, e.

11. Secret and Dormant Partners.

233. There may be a dormant partnership in the purchase and sale of real estate as between the partners themselves, but, as between the partners and third persons, the law in regard to dormant partners will not apply. (*Gray v. Palmer*, 9 Cal. 616.)

234. In an action against a partnership, involving the liability of one who denies belonging to the partnership, and who was not included as a partner in the written articles of partnership, it is proper to instruct the jury that, as to third parties, written agreements of copartnership are not conclusive evidence as to the question of partnership, that there may be secret agreements of partnership outside of written papers, and that the jury may consider evidence tending to show that the person whose liability is questioned furnished all the money for the firm business, and that the ostensible partnership was not bona fide, but was a mere device to protect such person from loss while sharing in the profits, in connection with the question whether such person was in fact a partner, and that such person, if a partner, whether secret or disclosed, comes under the firm's liability. (*Crawford v. Independent Stove Pipe Works*, 83 Cal. 629.)

Partner acting as salesman. See ante, 72.
Secret partner, nonjoinder of in actions against partner. See ante, 183.

12. Creditors.

a. Assumption of Individual Debt by Firm or Firm Debt by Individual Partner.

235. Where a partnership agreement provides that an existing individual debt of one of the partners shall be assumed and paid by the firm, either of the partners has authority to execute the note of the firm to secure the payment of such indebtedness. (*Randall v. Hunter*, 66 Cal. 512, cited 76 Cal. 257; *Randall v. Hunter*, 76 Cal. 255.)

236. Promise by one partner to assume payment of note executed in favor of firm, and to charge himself with the amount thereof on the firm books, is a sufficient consideration to sustain a transfer of the note to him by the partnership. (*Wood v. Franks*, 67 Cal. 32.) Cited 82 Cal. 134.

b. Formation of New Firm, Effect of.

237. An incoming partner is not liable for the debts of the old firm unless he agrees to become so. Instance of construction of agreements in this regard. (*Smith v. Millard*, 77 Cal. 440.) Cited 98 Cal. 290.

238. A new firm may assume an indebtedness of a former firm composed in part of the same members. And if the name of the new firm be subsequently changed, the obligation may be returned, and a new one given in the new name, if the partners consent thereto. (*Herman v. Paris*, 81 Cal. 625.)

239. Where an individual, doing business under the firm name of "D. W. & Co.," in-

curred obligations for professional services to the plaintiff, an attorney, and, pending the litigation of his matters, formed a partnership with two others under the same firm name, and one of the new members of the firm thus formed subsequently dismissed the suit in the firm name, and, when payment for the services was demanded, did not deny the liability of the firm, but refused payment and disputed the amount charged, held, that the firm was estopped from denying their liability. (*Burritt v. Dickson*, 8 Cal. 113.)

240. Though the plaintiff in such a case knew at the time he commenced suit for the original parties that he alone composed the firm, yet if he does not appear to have known on what terms the new firm was formed, he could only be guided by the acts and statements of the new firm. (*Burritt v. Dickson*, 8 Cal. 113.)

241. But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants, held, that plaintiff was bound to know the terms on which the defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability. (*Burritt v. Dickson*, 8 Cal. 113.)

c. Liability is Joint; Effect of Sale or Release.

242. Several persons contracting together with the same party for one and the same act are liable jointly, and not individually or separately, in the absence of any words to show that a several as well as an entire liability was intended. Especially is this the rule as to the legal liability of partners upon their partnership obligations. (*Harrison v. McCormick*, 69 Cal. 616.)

243. Partners are jointly liable for the debts of the partnership, but one of several joint debtors is not discharged from liability by a release to the others; and where it is expressly agreed that the release shall not operate in his favor, the liability continues independent of section 1543 of the Civil Code. (*Northern Ins. Co. v. Potter*, 63 Cal. 157.) Cited 69 Cal. 620.

244. Where one of several partners sells his undivided interest in partnership property, the purchase money stands in the place of the property, and is liable for the partnership debts, the same as the property for which it was paid. (*Burpee v. Bunn*, 22 Cal. 194.)

Liability of purchaser of partner's interest. See ante, VIII, 3.

Rights of creditors of mining partnership on sale by partner. See ante, VI, 6.

Deed by one partner to copartner to enable latter to pay off debts. See Trusts and Trustees, 26.

d. Priority of; Priority between Firm and Separate Creditors.

245. Partnership debts must be first paid from the partnership property before any portion of it can be applied to the payment of the individual debt of a copartner. (*Burpee v. Bunn*, 22 Cal. 194.) Cited 23 Cal. 501; 54 Cal. 317.

246. The lien of firm creditors is paramount

to the lien of individual creditors. (*Conroy v. Woods*, 13 Cal. 626.)
Cited 22 Cal. 199; 23 Cal. 501; 25 Cal. 106, 107.

247. The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners. (*Chase v. Steel*, 9 Cal. 64.)
Cited 22 Cal. 199; 23 Cal. 501; 54 Cal. 317.

248. The priority which a creditor of a firm has over a creditor of an individual partner is a right in equity, and must be maintained by appropriate proceedings. (*Golden State etc. Iron Works v. Davidson*, 73 Cal. 389.)

249. In equity, real property acquired with partnership funds for partnership purposes is regarded as personal estate, so far as the payment of partnership debts and the adjustment of partnership rights are concerned; and it is immaterial in whose name the legal title of the property stands, whether in the individual name of one copartner, or in the joint names of all; it is first subject to the payment of partnership debts, and then to be distributed among the copartners according to their respective rights. (*Dupuy v. Leavenworth*, 17 Cal. 262.)
Cited 22 Cal. 199; 23 Cal. 501.

250. The possessor of the legal title in such case holds the estate in trust for the purposes of the partnership; and, until such purposes are accomplished, each partner has an equitable interest in the property. Upon the dissolution of the copartnership by the death of one of its members, the surviving partner, who is charged with the duty of paying the debts, can dispose of this equitable interest, and the purchaser can compel the heirs at law of the deceased partner to perfect the purchase by conveyance of the legal title. (*Dupuy v. Leavenworth*, 17 Cal. 262.)
Cited 44 Cal. 362; 3 Mont. 22.

251. Fact that partner's interest is mortgaged for his individual debt, for the purchase money of his share in the partnership, is immaterial. He can only mortgage that which he has, viz., a share subject to partnership debts. (*Chase v. Steel*, 9 Cal. 64.)

252. If two or more persons are partners in the ownership and management of real estate, and owe partnership debts, and one of the partners mortgages his interest in the property to secure his individual debt, the mortgagee acquires only the mortgagor's interest in the surplus after the payment of the partnership debts; and if these debts equal or exceed the value of the property, and it is afterwards sold by the partners to pay the partnership debts, the mortgagee, as against the purchaser, holds no interest in the property liable in equity to be sold, and the mortgage cannot be foreclosed. (*Jones v. Parsons*, 25 Cal. 100.)
Cited 28 Cal. 580, 581, 587.

253. Where one partner buys out his copartners, agreeing to pay debts of the firm, the partnership property remains bound for firm debts, just as before the sale. The lien of firm creditors attaching must be preferred to the lien of an individual creditor of the re-

maining partner attaching first. (*Conroy v. Woods*, 13 Cal. 626.)

254. Partners may make a bona fide sale of their property any time before their creditors acquire a lien; but such sale cannot include a sale directly or indirectly to one of the partners, with a stipulation that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership in the vendee. (*Conroy v. Woods*, 13 Cal. 626.)

255. Where one partner bona fide sold the partnership property to satisfy his individual indebtedness, and, in an action of replevin by the purchaser against a creditor of the firm who has attached the property after the sale and delivery as the firm property and for a firm debt, the court properly rendered a judgment for the purchaser; and it will be presumed in support of the judgment that the court below found it as a fact that the other partner consented to and authorized the sale. (*Stokes v. Stevens*, 40 Cal. 391.)
Cited 76 Cal. 48.

256. A separate creditor of one of several partners levied an attachment for his debt upon the partnership property, and afterwards made an agreement with a trustee, to whom his debtor had conveyed the property, by which the latter stipulated to pay the attachment debt from the proceeds of a sale of the property, after paying expenses and prior claims. Held, that neither by his attachment nor by the agreement did the separate creditor acquire any title to or lien upon the property, as against the superior equity of a subsequently attaching creditor of the partnership. (*Burpee v. Bunn*, 22 Cal. 194.)

257. In an action against the members of a partnership upon a joint and several promissory note, signed by them individually, but not with the firm name, an attachment was issued and levied upon the interests of defendants in the partnership property, upon which one attachment previously had been made, and others were subsequently levied in actions against the firm. Subsequently the plaintiff, under section 432 of the Code of Civil Procedure, amended his complaint by alleging the partnership of the defendants, and that the note was a partnership debt; but the action still ran against the defendants as individuals, and judgment was entered against them in that capacity. Judgments having been entered in all the cases, the property was sold under execution in one of the cases against the firm, and the proceeds applied in satisfaction of that execution and another in a similar case. Held, that the money was properly applied on the executions against the firm in preference to those of the plaintiff. (*Commercial Bank of Los Angeles v. Mitchell*, 58 Cal. 42.)

258. Certain notes from third person, but for a larger amount, were held by the garnishee, as collateral, to secure a debt due to him by the partnership, at the time of the levy of an attachment by a creditor of one of the partners. After the garnishment the garnishee accepted an assignment by the partnership of the notes held by him as security, in trust for himself and other persons who

were creditors of the firm prior to the attachment. The garnishee collected the notes and applied the proceeds to the payment of the creditors in whose favor the trust was created, and in so doing exhausted the whole amount of funds collected on the notes. Held, that the creditor of the individual partner obtained no lien by his attachment. (*Robinson v. Tevis*, 38 Cal. 611.)

259. To enable the plaintiff in the attachment to recover, the burden is on him to show that there would be a surplus of funds after the payment of all the partnership debts. Per *Sawyer, C. J.* (*Robinson v. Tevis*, 38 Cal. 611.)

260. To justify a garnishee in the attachment suit for the debt of a partner in paying any debts, due by him to the partnership, to the creditors of the partnership, after the notice of the garnishment, the burden of proof is on him to show that the partnership debts would exhaust the entire amount of partnership property and assets. Per *Crockett, J.*, dissenting. (*Robinson v. Tevis*, 38 Cal. 611.)

261. The fact that an individual creditor obtains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. (*Conroy v. Woods*, 13 Cal. 626.)

262. In such case of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property. (*Conroy v. Woods*, 13 Cal. 626.)

263. B. & L. were partners. B. & L. as a partnership was also a member of two other firms, B., L. & S. and B., L., S. & D. The firms all failed, and their property was attached by creditors. The creditors of B., L. & S. and B., L., S. & D. obtained the first attachments, and placed them in the hands of the sheriff, before the creditors of B. & L. placed theirs in his hands. The sheriff levied all the writs on the property in the order in which they were placed in his hands. The sheriff had in his hands a sum of money received from the sale of the property of B. & L. to apply on the executions issued on judgments rendered in the actions. Held, that the creditors of B. & L. were entitled to the money, and that where a partnership is composed of two or more firms, the creditors of one of the firms are entitled to a preference in the payment of their debts, over the creditors of the whole partnership, out of money the proceeds of the property of that firm. (*Bullock v. Hubbard*, 23 Cal. 495.)

264. Charles H. T. Meyer sued defendants in an action entitled "Chas. H. T. Meyer on behalf of himself and the creditors of the firm of Philip Kalkman & Co. v. Philip Kalkman," for the settlement of the partnership between himself and Kalkman, and a distribution of the assets for the benefit of creditors. Judgment rendered dissolving the partnership, and directing an account. Plaintiffs here were creditors, and the referee who took the account reported in their favor the amount now sued for. An order was made

confirming the report and directing a distribution of the assets upon the basis therein established. Plaintiffs now bring an action of debt on judgment, alleging that these proceedings amount to a judgment in their favor against defendants. Held, that the proceedings do not amount to a personal judgment, which is necessary to maintain the action; that a personal judgment would have been foreign to the purposes of the suit, and that the relief granted was confined to those purposes; that while no particular words are requisite to constitute a judgment, enough should appear to indicate the intention of the court to grant the relief which the judgment is relied upon as securing. (*Seligman v. Kalkman*, 17 Cal. 152.) Cited 30 Cal. 21; 66 Cal. 386.

Fraudulent preference by firm, what is not. See post, 275.

Suits for dissolution or insolvency, effect of on priority. See post, IX, 12, e.

e. Rights on Suits for Dissolution or Insolvency.

265. Pending proceedings for a dissolution of partnership, and until a receiver is appointed, creditors may resort to adverse proceedings, and may gain a preference over other creditors. (*Marye v. Jones*, 9 Cal. 335.)

266. The filing of a bill by one partner against his copartners for a dissolution and account, and praying for an injunction and receiver, and an appointment of receiver by the court, does not prevent a creditor from proceeding by attachment, and gaining a priority over other creditors until a final decree of dissolution and order of distribution. (*Adams v. Woods*, 9 Cal. 24.)

267. It is only in cases of insolvency that the equitable rule for a pro rata distribution will apply, and then as of necessity. If the firm be solvent, a creditor whose claim is due cannot be placed on a par with others whose claims are not yet due, or who have been less diligent in procuring claims already due. (*Adams v. Woods*, 9 Cal. 24.)

268. Pending proceedings for a dissolution between partners, and until a dissolution is finally declared, and a receiver appointed to make a pro rata distribution among creditors, the latter are not prevented from resorting to adverse proceedings; and, when a creditor does so, he may gain a preference over other creditors. (*Naglee v. Minturn*, 8 Cal. 540.) Cited 9 Cal. 337; 58 Cal. 405.

269. Therefore a debtor of the partnership is justified in payment to the sheriff, on an execution held by such a creditor. (*Naglee v. Minturn*, 8 Cal. 540.)

270. A bill for a dissolution, and the appointment of a receiver, cannot operate as an assignment for the benefit of creditors, so as to prevent a creditor from acquiring a legal priority, because all such assignments, except in insolvency, are void under the statute. (*Adams v. Woods*, 8 Cal. 152.) Cited 8 Cal. 544; 9 Cal. 12, 29; 14 Cal. 456.

271. Creditors can attack the whole proceedings at any time before the distribution of the assets, on the ground that it was insti-

tuted to delay, hinder, and defraud creditors. (Adams v. Woods, 8 Cal. 152.)

272. Creditors of a firm can pursue their remedy at law, after a bill for a dissolution is filed by one of the partners, and before a decree of dissolution; any other rule would permit the partners indefinitely to postpone the payment of their debt. (Adams v. Woods, 8 Cal. 152.)

Cited 58 Cal. 504.

273. In a case where one partner has filed his bill for a dissolution of the partnership and the appointment of a receiver, it seems that, until a dissolution has been judicially declared and a receiver ordered to make a pro rata distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings and thereby gaining a preference. Per Burnett, J. (Adams v. Hackett, 7 Cal. 187.)

Cited 8 Cal. 158; 58 Cal. 405.

274. In an action to obtain a decree against defendants ordering that a partnership debt be satisfied out of the partnership assets, it is no defense that the defendants have been individually discharged in insolvency from their debts. (Freeman v. Campbell, 56 Cal. 639.)

Distinguished 62 Cal. 446.

275. Where a transfer of property is made by a partnership to a third person, for the purpose of securing him in his future payments of certain partnership obligations, in respect to which they had incurred danger of criminal prosecution, and not for any previous liability which he was under for the partnership, and it appears that the transferee did not know or have reason to believe that the firm was insolvent at the time of the transfer, or that any fraud was intended on the Insolvent Act on the part of the insolvent debtors, and that he paid full consideration for the goods transferred in good faith, he cannot be said to have accepted a preference in violation of the Insolvent Act, although the transfer was made within one month prior to a petition in insolvency by creditors of the firm, and the value of the property cannot be recovered from him in an action by the firm's assignee in insolvency. (Haskin v. James, 96 Cal. 258.)

Rights on insolvency. See ante, 267.

Rights of creditors on death of partner. See post, XI.

Preference of firm creditors on assignment by firm. See Assignments for the Benefit of Creditors, 30.

Right of mortgagee of one partner on death of his mortgagor. See post, 318.

X. Insolvency of Firm.

276. Neither the Insolvency Act of May 4, 1852, or the supplementary Act of March 31, 1876, apply to partnerships. (In re Baker & Hamilton, 55 Cal. 302.)

Distinguished 62 Cal. 446.

277. A joint application of two partners for the benefit of the insolvent act is void, there being no authority for such applications in the act. (Meyer v. Kohlman, 8 Cal. 44.)

278. There is no provision in the insolvency law of this state authorizing a partnership to apply in its joint name for the benefit of the

act; and the right of the creditors of the firm to pursue the partnership assets is not affected by insolvency proceedings in the case of one of the partners. (California Furniture Co. v. Halsey, 54 Cal. 315.)

Distinguished 62 Cal. 446.

279. A copartnership composed of four persons, three of whom are residents of this state and the fourth a nonresident thereof, and which carries on its business in this state, is a resident of this state within the meaning of section 8 of the Insolvent Act of 1880, providing that an adjudication of insolvency may be made upon the petition of a certain number of creditors, residents of this state. (Matter of Dennerly, 89 Cal. 101.)

280. An assignment by copartners for the benefit of their creditors of the entire firm assets, except property exempt from execution, operates as a dissolution of the partnership; and the subsequent delivery by the assignees to the assignors of such portions of the exempt property as was respectively owned by them and used in the business of the firm does not revive or continue the partnership. (Wells v. Ellis, 68 Cal. 243.)

Cited 9 Mont. 96.

281. A proceeding under the Insolvent Act for or against partners is properly for or against them individually as partners and the separate estate of each member of the firm passes to the assignee. (Wright v. Cohn, 88 Cal. 328.)

282. A petition in involuntary insolvency by partnership creditors, which describes the petitioning creditors by their firm names, is sufficient, although it fails to state the names of the members of the firm. (Matter of Dennerly, 89 Cal. 101.)

283. A petition of creditors for an adjudication of insolvency against a partnership, which alleges that the defendants individually named and described as "copartners, doing business under the firm name," etc., "are indebted to your petitioner," etc., can only be understood as charging that the indebtedness arose in the business of the copartnership. (Wright v. Cohn, 88 Cal. 328.)

284. Under section 8 of the Insolvent Act of April 16, 1880, a petition in involuntary insolvency which describes the petitioning creditors as firms or copartnerships is sufficient, although the names of the persons comprising the firms are not given. (Matter of Russell, 70 Cal. 132.)

Petition in, want of certificate of partnership, effect of. See ante, 206.

285. A verification to the petition of the creditors of the partnership in the usual form for the verification of a pleading, including matters necessarily stated on information and belief, is sufficient. (Wright v. Cohn, 88 Cal. 328.)

286. Where partners severally file their petitions in insolvency, the insolvency court acquires no jurisdiction over the estate of the copartnership, and discharges of the individual members of the firm cannot be made operative as to the debts of the firm. (Glenn v. Arnold, 56 Cal. 631.)

Cited 56 Cal. 639; distinguished 62 Cal. 446.

287. A schedule attached to a joint petition of two partners, showing a surrender of all the joint property of the partners, is not a compliance with the act which requires a surrender of all the property of the insolvent. (*Meyer v. Kohlman*, 8 Cal. 44.)

Cited 54 Cal. 317; 55 Cal. 303; 62 Cal. 446.

288. Assignees succeed only to right of insolvent on application by firm under insolvent law, and consequently, they are entitled to nothing except what remains after the discharge of all the partnership debts and of the claims of the other partners. (*California Furniture Co. v. Halsey*, 54 Cal. 315.)

289. In an action by an assignee in insolvency for the settlement of the affairs of a partnership of which the assignee was a member, the judgment may direct the assignee to pay into court the money in his hands adjudged to belong to the other partner, and, upon his refusal so to do may punish him for contempt. (*Buhlert v. Superior Court*, 72 Cal. 97.)

290. Parties appointed as assignees of an insolvent firm, in a proceeding in insolvency which was illegal and void, are merely the custodians, receivers, or bailees of the fund in their hands by virtue of the order of the court, and only hold it subject to the direction of the court. (*Adams v. Haskell*, 6 Cal. 113.)

291. Consequently, when in another proceeding for the protection of the creditors' property, instituted by one of the insolvent firm against his partners, in the same court, an order is made that they pay over the fund to a receiver appointed by the court, it is no answer or defense that the fund has been attached in their hands in actions brought by the creditors, or that it had been attached in the hands of a former receiver, appointed by the same court, from whom they, under a like order, had received it. (*Adams v. Haskell*, 6 Cal. 113.)

Cited 6 Cal. 477; 7 Cal. 37; 8 Cal. 158; 58 Cal. 405.

292. Nor is the disposition of the fund affected by any action of the immediate parties to the action, which was instituted to secure a distribution of the assets among the creditors, an object which a court of chancery will carry out without regard to any attempt by any of the partners to evade or defeat it. (*Adams v. Haskell*, 6 Cal. 113.)

Assignment by. See Assignments for the Benefit of Creditors, II.

Discharge of partners in insolvency. See Bankruptcy and Insolvency, X, 6, e.

Insolvent partner, transfer to copartner, instructions as to. See Bankruptcy and Insolvency, 251, 252.

Rights of creditors on insolvency. See ante, IX, 12, e.

XI. Death of Partner, Effect of and Rights on.

293. If all members of partnership die, whether within the jurisdiction of the same or of different probate courts, the assets, debts, and credits of the partnership do not become confused with the estate of the last survivor, but continue a separate existence, and the

rights of the representatives or successors of the several partners can only be determined in a court of equity. (*Theller v. Such*, 57 Cal. 447.)

Cited 58 Cal. 419; 8 Mont. 489.

294. When the partnership is dissolved by the death of one of its members, the surviving partner is to wind up the affairs of the partnership, and pay its debts out of the assets, if sufficient, and divide the residue, if any, among those entitled to it. (*Gleason v. White*, 34 Cal. 258.)

Cited 57 Cal. 461; 12 Nev. 248.

295. As a general rule, it is the duty of each partner, during the partnership, to devote himself to the interests of the concern without compensation, unless there is an express agreement that he receive compensation. But when the partnership is dissolved by death, and the survivor expends his time and labor in the care and management of the partnership property, by which its value is enhanced, he should receive compensation for the same, to be deducted out of the profits realized from the enhanced value of the property. A surviving partner, however, is not entitled to pay for services rendered, for merely winding up the affairs of the concern. (*Griggs v. Clark*, 23 Cal. 427.)

296. A surviving partner has, under the statute of May, 1850, regulating the settlement of the estates of deceased persons, section 198, the exclusive right of possession and the absolute power of disposition of the assets of the partnership. (*People ex rel. Allen v. Hill*, 16 Cal. 113.)

Cited 12 Nev. 248.

297. A surviving partner cannot convey by deed the title of a deceased partner to his interest in lands belonging to the partnership. (*McNeil v. First Congregational Society*, 66 Cal. 105.)

298. One who acquires the legal title to the interest of a decedent in land which had been partnership property of the decedent and another takes it free from all trusts or equities in favor of the surviving partner of which the purchaser had no notice at the time of his purchase. (*McNeil v. First Congregational Society*, 66 Cal. 105.)

299. A surviving partner has power, under section 2461 of the Civil Code, to prosecute a claim for unliquidated damages in favor of the partnership, and, under section 1585 of the same code, has power to settle the business of the partnership, which includes every thing that may be necessary to wind up its affairs. (*Berson v. Ewing*, 84 Cal. 89.)

300. Though the word "debt" does not, in its legal sense, like the word "claim," include a demand for damages arising from a tort, they are used synonymously in section 2461 of the Civil Code. (*Berson v. Ewing*, 84 Cal. 89.)

Duty of surviving partner on dissolution of firm by death. See ante, 250.

Surviving partners in partnerships to deal in real estate. See ante, V.

301. When a partner dies, leaving a will which bequeathes his entire interest in the partnership property to his surviving part-

ner, the latter cannot collect from the general assets of the estate of the decedent a debt due by him to the firm, if the interest of the deceased in the assets of the firm is sufficient to pay it; and this must be ascertained by complying with section 1585 of the Code of Civil Procedure. (*Painter v. Estate of Painter*, 68 Cal. 395.)

302. Surviving member of partnership owning real property is something more than a mere tenant in common with the representative of the estate of the deceased partner. He is a trustee for the purpose of winding up the affairs of the firm, and is accountable for the value of the use and occupation of the landed estate of the partnership. (*Smith v. Walker*, 38 Cal. 385.)

303. The surviving partner is bound to account and pay over to the administrator of the deceased partner all the profits of the realty, as well as that of the personalty, that rightfully belong to the estate, notwithstanding he may have purchased the interest of the heirs in the estate, or of the community interest of the surviving wife of the deceased partner; and it is for the probate court to distribute the estate to the parties entitled. (*Smith v. Walker*, 38 Cal. 385.)

304. A surviving partner cannot maintain an action against the personal representative of his deceased partner for an accounting of the partnership affairs. (*McKay v. Joy*, 70 Cal. 581.)

305. The relation of debtor and creditor between the surviving partner and the representative of the deceased partner does not arise until the affairs of the partnership are wound up and a balance is struck; and this balance is to be struck after all the partnership affairs are settled, and not while they are being wound up. (*Gleason v. White*, 34 Cal. 258.)

306. If the partnership is indebted to the surviving partner, this debt is a contingent claim against the estate of the deceased partner, which does not become absolute until the partnership affairs are settled, and it is ascertained that there are no partnership assets to pay the same. (*Gleason v. White*, 34 Cal. 258.)

307. The claim of a surviving partner for advances to the partnership should not be presented to the administrator of the deceased partner for allowance until the partnership affairs are wound up; and it may be thus presented at any time within ten months after the partnership affairs are settled, and, if rejected, suit may be brought on it at any time within three months after its rejection. (*Gleason v. White*, 34 Cal. 258.)

308. In an action for an accounting between a surviving partner and the administratrix of a deceased partner, the former is entitled to an allowance for sums drawn by the deceased from the partnership during his lifetime, notwithstanding the claim has not been presented to the administratrix for allowance and approval. (*Manuel v. Escolle*, 65 Cal. 110.)

309. It is not necessary that a surviving partner should have completed the liquidation of the partnership affairs before an ac-

tion for an accounting can be maintained against him by the personal representative of the deceased partner. (*Walsh v. McKeen*, 75 Cal. 519.)

310. In an action by the representative of one copartner against the representatives of a managing partner for an accounting and settlement of the partnership, and to enforce a trust in property bought with partnership funds, a nonsuit should not be granted on the ground of want of evidence, after the plaintiff had made out a prima facie case, and had introduced evidence tending to show the existence of a trust; but the court should proceed to a further inquiry and an accounting. (*Roach v. Caraffa*, 85 Cal. 436.)

311. No claim need be presented against the estate of a deceased managing partner, for the allowance and approval of the administratrix and probate court, before bringing an action by the representative of a copartner against the administratrix of the deceased managing partner for an accounting and settlement of the affairs of the partnership, and for the delivery of certain property claimed to have been held in trust by the deceased managing partner for his copartner, who left the partnership business in charge of such managing partner. (*Roach v. Caraffa*, 85 Cal. 436.)

312. In such action the administratrix of the estate of the deceased managing partner, who is also his widow, and into whose possession the alleged trust property came by operation of law charged with the same trust to which it was subject in the hands of her deceased husband, and who, upon her appointment as administratrix, inventoried and returned the trust property as property of the estate of her deceased husband belonging to the marital community, is a proper party defendant, both in her representative and in her personal capacity, she being a necessary party in her representative capacity in a proceeding to enforce the trust, and also a proper party in her personal capacity as claiming an interest in the property as the owner of one-half thereof. (*Roach v. Caraffa*, 85 Cal. 436.)

313. In such action, brought by the public administrator of a deceased partner, it appearing that both of the deceased copartners were brothers, and that one of them had left the United States, committing the management of the partnership to the other, and had died abroad, evidence that none of the members of the family except the managing partner were in this country or came to it thereafter is admissible in favor of plaintiff upon the question of laches and the statute of limitations to show that the trustee was the only person in this country, other than the public officers, having no knowledge of the facts, who was entitled to administer upon the estate of his brother, the cestui que trust. (*Roach v. Caraffa*, 85 Cal. 436.)

314. An account of a surviving partner with the estate of a decedent, though approved by the probate court, will be allowed to be reopened and impeached, in an action by the administratrix to recover the balance of the account as an account stated, where it ap-

pears that the surviving partner was not in fact indebted to the estate in any sum whatever, and that the balance with which he had charged himself consisted of one-half of the amount of a note due to the partnership, which he was authorized to collect, and expected to be able to collect, but never succeeded in collecting, through no fault on his part, owing to the insolvency of the maker and loss of all his property, and that he was led to present the account as he did through reliance on unfulfilled promises made by an agent of the administratrix that he would raise the money to enable the maker of the note to pay off the indebtedness. (*Green v. Thornton*, 96 Cal. 67.)

315. An unexpired contract of employment between a copartnership and an employee for a fixed period, at a fixed salary, is dissolved by the death of one of the partners during the term of hiring. (*Louis v. Elfelt*, 89 Cal. 547.)

316. If the employee of a copartnership, under an entire contract for a year's salary at a certain rate per month, continues to serve the surviving partners after the dissolution of the partnership by death during the year, and while the business is being wound up, the implication of law, in the absence of a new special agreement, is, that he was newly employed at a reasonable compensation for the services actually rendered in assisting to settle the affairs of the extinct copartnership. (*Louis v. Elfelt*, 89 Cal. 547.)

317. Action lies against surviving partner for work and labor performed for firm during the life of the deceased partner, and after his death while the surviving partner is winding up the business of the firm. (*Friermuth v. Friermuth*, 46 Cal. 42.)
Cited 86 Cal. 441.

318. Where one of two partners executes a mortgage upon his separate property to secure a debt of the firm, an action to foreclose the mortgage may, after the death of the mortgagor, be maintained against his executor, without any showing by the plaintiff that the partnership is insolvent, or that he has pursued his remedy upon the debt against the surviving partner. (*Savings and Loan Society v. Gibb*, 21 Cal. 595.)

319. In such action, where the surviving partner is also the executor of the deceased partner, and claims as his devisee an interest in the mortgaged property, there is no misjoinder in making him, as an individual, a co-defendant with himself as executor. (*Savings and Loan Society v. Gibb*, 21 Cal. 595.)

320. In an action by a subcontractor against the administratrix of the estate of one of the firm of contractors, to recover money alleged to have been had and received by the defendant's intestate as payment for work done for the state under a contract under which the plaintiff, as a subcontractor, was entitled to a fixed portion of the claims against the state, it is necessary to show that the deceased partner received the money individually, and that it did not go to the firm; and evidence that the payment was made by the state to a bank upon the indorsement upon the state warrants by the firm name of the contractors,

and that the deceased partner stated that he received all his money, without showing by whom the indorsement was made, or who received the money from the bank, or that the deceased was sole manager of the firm, is not sufficient to show that the deceased received individually any money belonging to the plaintiff, and that it did not go to the firm represented by the surviving partner. (*Rodan v. Doane*, 92 Cal. 555.)

321. Claim for overcharged rent against joint lessors who are partners need not be presented as a claim against the estate of a deceased partner, in order to enforce it against the firm; nor need the executors of the deceased partner be joined as parties to an action to enforce such claim against the firm, and, if joined, a judgment against the firm is not erroneous because not requiring that the amount awarded be paid in due course of administration of the deceased partner's estate. (*Corson v. Berson*, 86 Cal. 434.)

Right of partner to letters. See *Executors and Administrators*, II, 2, d.

Compelling accounting by surviving partner. See *Estates of Deceased Persons*, 17.

Account presented by executor and settled, conclusiveness of settlement. See *Executors and Administrators*, 437.

Partner as executor, refusal to settle accounts of. See *Executors and Administrators*, 426, et seq.

Surviving partner, right of to vote stock. See *Corporations*, 515, 516.

Partnership property cannot be set aside as a probate homestead. See *Homesteads*, 439.

XII. Dissolution of.

1. Right to; Grounds of.

322. Mere desire of one of copartners is not sufficient to authorize the courts to decree a dissolution of the same and a settlement of its affairs, but cause must be shown. (*Bradley v. Harkness*, 26 Cal. 76.)

323. If, in a case where there are several members of a partnership, one of them, even by consent, retires from the firm, this dissolution necessarily severs the copartnership relations of each of its members. (*Ross v. Cornell*, 45 Cal. 133.)

324. A member of a partnership has a right to elect to treat the partnership dissolved by reason of the wrongful acts of his copartner, when the latter, without his knowledge or consent, secretly disposes of the goodwill of the business and the greater part of the firm assets, and removes with the balance to another state, where he engages in business for himself. After such dissolution, one who sells goods on credit to the latter, relying entirely upon his individual responsibility, and without knowledge of the previous partnership, cannot hold the former partner liable as such; nor have his rights as an individual creditor of the latter any priority over the similar rights of the former partner. (*Strong v. Stapp*, 74 Cal. 280.)

325. Where one partner has the management of the partnership affairs, and makes false entries in the books, and defrauds his copartner of a portion of the partnership receipts, and retains the same to his own use,

the partner thus defrauded is entitled to a dissolution of the partnership and an accounting, even if the partnership was by agreement to continue for a fixed term and the term has not expired. (*Cottle v. Leitch*, 35 Cal. 434.)

326. Where the partnership property is seized under attachment proceedings, and applied towards payment of the firm debts, the partners not doing business after such attachment being levied, held, that such matters do not of themselves operate a dissolution of the partnership. (*Barber v. Barnes*, 52 Cal. 650.)

327. In such case, if there is an action pending, brought by the partners to recover a debt due the firm, any inference of dissolution arising from the above facts is rebutted. (*Barber v. Barnes*, 52 Cal. 650.)

Assignment for benefit of creditors dissolves firm. See ante, 280.

By sale of interest in firm property. See ante, 116.

Agreement on dissolution of partnership, validity. See Statute of Frauds, I, 7.

Action to dissolve agreement superseding partnership contract, amendment upon trial. See Pleading and Practice, 607.

2. Notice of; Continuance of Firm to Fulfill Engagements.

328. To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. (*Johnson v. Totten*, 3 Cal. 343.)

329. An ostensible partner, retiring from the firm, must give notice of his retirement, or he will be liable to creditors of the continuing firm on contracts made by them after his retirement. (*Williams v. Bowers*, 15 Cal. 321.)

330. Where proof has been given that a newspaper containing notice of the dissolution of a partnership between the defendants was taken by the plaintiffs at the time, it is not error to admit in evidence other papers not taken by them, by way of establishing the publicity of the notice, and raising the presumption of their actual knowledge of the fact. (*Treadwell v. Wells*, 4 Cal. 260.)

331. The publication of the notice of dissolution in a paper taken by the plaintiffs is a fact from which a jury may infer actual notice. The court has no right to charge the jury in regard to conclusions of fact. (*Treadwell v. Wells*, 4 Cal. 260.)

332. Question of notice of dissolution of partnership is fact for the jury, under the charge of the court. (*Rabe v. Wells*, 3 Cal. 148.)

333. It is not error to instruct a jury that if sufficient time had elapsed between the dealings of the plaintiffs with the old firm and their subsequent transactions with the new firm to put a reasonable man on inquiry, they might be treated as new dealers. (*Treadwell v. Wells*, 4 Cal. 260.)

334. A consignment of merchandise was made to defendants as partners. After the dissolution of the partnership, two sales of a

portion of the merchandise were made, one by each partner, who severally received the money. Held, that the partnership continued for the purpose of fulfilling engagements; and that the defendants were jointly liable. (*Johnson v. Totten*, 3 Cal. 343.) Cited 15 Cal. 321.

Dissolution pending action by firm, judgment in. See ante, 204.

Published notice of dissolution as evidence. See Evidence, 203.

3. Appointment of Receiver.

335. In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff, and so is the employment of counsel by the receiver. (*Adams v. Woods*, 8 Cal. 306.)

Cited 58 Cal. 405.

Sale of property in hands of receiver. See ante, 117.

Dissolution, receiver on. See Receivers, 24, et seq.

Reference in action for dissolution and accounting. See Reference, 5.

Writ of assistance against receiver of partnership property. See Assistance, 26.

Attachment of fund in hands of receiver. See Attachment, 114.

4. Rights and Powers of Partners After.

336. After the dissolution of a partnership between attorneys, each partner is entitled to share in the fees collected for the unfinished business of the firm. (*Osment v. McElrath*, 68 Cal. 466.)

337. One member of a partnership cannot bind his copartner by promissory note for a partnership demand, made after the dissolution of the partnership. (*Curry v. White*, 51 Cal. 530.)

338. Where the liquidation of the affairs of a general partnership, after its dissolution, is not committed to any one partner by consent, either of the partners has authority to act in liquidation, and may compromise or release a debt due to the firm, whether the partnership debtor has notice of the dissolution or not. (*Hawn v. Seventy-Six Land etc. Co.*, 74 Cal. 418.)

339. Admissions made by one partner, after the dissolution of the partnership, concerning the partnership business, are not competent evidence to charge the other partner. (*Burns v. McKenzie*, 23 Cal. 101.)

340. After the dissolution of a partnership, one partner cannot revive a debt barred by the statute of limitations, but during its existence each partner is an agent for all in making an acknowledgment under the statute. (*Sears v. Starbird*, 78 Cal. 225.)

341. Where McKenzie and Dickinson, bag manufacturers, dissolved partnership, leaving certain assets of the firm in McKenzie's hands, and afterwards McKenzie purchased, for much less than its face, a judgment against Dickinson, and had it levied upon Dickinson's interest in the assets, and on the execution sale bought them in on his own account, held, that Dickinson was not entitled to an

account of the profits made by McKenzie in the transaction, nor could he attack the sale made to McKenzie. (*McKenzie v. Dickinson*, 43 Cal. 119.)

Right of possession after. See ante, VIII, 1.

Compensation of surviving partner winding up firm. See ante, 295.

Sale of interest pending suit for dissolution. See ante, 117.

5. Dissolution, Where No Decree of Dissolution Asked.

342. It is not error to decree dissolution of partnership, although there is no specific prayer for it in the pleadings, there being a prayer for general relief, and the facts found being sufficient to warrant a dissolution. (*Hall v. Lonkey*, 57 Cal. 80.) Cited 77 Cal. 616.

343. In such case, the court may direct a sale of all the partnership property, including the debts due to the firm. (*Hall v. Lonkey*, 57 Cal. 80.)

XIII. Accounting.

1. Right to; Time to Seek.

344. A partner cannot have partition and accounting without a dissolution of partnership; and a dissolution being found and decreed, the decree should provide for an accounting. (*Nisbet v. Nash*, 52 Cal. 540.)

345. Whenever a partner is entitled to a dissolution, the taking of an account is necessary, and follows as a matter of course. (*Cottle v. Leitch*, 35 Cal. 434.)

346. If partners agree that the partnership shall be dissolved and the business closed, and that the partnership accounts shall be considered and taken as if the partnership had never existed, and that the amount already received by one partner from the partnership shall be his compensation paid by the other partner to him as an employee, and that the other partner shall collect the debts due the firm and pay the debts due by the firm, and the agreement is acted on, the partner who receives the compensation as an employee has no further interest in the partnership accounts, and cannot maintain an action for a settlement of such accounts. (*Wagner v. Wagner*, 50 Cal. 76.)

347. An agreement by which one partner conveys his interest in property to his copartner is a bar to an action by bill, of one of the partners against the others for an account and dissolution and sale of the partnership property. (*Cayton v. Walker*, 10 Cal. 450.)

348. H. came to California, and died here in 1876, leaving property of large value. In an action for an accounting brought against his administrator, the complaint alleging that the partnership was never dissolved until the death of H., but also alleging, and attempting to excuse the fact, that no demand had ever been made for an accounting in the lifetime of H., held, upon demurrer to the complaint, without deciding whether in any case an objection that the demand is stale can be taken by general demurrer, that in this case, in view of the allegation that the

partnership was never dissolved, the objection did not lie, although the other facts stated might tend strongly to show, or prima facie might even show, that in point of fact the partnership had been dissolved long before the date alleged. (*Harris v. Hillegass*, 54 Cal. 463.)

Distinguished 75 Cal. 223.

Right after sale of interest. See post, 386.

On sale by copartner. See ante, 116.

Right to accounting of profits made after dissolution. See ante, 341.

Accounting on death of partner. See ante, XI.

Action for accounting of partnership to deal in real estate. See ante, V.

Account between partners in water ditch. See *Watercourses*, 188.

Bill in equity for accounting will not lie when. See *Equity*, 25, 26.

Bill for accounting is proper remedy for joint adventure. See *Equity*, 28.

2. Nature of Action; Pleading.

349. In an action for an accounting of the affairs of a partnership, an allegation in the complaint that a portion of the partnership assets consists of real estate, "which was acquired and at all times has stood in the name of the partners," in connection with other allegations, held, not to make the action one for partition, ejectment, or mesne profits. (*Bell v. Hudson*, 73 Cal. 285.)

350. Where a complaint filed to compel a partnership account contained sufficient to call upon the defendants for an account as to a particular branch of their business, but was, in other respects, inartificially drawn and insufficient, and a demurrer was put in to the whole complaint, held, that the demurrer must be overruled. (*Young v. Pearson*, 1 Cal. 448.) Cited 66 Cal. 653.

351. When the complaint for an accounting and settlement of a partnership alleges that the defendant agreed with the plaintiff's assignor and another person to do certain street work with them as partners, and that the defendant should appoint a bookkeeper who should keep all accounts, pay all bills, and collect all moneys belonging to the copartnership, and that the profits arising from the work should be equally divided, and which alleges that the work has been performed, and that a large sum of money is still uncollected, but which does not aver that the defendant failed to perform any of the conditions of the agreement to be performed by the defendant, or that the defendant was neglecting or refusing to collect the unpaid money, or was insolvent or likely to become so, or unable or unwilling to respond to any just claim or demand against the defendant, or that there was any danger that the money, when collected by the defendant, would be misappropriated, squandered, or lost, fails to state a cause of action. (*Cuyamaca Granite Co. v. Pacific Paving Co.*, 95 Cal. 252.)

352. The plaintiff, in action for accounting, need not aver in his complaint that the act from which the loss resulted was in violation of the partnership agreement, in order to let

in the testimony as to the loss. (*Clark v. Gridley*, 41 Cal. 119.)

353. It is not clear that partnership fixtures are a part of the stock of goods, though a part of the stock in trade of the partnership; and a complaint describing them as part of the stock of goods should be allowed to be amended in order clearly to justify evidence as to the disposition or appropriation made of the fixtures by the partners, which ought to be considered in order to a fair adjustment of the partnership matters. (*Chalmers v. Chalmers*, 81 Cal. 81.)

Complaint for accounting does not state cause of action when. See *Watercourses*, XIII.

3. Jurisdiction Over Suit.

354. A court of law is not competent to administer redress, in adjusting the affairs of a partnership, and to ascertain and enforce the equitable liens of creditors, and of the several copartners. (*Stokes v. Stevens*, 40 Cal. 391.)

355. Jurisdiction of probate courts over estates of deceased persons does not divest district courts of their general jurisdiction as courts of chancery over actions for a settlement of the affairs of a partnership. (*Griggs v. Clark*, 23 Cal. 427.)

Accounting, jurisdiction. See *Mines and Mining*, 464.

4. Parties.

356. A settlement of partnership accounts between the partners can only be made in action in which all the partners are parties. (*Young v. Hoglan*, 52 Cal. 466.)

357. In an action for an accounting and settlement of a partnership, where it appears that the defendant was in partnership with the plaintiff's assignor and another person, all of whom were jointly interested in the profits of the partnership, and it also appears that no settlement of the partnership matters had ever been made between the original partners, all of them are necessary parties to the action; and a demurrer to the complaint for defect of parties, in that the partner who was plaintiff's assignor, and who was not joined, was a necessary party to the complete determination of the controversy, is properly sustained. (*Cuyamaca Granite Co. v. Pacific Paving Co.*, 95 Cal. 252.)

358. In an action for an accounting between one member of a partnership and a purchaser of the interest of the other partner at an execution sale, the partner whose interest has been sold is a necessary and indispensable party to the action, notwithstanding it is alleged and proved that he is out of the state, and his whereabouts is unknown. (*Wright v. Ward*, 65 Cal. 525.)

359. If two men are in partnership for a term of years in the care and one-half the increase of a flock of sheep, under a contract with the owner of the flock, who receives the other half of the increase, and the owner buys the interest of one through fraudulent representations that he has purchased the interest of the other, and then takes possession of the flock and increase, the remedy of the partner who has not sold is in equity for an accounting, and in such action the partner who sold

is a necessary party. In such case an action at law for damages does not lie. (*Blood v. Fairbanks*, 48 Cal. 171.)
Cited 75 Cal. 522.

360. When, in a suit for an accounting of partnership affairs, an employee is improperly sued as a partner with plaintiff and another defendant, and a nonsuit is granted as to the employee, it is proper to proceed with the accounting between the plaintiff and the remaining defendant, between whom a partnership is shown to exist, and a nonsuit may be refused as to such defendant. The issue tendered as to partnership between the three persons includes an issue as to partnership between the remaining two which may be tried without amendment. (*Chalmers v. Chalmers*, 81 Cal. 81.)

Partner selling interest should be made a party in suit for accounting. See post, XIII, 5.

Accounting, creditors may intervene in suit for. See *Intervention*, 12.

5. What Considered on.

361. The determination of a difference between partners as to what is partnership property, as distinguished from the individual property of one of the partners, is the settlement of a partnership matter, and is necessary in order properly to adjust the partnership accounts. (*Fulmore v. McGeorge*, 91 Cal. 611.)

362. A court of equity, in the settlement of partnership accounts, and the conversion into money of partnership assets, whether real or personal, and their division among the partners, never inquires into the source of title of such assets, or in whose name they are held. (*Bates v. Babcock*, 95 Cal. 479.)

6. Evidence in.

363. If two persons who are partners enter into a partnership with a third person residing in another place, and the accounts of the new partnership are kept in the books of the old partners, but are kept separately and not mingled with other accounts, and such third person has access to them, and knows that they are so kept, and makes no objection that they are not kept in separate books, the books are admissible in evidence in an action between the partners, for the purpose of proving the state of the partnership accounts. (*Clark v. Gridley*, 49 Cal. 105.)

364. In an action for dissolution of a copartnership and an accounting, when the books of the firm have been kept in such manner as to be unintelligible, and in view of that fact a stipulation is entered into by the attorneys, allowing the referee appointed by the court to employ experts to reduce the accounts of the firm into a tangible form, the books prepared by the experts are admissible in evidence in connection with the report of the referee, for the purpose of enabling the court to comprehend the accounts. (*Roberts v. Eldred*, 73 Cal. 394.)

365. In an action for a settlement of partnership accounts, a statement of accounts between the partners, made by an expert in

book-keeping, was offered in evidence by the plaintiff, and it appeared by the testimony of the witness that the books had been altered by him by the direction of the plaintiff after the dissolution. Held, that if this had been the only evidence of the correctness of the statement, it would have been inadmissible in evidence, for the plaintiff had no right to alter the books, and then use them as evidence in support of his case; but held, further, there being sufficient evidence aliunde to show the correctness of the data from which the statement was made, that it was properly admitted; and held, further, the evidence being conflicting on the point, that the findings would not be disturbed. (*Butler v. Beech*, 65 Cal. 28.) Cited 63 Cal. 378.

366. In an action at law or in equity, if the plaintiff offers evidence tending to show that the defendant has received moneys growing out of their adventures, whether as joint owners or as copartners, the defendant will be entitled to show that such moneys have been disbursed in the due course of the business. (*Fisher v. Sweet*, 67 Cal. 228.)

Loss borne by one partner, evidence relating to. See post, 375, 376, 377.

7. Extent of.

367. In an action to dissolve a partnership, and for a settlement of its affairs, where a partial settlement has already been made between the partners, the accounting should be limited to the unsettled portion of the partnership business. (*Stretch v. Talmadge*, 66 Cal. 510.)

368. When a bill is filed to settle the affairs of a partnership, the partnership transactions of each and all the partners should be taken into account; and the decree should include all these, so as to leave nothing open for future litigation. (*Griggs v. Clark*, 23 Cal. 427.)

369. In an action of accounting between partners, it is the duty of the court to make a complete settlement, although it includes items accruing after the commencement of the action. (*Roberts v. Eldred*, 73 Cal. 394.) Cited 81 Cal. 13.

8. Allowances and Charges.

370. In the absence of any special agreement between partners upon the subject, the rule of law is that partners are to share equally both profits and losses; and the mere fact that partners have put unequal amounts of capital into the common stock, or that one has put in all the capital, and the others only their skill and industry, will make no difference in the rule. (*Griggs v. Clark*, 23 Cal. 427.)

371. In a settlement between partners, where one of the partners has advanced merchandise, paid for from his personal funds, for the purchase of a tract of land, which both parties treated as partnership land, the other partner should be charged with one-half of the value of the merchandise as his share of the cost of the investment. (*Boskowitz v. Nickel*, 97 Cal. 19.)

372. A partner is properly chargeable with

his share of office expenses, where there is nothing in the agreement of the partners to the contrary. (*Boskowitz v. Nickel*, 97 Cal. 19.)

373. Where, by the terms of an agreement between the partners, it was expressly agreed that each party should satisfy one-half of the interest charged upon all indebtedness due subsequent to the date of the agreement, it is proper to charge interest upon the amount due to a partnership creditor whose indebtedness was created subsequent to the agreement, with the express consent of the partner who objects to such charge. (*Boskowitz v. Nickel*, 97 Cal. 19.)

374. One partner cannot properly be charged with the loss of a debt due to the partnership by allowing it to be barred by limitation, although he had the firm books in his possession and control, if the other partner was a managing partner and knew of the debt, and might have demanded or sued for its payment. (*Chalmers v. Chalmers*, 81 Cal. 81.)

375. If the complaint, in an action to dissolve a partnership and settle its accounts, avers a loss, borne exclusively by plaintiff, and asks for judgment for defendant's proportion, and the evidence shows a profit realized by plaintiff in one transaction, as well as a loss borne by him in another, the account taken should credit the defendant with his part of the profit realized, as well as charge him with his proportion of the loss sustained. (*Clark v. Gridley*, 41 Cal. 119.)

376. In such case, if the plaintiff has settled with the defendant for his part of the profit realized, it is incumbent on the plaintiff to show that fact on the trial. (*Clark v. Gridley*, 41 Cal. 119.)

377. Where the complaint, in an action for the dissolution of a partnership and a settlement of the accounts, avers a loss in the transactions of the firm, borne exclusively by the plaintiff, and asks for a judgment against the defendant for his proportion of such loss, the plaintiff may prove a loss resulting from his own act, done in violation of the partnership agreement. (*Clark v. Gridley*, 41 Cal. 119.)

Cited 65 Cal. 511.

378. In such case the plaintiff is entitled to a settlement of the partnership accounts, on such terms as may be equitable; and the defendant may show, as a matter of defense, that he suffered loss by such violation of the contract, and may charge the plaintiff with it. (*Clark v. Gridley*, 41 Cal. 119.)

379. If damages accrue by failure to perform covenants, such damages, if liquidated, can be settled by the court; if unliquidated, by directing an issue to have them ascertained. (*Stone v. Fouse*, 3 Cal. 292.)

Interest between partners. See Interest, VII.

Accounting, objections, when to be raised. See Appeals, 2393.

9. Decree Distributing Property; Findings.

380. If, in an action to wind up a partnership between the plaintiff and defendant in the stock of a corporation standing in the

name of defendant, it appears that the plaintiff has agreed that the defendant may retain certain shares until a demand made against the partnership is settled, the court should not direct a conveyance of those shares to the plaintiff without proof that the demand has been settled. (*Harper v. Lamping*, 33 Cal. 641.)

381. A judgment winding up the affairs of a partnership may make a division of the partnership property if there are no debts, and if a division in kind is as fair to all the parties as a sale and division of the proceeds. If the property consists of stock standing in the name of the defendant, the judgment should not be in the alternative, requiring the defendant to either transfer to the plaintiff his part thereof or pay him a certain sum of money, but should direct a division in kind or a sale and a division of the proceeds. (*Harper v. Lamping*, 33 Cal. 641.)

382. In a suit by one partner for the dissolution of the partnership and an account, etc., alleging that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due for such dividends before final distribution of the assets. (*O'Conner v. Stark*, 2 Cal. 153.)

383. In an action for an accounting of the affairs of a partnership, which the complaint alleges and the answer denies to be in existence at the commencement of the action, a finding on the issue so raised, to the effect that the partnership was dissolved and the partnership assets divided by mutual consent before the commencement of the action, although not a finding in the exact language of the pleadings, is sufficient to sustain a judgment in favor of the defendant. (*Hart v. Finigan*, 71 Cal. 578.)

Failure to find as to partnership in suit for accounting. See Appeals, 2680.

Judgment upon partnership accounting, staying pending appeal. See Appeals, 1753.

10. Reopening Account.

384. In an equitable action to reopen a settlement and sale between partners, and to obtain an accounting of partnership affairs, on the ground of fraud alleged to have been practiced by the defendant, the court, if it finds for the plaintiff, should set aside the sale and settlement and take an accounting. Without this it cannot render judgment against the defendant for a specific sum. (*Black v. Merrill*, 65 Cal. 90.)

385. If one partner makes false entries in the books and defrauds his copartner, and there has been an accounting between the partners, and the partner defrauded does not discover the fraud until after the accounting, he may sue for an accounting and dissolution, and on the trial may surcharge and falsify the account, without demanding a reaccounting prior to the commencement of the action. (*Cottle v. Leitch*, 35 Cal. 434.)

Impeachment of settled account. See ante, 814.

Mistake in settlement, equity will not relieve when. See Mistake, 15.

11. Action for Amount Due on Settlement or for Contribution for Debts Paid.

386. In an action to recover a balance alleged to be due upon a settlement of partnership accounts, the plaintiff's evidence tended to show a purchase by the defendant of the plaintiff's interest in the goods and assets of the firm. Held, that a nonsuit was properly granted. (*Whitney v. Purrington*, 69 Cal. 36.)

387. Where, in an action for an accounting and dissolution of a partnership, the judgment provides that the partnership property be sold, and the proceeds applied to the payment of an indebtedness due to one partner, and that a personal judgment for the balance, if any, be entered against certain other partners, the statute of limitations does not commence to run in favor of the latter until such balance has been ascertained and judgment rendered therefor. Until that is done the judgment is not final. (*White v. Conway*, 66 Cal. 383.)

Cited 11 Mont. 567.

388. In an action by one partner against another for a contribution of the debts of the partnership which had been paid by him, the judgment-roll in a prior action brought by the defendant against the plaintiff for a dissolution and an accounting, and for the establishment of the respective interests of the partners in the firm assets, is admissible in evidence to show their respective interests. (*Sears v. Starbird*, 78 Cal. 225.)

389. Where a partnership has been dissolved and the partnership accounts fully settled, one partner who has individually paid the partnership debts may maintain an action against the other for contribution, although there has been no express promise on his part to pay the balance. (*Sears v. Starbird*, 78 Cal. 225.)

390. Where a partnership is dissolved by mutual consent, and an accounting is had between the members, and an agreement is entered into that the firm debts shall be paid equally, one of the partners, who collects all the available partnership assets, and applies them to the payment of the firm indebtedness, and pays the balance of the indebtedness with his own funds, may maintain an action against the other to recover his proportion of the indebtedness so paid, although no definite balance has been agreed upon between them. (*Jepson v. Beck*, 78 Cal. 540.)

Partner paying debt, right of to contribution. See ante, 81.

PART PAYMENT.

See Payment, VI.

Effect on barred debt. See Statute of Limitations, XII, 2.

PART PERFORMANCE.

See Statute of Frauds, II.

Oral contract for sale of land. See Specific Performance, IV, 12.

PARTY AGGRIEVED.

See Appeals, III, 1.

PARTY WALLS.

Nuisance, overhanging wall as. See Nuisances, II, 2.

1. Agreement for party wall confers only an easement to use the wall as a party wall. Each party owns the half of the wall which is upon his land, and neither has the right to have the face of the other's half finished in any particular manner, in the absence of a special agreement to that effect. (McCarthy v. Mutual Relief Assn. of Petaluma, 81 Cal. 584.)

2. He who seeks equity must do equity, and therefore so long as the plaintiff's wall, laid on his own land, projects over the defendant's land, the court will not compel the defendant to desist from using it as a party wall. (Guttenberger v. Woods, 51 Cal. 523.) Cited 87 Cal. 60.

PASSAGE.

Ordinances, passage of. See Ordinances, II. Statute, fraud in. See Statutes, I, 1. Statutes, passage of and inquiry into. See Statutes, I, 1.

PASSENGER CARRIERS.

See Common Carriers, IV.

PASSENGERS.

See Common Carriers, IV.

PASTURAGE.

Use of land for. See Adverse Possession, II, 5, d.

PATENT PAVEMENT.

Contract for. See Streets, XIV, 6.

PATENTS.

See Public Lands, XX.

Reservations, island, when included in. See Watercourses, VII.

Spanish grants, patent to. See Mexican Lands, I, 26, a.

Pueblo grant, patent for. See Mexican Lands, II, 5.

Actions to cancel. See Swamp and Overflowed Lands, XIII.

Conclusiveness and priority. See Swamp and Overflowed Lands, XIII.

Inventions. See Inventions.

PATERNITY.

Evidence of. See Legitimacy, II.

Proceedings to determine heirship. See Estates of Deceased Persons, VIII, 1.

PAUPERS.

See Poor Laws.

Power of state to exclude paupers. See Constitutional Law, 45.

PAVEMENT.

Patented, contract for. See Streets, XIV, 6.

PAVING.

Streets, paving of. See Streets, XII, 3.

PAWNBROKERS.

Act limiting rate of interest is valid. See Interest, 5.

1. The act of 1861, prohibiting pawnbrokers or pledgees from charging more than four per cent per month on loans made on property pledged as security, is not in violation of section 2 of article I of the constitution, which provides that "all laws of a general nature shall have a uniform operation." (Jackson v. Shawl, 29 Cal. 267.) Cited 43 Cal. 249; 67 Cal. 360.

2. Where a pawnbroker loans money upon property pledged, and the borrower contracts to pay him more than four per cent interest per month, he can recover possession of the property by tendering him the principal and four per cent per month interest. (Jackson v. Shawl, 29 Cal. 267.)

3. Could the borrower in such case recover the property by making a tender of the principal sum without interest, query? (Jackson v. Shawl, 29 Cal. 267.)

PAWNS.

See Pledges.

PAYMENT.**I. Kinds and Value of Money.****II. How Made.**

1. *By Note, Bill, or Check.*

2. *By Property or in Gold Dust.*

3. *Payment in Particular Kind of Money; Herein of Legal Tender or Specific Contract Act.*

III. Time of and Extension of; Agreement to Pay in Gold in Consideration of Forbearance.**IV. Application of Payments.****V. Pleading, Evidence, and Findings.****VI. Effect of; Part Payment; Payment to One of Two Joint Creditors.****VII. Payment by a Third Person.****VIII. Actions to Recover Money Paid.**

1. *Money Paid Where Consideration has Failed.*

2. *Money Paid by Mistake of Law; Herein of Voluntary and Compulsory Payments.*

3. *Money Paid for Illegal Purpose.*

4. *Excessive Payment.*

Alternative modes of. See Contracts, 233, 234.

Election to pay in money or lumber, construction of. See Building Contracts, 54.

Option to pay in money or labor. See Specific Performance, 74.

"Recovery" and "collection," meaning of. See Words and Phrases, 5.

Condition in deed as to payment. See Deeds, 332.

Marshaling of assets. See Marshaling of Assets.

Order of. See Estates of Deceased Persons, VI, 10.

What amounts to, and evidence of. See Master and Servant, II, 5.

What transaction amounts to payment.

See Executors and Administrators, 397; Master and Servant, II, 5.

Tender as. See Default, 176.

Contract to pay out of proceeds of sales, liability on. See Watercourses, 170.

Receipts. See Receipts.

Release. See Release.

Release supports plea of payment. See Corporations, 269.

Judgments, in what payable. See Judgments, II, 5.

Payment in particular cases. See particular title.

I. Kinds and Value of Money.

1. There are three kinds of money, by the laws of the United States, to wit, gold, silver, and treasury notes, each of which is made a legal tender in payment of debts. (*Carpentier v. Atherton*, 25 Cal. 564.) Disapproved 1 Idaho, 215; s. c. 1 Idaho, N. S., 183.

2. A court cannot say judicially that one kind of money, made a legal tender, is of greater or less value than another; nor can evidence be received that a dollar of one kind is of greater or less value than another. (*Carpentier v. Atherton*, 25 Cal. 564.) Cited 31 Cal. 80.

3. Courts cannot discriminate between one kind of money and another in cases where neither the parties contracting nor the laws have made any such discrimination. (*Higgins v. Bear River etc. Co.*, 27 Cal. 162.)

4. As a matter of law, there is no possible difference in value between gold coin and legal tender notes, nor can evidence be received to prove a difference. (*Poett v. Stearns*, 31 Cal. 78.) Cited 38 Cal. 254, 259.

Treasury notes made legal tender, value of. See post, 42.

II. How Made.

1. By Note, Bill, or Check.

5. The payment of money is not necessary to the extinguishment of an obligation. A debt may be paid by the giving of a note, if it is offered and accepted as payment. (*Stanley v. McElrath*, 86 Cal. 449.)

6. A note given in consideration of an antecedent indebtedness does not per se discharge the debt. In the absence of an agreement to the contrary, the only effect is to suspend the remedy until the maturity of the note. (*Smith v. Owens*, 21 Cal. 11.) Cited 85 Cal. 287.

7. Giving a promissory note, payable at a future time, for a pre-existing debt, does not discharge it. Its only effect is to suspend the right of recovery upon the maturity of the note. (*Brewster v. Bours*, 8 Cal. 501.) Cited 50 Cal. 166; 78 Cal. 20; 85 Cal. 287; 3 Mont. 275.

8. An express agreement must be shown to establish the fact that a bill of exchange of either the debtor or a third person was taken by the creditor in payment of a pre-existing debt. (*Brown v. Olmsted*, 50 Cal. 162.) Cited 78 Cal. 20; 85 Cal. 287; 94 Cal. 366; 3 Mont. 375.

9. Where a note is executed for the amount of an account, without any agreement that the account is thereby satisfied or discharged, the only effect of the note is to extend the time of payment. Upon failure to pay at the maturity of the note, a right of action accrues upon the account as well as on the note. (*Higgins v. Wortell*, 18 Cal. 330.) Cited 78 Cal. 20; 85 Cal. 287.

10. Where a creditor receives, on account of his debt, a bill of exchange drawn in his favor by the debtor upon a third person, it operates but as a conditional payment; if, however, the creditor fails to present it to the drawee for acceptance or payment, as required by the rules of commercial law, it becomes thereby an actual charge against him, and operates pro tanto as a satisfaction of his demand. (*Brown v. Cronise*, 21 Cal. 386.) Cited 78 Cal. 20.

11. Defendants were indebted to plaintiff in the sum of ten thousand dollars; subsequently, parties had a settlement, and defendants gave to plaintiff, in part payment of the debt, a note of third parties for two thousand five hundred dollars, which was received by plaintiff without objection, and the same left with defendants for collection. The note was not paid at maturity, and plaintiff demanded the amount for which the note was taken in settlement of the defendants, who paid twelve hundred and fifty dollars, and gave to plaintiff another note of same parties for the balance, payable in one year. Held, in an action by plaintiff against the defendants to recover the balance, that defendants are liable for the amount. (*Griffith v. Grogan*, 12 Cal. 317.) Cited 18 Cal. 333; 23 Cal. 322; 25 Cal. 542; 50 Cal. 166; 78 Cal. 20; 85 Cal. 287; 94 Cal. 366; 3 Mont. 275.

12. Unless the note was received by express agreement as payment, it did not extinguish the debt. It only operated to extend the time of payment of the debt to the time the note fell due, and hence the statute of limitations would commence running only from that time. (*Griffith v. Grogan*, 12 Cal. 317.)

13. The acceptance of a note of a third party, by the creditor, is considered as accompanied with the condition that the note shall be paid at its maturity. (*Griffith v. Grogan*, 12 Cal. 317.)

14. The obligation of the debtor to pay in such case does not rest upon notice by the creditor of the nonpayment of the note, but upon the fact that the note was not paid; and hence, delay on the part of the creditor in calling on the debtor will not absolve him from his obligation to pay. (*Griffith v. Grogan*, 12 Cal. 317.)

15. A holds a note against B for four thousand dollars, secured by a mortgage on B's mining claim. The note being due, B agrees with C to sell the claim to him, in consideration of C's payment of the debt to A. B and C execute an agreement in writing, to which A assents, that C shall pay A four hundred dollars in cash, sixteen hundred within two days, and for the remaining two thousand gives his note to A, payable in four months.

C pays the four hundred dollars, and executes the note, which A receives. A retains his original note and mortgage, and there is no understanding that these shall be released. Held, that this transaction operated as a conditional payment of the original debt; that the debt was not thereby extinguished, but the remedy upon it suspended until default on the part of C in making his payment. (*Crory v. Bowers*, 20 Cal. 85.) Cited 85 Cal. 287.

16. C failing to pay the sixteen hundred dollars at the time agreed in such case, A might thereupon, for this breach, consider the entire contract annulled, and, without waiting for the maturity of C's note, maintain an action against B upon the original note for the whole balance unpaid. (*Crory v. Bowers*, 20 Cal. 85.)

17. A written receipt of payment in full does not establish a positive agreement for absolute payment when the payment is by a bill or note. (*Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15.)

Note, payment of subscription in. See Corporations, IV, 2, c.

18. The test as to whether the note was paid or not, as against the payee, by means of the check, is whether an action could afterwards be maintained upon the note against the maker, and the check could operate as payment until collected. (*Steinhart v. National Bank of D. O. Mills & Co.*, 94 Cal. 362.)

19. When a creditor takes a note or check for an antecedent debt, it does not operate to extinguish the debt unless it is received by express agreement as payment. (*Steinhart v. National Bank of D. O. Mills & Co.*, 94 Cal. 362.)

20. The agreement for absolute payment by note or check must be mutual between the debtor and creditor, and it is error to instruct the jury that "if it be accepted by the creditor by his own voluntary act or choice as payment, and in satisfaction of the debt, such acceptance would establish payment of such debt." *Paterson, J., dissenting.* (*Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15.) Cited 94 Cal. 366.

21. When a check is taken by agreement as absolute payment of a debt, the creditor takes all the risk of its payment. (*Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15.)

22. The language of a witness who is manager of a plaintiff bank, in stating that a check which was afterwards dishonored was accepted in payment of the debt sued upon, should not be construed as signifying any thing more than the provisional or conditional payment presumed by law, and is no evidence of absolute payment. (*Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15.)

23. When the trial of an issue involves a question of payment of a debt by a check which was dishonored, it is error to refuse to instruct the jury that when a check is given in payment of a debt it is only accepted on condition that the check be paid, but if dis-

honored, the creditor may resort to his original claim, on the ground that there has been a failure of the condition on which the check was taken. A check or note is only a conditional or provisional, and not an absolute, payment of the debt for which it was given, and does not extinguish the debt unless it is expressly agreed it is accepted as payment. *Paterson, J., dissenting.* (*Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15.)

24. The action was brought on a promissory note executed in favor of the plaintiffs by the defendant and one Scoggins, and was secured by a chattel mortgage upon a crop of wheat belonging to the latter. After the wheat was harvested, Scoggins delivered it to the plaintiffs to be sold, according to the usual custom of merchants, and the proceeds applied to the payment of the note. The plaintiffs sold the wheat, and, without the consent of Scoggins or the defendant, received in payment therefor a check payable in ten days after sight. The usual custom of merchants engaged in the wheat trade at the place of sale was to sell for cash or sight drafts. Before the maturity of the check, the purchaser of the wheat failed, whereby the purchase price was lost. Held, that the plaintiffs were liable for the loss, as it was occasioned through their negligence in accepting a time check in violation of the usual custom of merchants. (*Harlan v. Ely*, 68 Cal. 522.)

Check, payment by. See Bills and Notes, 482; Trust Deeds, 33.

Check, payment of subscription in. See Corporations, IV, 2, c.

Warrants, payment in on sale of city property. See San Francisco, 293.

Payment in certified checks is invalid. See Executions, 340.

2. By Property or in Gold Dust.

25. Payment can only result from an agreement of the parties that the transaction shall have that effect, and though payment may be made by agreement in articles other than money, yet it is only the distinct agreement of the creditor, with the consent of the debtor, to accept the thing in discharge of the debt that gives it the character of a payment. (*Borland v. Nevada Bank*, 99 Cal. 89.)

26. Property delivered for vendor to third person not authorized to receive it, and who subsequently refused to accept the same as payment under the contract of purchase, to the knowledge of the purchaser, cannot be regarded as a payment under the contract. (*Snodgrass v. Parks*, 79 Cal. 55.)

27. The burden of establishing that property, the possession of which was transferred by a debtor to his creditor, was transferred by way of sale or payment of the indebtedness, is upon the debtor, and if he fails to make such proof, the law makes the positive inference that the transfer was only as collateral security. (*Borland v. Nevada Bank*, 99 Cal. 89.)

28. Where a party agrees to deliver specific property at all events, without any option on his part, and he fails to carry out the contract, he is liable in damages for the value of

the property. (*Cummings v. Dudley*, 60 Cal. 383.)

29. An agreement to pay a fixed sum in grain, at the market price on a day specified, if not fulfilled by the delivery of the grain at the time fixed, becomes a debt payable in money. (*Marshall v. Ferguson*, 23 Cal. 65.)

30. Where such an agreement exists, no demand of the grain is necessary, but a failure to deliver makes the sum fixed a money debt. (*Marshall v. Ferguson*, 23 Cal. 65.)

31. Gold dust is not cash within the meaning of a contract calling for the payment of cash. (*Gunter v. Sanchez*, 1 Cal. 45.)

32. A purchased of B a cargo of lumber for thirty-eight thousand dollars, one-half of the purchase money to be paid in cash, and one-half in bills at sixty days. The bills were given, and A offered to pay the balance of the purchase money in gold dust, at sixteen dollars the ounce, which B refused to receive at a higher rate than fifteen dollars and fifty cents per ounce. A thereupon paid the whole amount due in gold dust at the latter price, and B accepted it at that rate. In an action by A to recover damages for the nondelivery of the lumber within a reasonable time, and also the difference between the gold dust at fifteen dollars and fifty cents per ounce and sixteen dollars per ounce, held, that the portion of the judgment of the court below allowing this difference as damages should be reversed, and that the rest of the judgment, being for damages sustained by reason of the nondelivery of the lumber, should be affirmed. (*Gunter v. Sanchez*, 1 Cal. 45.)

3. Payment in Particular Kind of Money; Herein of Legal Tender or Specific Contract Act.

33. Promise to pay money generally can be satisfied by a payment in any kind of currency that becomes lawful money and a legal tender during the interval through which the relation of debtor and creditor shall be extended. (*Higgins v. Bear River etc. Min. Co.*, 27 Cal. 153.)

34. A contract made to pay money generally may be discharged by a tender and payment of either of the three kinds of money made a legal tender by the laws of the United States; but a contract made to pay in one of the three kinds of money cannot be discharged by a tender of either of the two other kinds. (*Carpentier v. Atherton*, 25 Cal. 564.)

What is. See ante, I.

35. A contract agreeing to pay a specific sum in gold coin, or, upon failure thereof, to pay such further sum as may be equal to the difference in value between gold coin and legal tender notes, belongs to the class of contracts provided for in the so-called Specific Contract Act, and may be enforced according to its meaning. (*Lane v. Gluckauf*, 28 Cal. 288.)

Cited 33 Cal. 473; distinguished 29 Cal. 275, 277.

36. The meaning of such contract is that the maker will pay in gold coin, or, if he does not do so, in legal tender notes at their gold value. (*Lane v. Gluckauf*, 28 Cal. 288.)

37. A contract to pay money in gold coin of the United States, or the equivalent of such gold coin, if paid in legal currency, is a contract to pay the given number of dollars in any kind of lawful money of the United States, and cannot be enforced in any specific kind of money. (*Reese v. Stearns*, 29 Cal. 273.)

Cited 35 Cal. 357; 6 Nev. 47, 48.

38. If, to a note secured by a mortgage duly recorded, payable in money generally, a supplement is afterwards added agreeing to pay in gold coin, which supplement is not recorded, the mortgage can be enforced by a sale for gold coin as against subsequent encumbrancers whose lien attached after the addition to the note. (*Poett v. Stearns*, 31 Cal. 78.)

Agreement to pay in gold in consideration of forbearance. See post, III.

39. Debt for goods purchased by firm, with verbal understanding that it is to be paid in gold coin, may be enforced in gold coin, if, after the debt has accrued and suit has been commenced on it, one of the firm makes a contract in writing in the firm name, dated before the sale, to pay in gold, provided the complaint avers a contract to pay in gold made before the goods were sold. (*Meyer v. Kohn*, 29 Cal. 278.)

Specifying money in which note payable. See Bills and Notes, VIII, 1.

Verdict in gold coin. See Verdict, XI.

Gold coin judgments. See Judgments, II, 5.

Wharfage is payable in gold and silver coin. See Wharves, 35.

In what kind of money draft may be paid. See Bills and Notes, 469, et seq.

40. The act of Congress, passed February 25, 1862, making the notes issued under the act lawful money, and a legal tender in the payment of private debts, is constitutional. (*Curiac v. Abadie*, 25 Cal. 502.)

Cited 38 Cal. 254.

41. The notes issued under said act are a legal tender in payment of a debt, the consideration of which was gold or silver coin of the United States, unless there is a written contract to pay in gold or silver coin. (*Curiac v. Abadie*, 25 Cal. 502.)

42. In contemplation of law, a dollar in United States treasury notes, made a legal tender in payment of debts, is equal to and therefore the equivalent of a dollar in gold coin. (*Reese v. Stearns*, 29 Cal. 273.)

Cited 31 Cal. 80.

43. Treasury notes issued under the act of Congress of February 25, 1862, are lawful money, and a legal tender in payment of all debts, public and private, except certain public debts mentioned in the act. (*People ex rel. Mulford v. Mayhew*, 28 Cal. 655.)

Cited 38 Cal. 254.

44. United States notes issued under and by authority of the act of Congress of February 25, 1862, entitled "An act to authorize the issue of United States notes," etc., and the act of March 3, 1863, entitled "An act to provide ways and means for the support of the government," are lawful money and a

legal tender in payment of all private debts contracted before the passage of said acts, unless, by the terms of the contract creating the debt, the debtor promised to pay in gold or silver coin. (*Higgins v. Bear River etc. Min. Co.*, 27 Cal. 153.)
Cited 38 Cal. 254.

45. The acts of Congress making United States notes lawful money and a legal tender in payment of debts are not laws operating retrospectively, but in presenti and prospectively. (*Higgins v. Bear River etc. Min. Co.*, 27 Cal. 153.)
Cited 38 Cal. 255.

46. The bonds issued at the date of or subsequent to the passage of the first Legal Tender Act, and not expressly made payable in coin, may be satisfied with legal tender notes, unless the law providing for their issue requires payment to be made in gold coin only. *Per Rhodes, O. J., Sprague, J., concurring.* (*People ex rel. Chrystal v. Cook*, 39 Cal. 658.)

47. A debt secured by note and mortgage made and executed before the passage of the Legal Tender Act may be discharged in legal tender notes, if they contain no stipulation requiring payment to be made in coin. (*Belloc v. Davis*, 38 Cal. 242.)

Verdict in legal tender notes. See Verdict, XI.

Treasury notes are legal tender. See Executions, 337, et seq.

Payment in legal tender notes. See Common Carriers, IV, 4, a; Estates of Deceased Persons, 436.

Recovery of property in value in legal tender notes. See Trover, 56, et seq.

48. A contract for the payment of a sum of money in United States coin, entered into before the passage of the act of April 27, 1863, commonly called the "Specific Contract Act," can only be performed by a payment of the kind of money specified. (*Galland v. Lewis*, 26 Cal. 46.)

49. A gold coin contract entered into before the passage of the Specific Contract Act will be enforced by the courts in accordance with the provisions of said act in actions commenced after the passage of said act, and a tender made in the United States treasury notes on such contracts, before the passage of said act, will not satisfy the same. (*Galland v. Lewis*, 26 Cal. 46.)
Cited 27 Cal. 82; 1 Nev. 602.

50. The Specific Contract Act was not intended to legalize contracts which without it were illegal, but to provide a remedy for enforcing certain contracts, if held to be legal. (*Lane v. Gluckauf*, 28 Cal. 288.)
Cited 32 Cal. 130.

51. A note and mortgage, by the terms of which the payments promised and secured are to be made in United States gold coin, or, in default of that, then in legal tender notes, at their market value in gold coin, is authorized by and enforceable under the Specific Contract Act. (*Burnett v. Stearns*, 33 Cal. 468.)

52. The act of 1863, commonly called the "Specific Contract Act," applies to contracts

made before as well as after its passage. (*Otis v. Haseltine*, 27 Cal. 80.)

Specific Contract Act, validity of. See Constitutional Law, VIII, 18.

III. Time of and Extension of; Agreement to Pay in Gold in Consideration of Forbearance.

Reasonable time for payment where no time provided. See Vendor and Vendee, XI, 1.

53. Plaintiff contracts to dig a ditch for a water company, the company agreeing to pay three dollars per rod, one-third of it in money, on the completion of each mile, the other two-thirds to be paid in water, at the rate of twenty-five cents per square inch, delivered through an orifice, under six inches of pressure, anywhere along and at the main ditch, the company having the right of paying the two-thirds in cash instead of water, if they so elect. Held, that said two-thirds, if elected to be paid in cash, need not be paid as the other third, on the completion of each mile. (*Myers v. South Feather River Water Co.*, 14 Cal. 268.)

54. An agreement without consideration, to extend the time of payment of money due on a contract, cannot be enforced. (*Hughes v. Davis*, 40 Cal. 117.)

55. In a contract for the payment of money at different periods of time, with an extension of time, if needed, for the payment of an installment, the extension is a privilege of which, if the party entitled to it desires to avail himself, he must notify the other party, on or before the day upon which the installment becomes due, that he needs the extension. (*Bohall v. Diller*, 41 Cal. 532.)

56. The defendant, being indebted to the plaintiff upon an account, agreed to pay the amount of the debt, and also an amount due from a third person (which he assumed), by transmitting the money through Wells, Fargo & Co.'s Express within one week from September 11, 1880; and the plaintiff, in consideration of the defendant's agreement, agreed to the postponement of the payment of his account until the expiration of the time specified. The defendant, within that time, transmitted the money as agreed, but in the mean time suit had been brought by the plaintiff upon the account. Held, the agreement was binding; and it follows the action was prematurely brought. (*Leslie v. Conway*, 59 Cal. 442.)

57. Where a contract of loan is executed in writing, a parol agreement to extend the time of payment, if made at the time of the loan, cannot change the terms of or be substituted for the written contract; and, if made subsequently, cannot create a new or continuing contract, so as to take the original contract out of the operation of the statute of limitations. (*Booth v. Hoskins*, 75 Cal. 271.)
Cited 87 Cal. 60.

Presumptions as to maturity of obligation and dates of payment. See Appeals, 2861.

Not due until performance. See Contracts, 272.

Extension of time of mortgage. See Mortgages, XVI.

Extension of time as consideration. See Contracts, 22, 23.

Delay in, waiver of. See Specific Performance, 160.

58. Promise, in consideration of forbearance, "to pay our indebtedness in gold coin," is not void for want of certainty. The promise to pay "our indebtedness" must be deemed sufficiently specific to embrace the only debt which is shown to be owing. (*Belloc v. Davis*, 38 Cal. 242.)

59. Subsequent encumbrancers or purchasers, whose rights had attached to the mortgaged property prior to the date of the subsequent promise, to pay in gold coin, in consideration of forbearance, are not affected thereby. (*Belloc v. Davis*, 38 Cal. 242.) Cited 43 Cal. 188.

60. Where the makers of a note and mortgage, subsequently to their execution (being otherwise capable of contracting), entered into the following promise in writing, in consideration that the creditor would forbear to sue, "We promise to pay our indebtedness to Benjamin Belloc in United States gold coin," it is sufficient to bring the note and mortgage within the operation of the Specific Contract Act. (*Belloc v. Davis*, 38 Cal. 242.)

IV. Application of Payments.

61. The rules prescribed by section 1479 of the Civil Code, respecting application of the payment, are not sufficient for all occasions; and in cases where those rules do not apply, the application must be made upon equitable principles. (*Murdock v. Clarke*, 88 Cal. 384.)

62. Debtor who owes different obligations has right to designate, at the time of making a payment, the debt to which he wishes the payment applied; and, if he does not designate the debt the creditor may make the application, and if neither makes it the application is to be made by the court, under the rules of law. (*Murdock v. Clarke*, 88 Cal. 384.)

63. The debtor, who owes the same person on several promissory notes, has the right to direct verbally on which notes any payments he may make shall be applied. (*Clarke v. Scott*, 45 Cal. 86.)

64. The debtor may, at or before the time of payment, direct the application of the payment, and if the creditor receives the money, he is bound by the direction. If the debtor omits to make such application, the creditor may, generally, apply the payment to any debt he chooses, but when so made, he cannot, without the consent of the debtor, change such application. (*Wendt v. Ross*, 83 Cal. 650.)

65. In an action upon a promissory note against the debtor and one who signed as surety, where the defense is that other notes were given by the debtor at the same time as the one in suit, with a verbal agreement with the plaintiff that the first payments made by the debtor should be applied on the note signed by the surety until it was paid, and that payments had been made and had been

wrongfully indorsed on the notes not signed by the surety, the defendants have a right to give such verbal agreement in evidence as tending to show that the debtor, when he made the payments, had not changed his first intention as to how the payments were to be applied. (*Clarke v. Scott*, 45 Cal. 86.)

66. Where it appears that, at the time payments were made by a debtor to his creditor, the debtor intended them to be applied upon a specific obligation, and the creditor "well knew" that the debtor so intended, nothing further is required to fix the application of the payments, and the mode by which the debtor manifested his intention in such case is immaterial. (*Hanson v. Cordano*, 96 Cal. 441.)

67. Under section 1479 of the Civil Code a creditor, to whom money is paid for the account of a debtor who is under several different obligations to him, may apply the same to the extinction of any obligation which is then due, unless the debtor, at the time of the payment, manifests the intention or desire that the money should be applied to the extinction of some particular obligation. (*Byrnes v. Claffey*, 69 Cal. 120.)

68. If the debtor, at the time of, or previous to, payment, neglects to designate to which of several debts he applies his payment, his right to control the application is gone, and the creditor may exercise it at any time before suit. (*Haynes v. Waite*, 14 Cal. 446.)

Cited 1 Mont. 48.

69. The institution of suit evidences the creditor's application of the payment. (*Haynes v. Waite*, 14 Cal. 446.)

70. Pending the delivery of bricks for a building by plaintiff, and within a few days thereafter, the original contractor paid money to the plaintiff without specially directing the application of the payments; and the plaintiff applied a portion of the money to the payment of a debt due him from the contractor previous to the making of the contract, and it was held that he had no right to do so. (*Goss v. Strelitz*, 54 Cal. 640.) Cited 16 Nev. 274.

71. If a party who is indebted on several promissory notes, all held by the same person, makes a payment of money to the holder and directs it to be applied on one of the notes, but the holder applies it on other notes than the one directed, and the payor afterwards acquiesces and takes the notes upon which the application was made, this is a ratification of the application made by the creditor. (*Cardinell v. O'Dowd*, 43 Cal. 586.)

72. Where payments are made by a debtor without applying them to any specific demand, they should be applied by the court to the extinction of obligations earliest in date of maturity. (*Coalter v. Hurst*, 97 Cal. 290.)

73. In a case of several obligations, where neither the debtor nor creditor has made any express application of a fund paid to any particular obligation, the law applies the payment to the extinguishment of the obligation earliest in date of maturity. (*Duncan v.*

Thomas, 81 Cal. 56; Wendt v. Ross, 83 Cal. 650.)

74. It is the settled rule in this country, wherever the common law prevails, that where indefinite payments are made by a debtor to his creditor to whom he owes different obligations, and neither party makes any application of the payments, the law will make the application in such a manner, in view of all the circumstances of the case, as is most just and equitable, and will best protect and maintain the rights of both parties. (Murdock v. Clarke, 88 Cal. 384.)

75. In applying the indefinite payments, the burden should be made as light upon the debtor as is consistent with giving to the creditor all that the debtor has bound himself to pay; and where all debts are alike secured, the application should be made to the payment of interest upon the debt bearing the most onerous rate. (Murdock v. Clarke, 88 Cal. 384.)

76. If the application can be so made as to discharge all the legal obligations of the debtor without increasing his burden, the law presumes that the payments were received in a way that was of most advantage to the creditor, and will apply the payments to interest instead of principal, to matured debts, to legal interest and legal items of account, to the earliest matured debt, to unsecured debts, and to that debt for which the security is most precarious. (Murdock v. Clarke, 88 Cal. 384.)

77. A payment made on account of a promissory note, in the absence of any agreement or direction as to how it should be applied, in so far as it exceeds the interest which has accrued at the time of payment, will be applied to the payment of the principal of the note, and not to future or unearned interest. (Monroe v. Fohl, 72 Cal. 568.)

78. Where payments are made generally to a party having two accounts against the party paying, one due to himself, the other to a third party, for whom he was acting as agent, and no appropriation of such payments to either account is made by either party, the rule is that said payments will be applied ratably to both accounts. (Wendt v. Ross, 83 Cal. 650.)

Application of payment. See post, 81.

Application of proceeds of execution sale. See Executions, IX, 6, k.

Application of, on payment by maker to indorser. See Bills and Notes, 222.

V. Pleadings, Evidence, and Findings.

79. Evidence of the discharge of the old debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment *pais darrein continuance*. (Jessup v. King, 4 Cal. 331.)

Nonpayment, alleging. See Bills and Notes, 367, et seq.; Contracts, V, 3, c.

Nonpayment, allegation of, sufficiency. See Appeals, 2469; Bailments, 11; Contracts, 323.

80. Evidence of payment of a debt, or of an offer to pay, is admissible if the payment, or the offer to pay, be made before the commencement of the action for the debt, or if

made subsequently to the commencement of the action, and the fact be averred in the answer. (Glascocock v. Ashman, 52 Cal. 493.)

Burden of proving payment. See ante, II, 2. Presumption of. See Presumptions, 27.

Evidence admissible under plea of payment. See Bills and Notes, 427.

Provable under general denial. See Assumpsit, 73.

Parol evidence as to time of payment. See Evidence, VII, 8.

Tax, evidence of payment. See Taxation, XI, 2.

Evidence of payment of warrants. See Counties, IX, 4.

Contradicting recital of payment. See Deeds, III, 3.

81. Where the plaintiff, in an action to recover the reasonable value of services rendered to the defendant, alleged that he had not been paid for his services, and the defendant pleaded payment therefor, and proved that he had paid to the plaintiff various sums of money, amounting, in the aggregate, to more than the court found to be the value of plaintiff's services, but failed to show any application of any of the moneys paid by him to a discharge of his obligation for the services rendered by the plaintiff, or to any specific demand of the plaintiff, the plaintiff was entitled to show, in rebuttal, that the moneys paid had in fact been paid by the defendant upon indebtedness to the plaintiff growing out of other transactions; and a finding by the court, stating the account between the parties, and finding that certain of the amounts paid by the defendant were upon account of other transactions specified, and that there was a specified balance due the plaintiff, is not a finding upon issues not raised by the pleadings, but is a finding upon the issue of payment presented by the answer. (Coalter v. Hurst, 97 Cal. 290.)

Finding of nonpayment, what is not. See Bills and Notes, 454.

VI. Effect of; Part Payment; Payment to One of Two Joint Creditors.

82. Where the defendant, being indebted to the plaintiff, a banking firm, made a payment on account in the bank to one of the plaintiff's clerks, and on a subsequent day agreed to lend to the clerk the amount thus paid, who took the money and used it, and the amount thus paid was never credited to the defendant on the books of the plaintiff, held, that the amount paid by defendant, in the usual way of business, was a legal payment, and that defendant lost all control over it. (Rhodes v. Hinckley, 6 Cal. 283.)

83. If defendant is ultimately liable for the amount thus advanced to the clerk, it must be in an action for thus advancing it, and not in an action on the original indebtedness. (Rhodes v. Hinckley, 6 Cal. 283.)

84. M. & T. being indebted to V. in the sum of six hundred and seventy-one dollars, plaintiff, for the accommodation of the debtors, procured E. to assume the debt and execute to V. his (E's) note for the amount, and, to secure E., plaintiff assigned to him a

note and mortgage of M. for two thousand dollars, with an agreement that the latter should be retransferred to plaintiff upon the payment by him to E. of the amount of his (E's) note to V. Subsequently, E. died, having in his hands at the time fourteen hundred dollars belonging to M., and received by E. as rents and profits of a certain ditch of which he and M. were joint owners. Defendants were appointed administrators of E. and received the fourteen hundred dollars as assets of deceased, and afterwards from the funds of the estate paid the six hundred and seventy-one dollar note to V. The action is brought to compel defendants to redeliver to plaintiff the two thousand dollar note and mortgage, he claiming that the transaction above stated amounted to a payment by him of the debt for which they had been pledged as security. Held, that the facts did not show a payment of E's note to V. by plaintiff; that they only established that there was a balance due to M. from the estate of E., and that plaintiff was not authorized in this action to avail himself of such counterclaim of M. against the estate as a payment on behalf of M. & T. (*Cook v. Davis*, 22 Cal. 157.)

Effect of, where contract assigned. See Assignments of Contracts, VI.

Title, payment by carrier passes. See Common Carriers, III, 9.

Waiver of performance by payment. See Contracts, IV, 1.

Payment as waiver of breach of contract. See Contracts, 270.

Part performance, payment as. See Specific Performance, 101, et seq.

Surety, exoneration of by. See Suretyship, IV, 5, c.

Receipt of, no waiver of defense to fraud, when. See Fraud, 69.

85. A part payment of a demand, of one of two debtors, will not discharge such debtor making the payment from the payment of the balance. His obligation is to pay the whole. (*Griffith v. Grogan*, 12 Cal. 317.)

Part payment, effect on barred debt. See Statute of Limitations, XII, 2.

Part payment, whether takes case out of statute of frauds. See Statute of Frauds, II.

Part payment of claims against estate. See Estates of Deceased Persons, VI, 10.

Payment on account. See Accounts, I.

86. Where A owes B and C jointly, and C accepts from A a certain sum in satisfaction of his share of what is due, his right is extinguished and cannot be kept alive by an assignment without consideration to a third person "in trust" for A. (*Wright v. Mix*, 76 Cal. 465.)
Cited 86 Cal. 187.

87. If afterwards B sues A on the whole claim, A must plead the payment to C in partial satisfaction of the claim; if not, the judgment against A is conclusive, and he cannot maintain a suit in the name of the third person for an interest in the judgment against himself. (*Wright v. Mix*, 76 Cal. 465.)

88. Payment of a note to one of two payees, with or without suit, will extinguish the debt. (*Delano v. Jacoby*, 96 Cal. 275.)

89. If a contract of two persons for running a tunnel is joint, payment in full to one of the joint contractors will bar a separate action by the other. But when the work can be done separately, and two persons are running the tunnel at a certain price per foot, if the defendant treats the contract as several, and measures the work of one of the parties, and agrees to pay him when the other finishes the tunnel, the cause of action for such work is separate, and payment to the other party is no bar to a suit thereupon. (*Sullivan v. Grass Valley etc. Min. Co.*, 77 Cal. 418.)

Payment by a third person, effect of. See post, VII.

VII. Payment by a Third Person.

90. The payment of a debt by a person not legally responsible for it is a satisfaction of the debt, if the money is accepted for that purpose. (*Martin v. Quinn*, 37 Cal. 55.)

91. Payment of promissory note by third person at request of maker to an agent holding it for collection extinguishes the note, and cannot afterwards be treated as a purchase. The obligation to pay being discharged, a subsequent transfer of the note by the payee to the person making the payment will not revive it. (*Moran v. Abbey*, 63 Cal. 56.)

Unauthorized payment for another's benefit. See Contracts, 330.

Payment by note of third person. See ante, II, 1.

Satisfaction by one jointly liable. See Release, 17.

VIII. Actions to Recover Money Paid.

1. Money Paid Where Consideration has Failed.

92. Where a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

93. One who pays money to another for a release of his interest in certain land, upon the condition that if it be ascertained that he did not have any interest in the land the money is to be repaid, may maintain an action for the recovery of the money, if it is satisfactorily established that he had no interest in the land sold. (*Putnam v. Dungan*, 89 Cal. 231.)

94. The fact that the vendee had learned the facts connected with the purchase before the payment was made would not make the payment voluntary, or preclude him from recovering it back under such agreement in case the seller had no interest in the purchase. (*Putnam v. Dungan*, 89 Cal. 231.)

Refunding money paid on void sale. See Taxation, XII, 5, e, F.

Action by purchaser to recover back money paid. See Vendor and Vendee, XI, 6.

2. Money Paid by Mistake of Law; Herein of Voluntary and Compulsory Payments.

95. Money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability. The illegality of the demand paid constitutes of

itself no ground for relief. There must be in addition some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment. (*Brumagim v. Tillinghast*, 18 Cal. 265.)

96. The proposition that "moneys voluntarily paid upon a claim of right, with full knowledge of the facts, cannot be recovered back," has exceptions. *Cope, J. (Brumagim v. Tillinghast*, 18 Cal. 265.)

97. Money paid by plaintiffs to the treasurer of the city and county of San Francisco to purchase stamps under the act of 1857, as amended by the act of 1858, to put on bills of lading for the transportation of gold or silver by steamer from that city to New York, is money voluntarily paid and cannot be recovered back. As the act of 1857, as amended, required stamps to be deposited with the treasurer for sale, and as he had no authority to compel plaintiffs to purchase them, the fact that the owners and agents of the steamers refused to issue bills of lading without the stamps does not show any coercion on the part of the treasurer. The conduct of third parties cannot be resorted to for the purpose of fastening a liability upon him. Unless he personally does some act which the law condemns, he cannot be charged, no matter how arbitrarily or improperly others have acted. (*Brumagim v. Tillinghast*, 18 Cal. 265.)

Cited 18 Cal. 407, 408; 71 Cal. 467.

98. Owners or agents of steamers running between San Francisco and New York who purchased stamps from the defendant, as treasurer of the city and county of San Francisco, to be placed on the passage tickets issued, cannot recover back the money paid for such stamps, on the ground that the act of 1857, as amended by the act of 1858, stood on the statute book, and declared that such ticket should not be admitted in evidence in any court or be available in law or equity unless stamped as required, and hence that the tickets could not be sold to passengers without the stamps. The influence exerted by these provisions of the statute does not constitute that kind of compulsion or coercion which the law recognizes as sufficient to render the payment in a legal sense involuntary. There was no compulsion or coercion on the part of the defendant. The stamps are by the law deposited with him to be sold to applicants. (*Garrison v. Tillinghast*, 18 Cal. 404.)

99. Whether these provisions of the statute be constitutional or not does not affect the question of plaintiff's right to recover back his money. If they are constitutional, then there is no basis for the action; if they are unconstitutional and the plaintiffs were ignorant of this at the time, the case becomes only one where a recovery is sought because a payment is made under a mistake of law, a ground which cannot avail; but if the plaintiffs knew the act to be unconstitutional, as they protested it was, then the case is only an attempt to recover an illegal demand, voluntarily paid, knowing it to be illegal at the time, and is not entitled to any consideration. (*Garrison v. Tillinghast*, 18 Cal. 404.)

100. The rule laid down in *Garrison v. Tillinghast*, No. 1, 18 Cal. 404, and *Brumagim v. Tillinghast*, 18 Cal. 265, as to what constitutes such an involuntary payment as that it may be recovered back, applied to money paid for a license as passenger broker under the act of March 25, 1857, and affirmed. (*Garrison v. Tillinghast*, No. 2, 18 Cal. 408.)

101. If property is assessed for widening of a street, not to the true owner, but to a stranger, and the owner pays the money to prevent a sale by the tax collector, he will be deemed to have known when he paid it that a sale by the tax collector would be a nullity, and would not invest the purchaser with even a colorable title, and in such case the payment will be deemed voluntary. (*Bucknall v. Story*, 46 Cal. 589.)

102. When an assessment is void upon its face, because made to one who does not own the property, and the true owner, with a knowledge of the fact, but under a misapprehension of or in ignorance of the law, pays the tax under protest and to avoid a threatened sale of the property by the tax collector, it is to be deemed a voluntary payment, and he cannot recover back the money in a suit against the tax collector. (*Bucknall v. Story*, 46 Cal. 589.)

Cited 46 Cal. 556; 52 Cal. 171; 53 Cal. 178; 80 Cal. 89.

103. If the owner of a lot in a city pays an assessment levied on the same for improving it, which is illegal and void, it will be regarded as a voluntary payment, and he cannot recover it back in an action at law against the officer, even if it was paid under protest after a threatened sale. (*De Baker v. Carrillo*, 52 Cal. 473.)

Cited 78 Cal. 453.

104. A party who purchases from another county warrants drawn by the auditor on the treasurer, which show on their face that they were issued in violation of law, and do not constitute a charge on the treasury, is presumed to know the law, and if there is no fraud or misrepresentation on the part of the seller, the purchaser cannot recover from him the money paid. (*Christy v. Sullivan*, 50 Cal. 337.)

Mistake in payment. See *Taxation*, XI, 4.

By mistake on purchase of overissued bonds. See *Bonds*, 51.

Counterfeit money, payment in by mistake. See *Mistake*, 16, et seq.

Recovery back of money paid for freight. See *Shipping*, 58, et seq.

Recovery back of money paid under invalid sales. See *Municipal Corporations*, 160, et seq.

Refunding payment, where sale of property void. See *San Francisco*, XIV, 10, e.

Tax partly illegal, recovery of payment. See *Taxation*, 126.

Duty of municipality to refund money received without authority. See *Municipal Corporations*, XIII, 1.

Power of supervisors to refund money illegally collected. See *Supervisors*, V, 12.

Treasurer, payment by without authority, recovery of. See *Treasurers*.

Compelling refunding of taxes illegally collected. See *Mandamus*, II, 13, h.

Recovery of money paid for tax. See *Taxation*, XI, 3.

105. No action lies to recover money voluntarily paid in satisfaction of an illegal or erroneous license tax. Section 3804 of the Political Code does not apply to such an action. (*Grimley v. County of Santa Clara*, 68 Cal. 575.)

106. Money voluntarily paid in satisfaction of an illegal license tax cannot be recovered back. (*O'Brien v. Colusa County*, 67 Cal. 503.)

Cited 68 Cal. 575.

107. Money paid to a tax collector in satisfaction of an illegal license tax, in order to avoid a civil action or criminal prosecution on account of nonpayment, to which the invalidity of the law purporting to authorize the tax would be a perfect defense, is a voluntary payment, and cannot be recovered by the payor. (*Maxwell v. County of San Luis Obispo*, 71 Cal. 466.)

108. Where a redemptioner, under the statute, pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. (*McMillan v. Vischer*, 14 Cal. 232.)

109. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. (*McMillan v. Vischer*, 14 Cal. 232.)

Voluntary payment by officer into treasury, what is not. See *Offices and Officers*, 165.

Voluntary, money paid under void sale. See *Taxation*, 740.

Voluntary, payment by stockholder in excess of his share is not. See *Corporations*, 305.

110. The object of a protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. It is available only in cases of payment under duress or coercion, or when undue advantage is taken of the party's situation. It has no application to voluntary payments. It does not create a lien upon the money paid, or any legal impediment to its control. It does not impair, in any respect, the operative effect of the payment as a discharge of the demand upon which it is made, so far as such demand is legal. It is notice only to the party receiving the payment that if the demand is illegal in whole, or in any specified particulars, he may be subjected to an action for the recovery back of the amount to which objection is made; and if action be brought, the protest is only available as evidence of the fact of compulsion. (*McMillan v. Richards*, 9 Cal. 365.)

Cited 16 Cal. 170; 18 Cal. 274; 46 Cal. 597; 49 Cal. 627; 80 Cal. 89.

111. If money illegally exacted is paid, under coercion, to a party for his own use, no protest is necessary in order to lay a foundation for an action to recover it back. (*Meek v. McClure*, 49 Cal. 623.)

112. If a public officer who illegally de-

mands money of a person and exacts the payment thereof by coercion has notice of the facts which render the demand illegal, the party who pays him the money need not make the payment under protest in order to be able to recover it back, but if the officer has no notice of such illegality, a protest is necessary. (*Meek v. McClure*, 49 Cal. 623.)

113. When a protest is necessary to enable a party who pays money to an officer, illegally exacted, to recover it back, the protest must state the grounds upon which the party paying the money claims that the demand is illegal. (*Meek v. McClure*, 49 Cal. 623.) Cited 52 Cal. 81; 53 Cal. 383.

114. The compulsion or coercion which is sufficient in law to render a payment involuntary must come from the party to whom or by whose direction the payment is made, and arise from the exercise or threatened exercise of some power possessed, or supposed to be possessed, by him, over the person or property of the party making the payment. (*Garrison v. Tillinghast*, 18 Cal. 404.)

115. Generally, to constitute such compulsion or coercion as to render the payment involuntary, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money. (*Brumagim v. Tillinghast*, 18 Cal. 265.)

Cited 18 Cal. 407; 46 Cal. 598; 78 Cal. 453; 80 Cal. 90.

116. The fact that a party pays money under protest does not change the character of the transaction or enable him to recover it back, unless the payment was under duress or coercion, or where undue advantage was taken of his situation. (*Brumagim v. Tillinghast*, 18 Cal. 265.)

117. Object of protest is to take from the payment its voluntary character, and thus conserve to the party a right of action to recover back the money. But where no such compulsion exists, or no advantage is taken, there is no case for its interposition. If the payment is in truth voluntary, no language used on the occasion can change its character. (*Brumagim v. Tillinghast*, 18 Cal. 265.)

118. There is no rule of pleading which requires a party, who sues an officer to recover back money illegally exacted from him, to aver in his complaint the precise amount of money which was illegally exacted, but he may recover an amount less than that stated in the complaint. (*Meek v. McClure*, 49 Cal. 623.)

Cited 6 Dak. 482.

119. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiff's use. The words "had and received to the plaintiff's use" are put as the consideration upon which to support the assumpsit on the part of the defendant. (*McMillan v. Richards*, 9 Cal. 365.)

120. Evidence to the effect that when the

money was paid the plaintiff was prepared to pay the amount claimed under protest, and that when the mistake in the amount was discovered the plaintiff notified the defendant, who agreed to come and see about it, and said that if the plaintiff "was right, it would be right," fails to prove any agreement of the defendant to recoup or repay to the plaintiff any money, or to show that the payment of any excess was made under compulsion. (*Rodgers v. Wittenmyer*, 88 Cal. 553.)

Voluntary payment, what is not. See ante, 94.

Duress, action to recover payment. See Nonsuit, 14.

Duress, action to recover payment, pleadings. See Irrigation Districts, 62.

Payment of tax under protest. See Taxation, XI, 3.

3. Money Paid for Illegal Purpose.

121. Where, in a suit to recover money in the hands of defendant, it appeared that he had been employed as an attorney and furnished with money to purchase school land warrants, and therewith to procure title to certain lieu lands, and that at his advice some of the certificates of purchase were taken in the names of third persons and assigned to plaintiff, and defendant set up in defense that (the taking of the certificates in that way being contrary to law) the money was paid to and received by him for an illegal purpose and could not be recovered back, held, that the contract under which the money was received was not unlawful, and that, though the purchase of the certificates referred to might have been illegal, yet, it appearing that he had been fully credited with all moneys paid for them, his defense could not avail him. (*White v. Lyons*, 42 Cal. 279.)

4. Excessive Payment.

122. A complaint shows a cause of action with sufficient certainty for the recovery of an excessive payment, if it alleges, in substance, that the plaintiff, a mortgagor of property, and the defendant, the mortgagee, differing as to the amount due upon the mortgage, agreed that, if the mortgagor would pay the amount claimed by the mortgagee to be due, and if it should afterwards be found that the amount so paid was in excess of the amount due the mortgagee would repay to the mortgagor such excess, and that the amount paid was in excess of the amount due, but that the excess had not been repaid. (*Rodgers v. Wittenmyer*, 88 Cal. 553.)

123. In an action to recover the excess paid in redeeming from a mortgage, certain objections to the complaint as ambiguous and as uniting several causes of action in the same count, held, not well taken. (*Applegarth v. Dean*, 68 Cal. 491.)

Excessive payment, recovery of. See ante, 120; Mortgages, XX, 7.

Excessive payment by redemptioner, recovery of. See ante, 108, 109.

PEACE.

Bills of. See Equity, III, 3, b.

Parties in bill of peace. See Equity, 34.
Breaches of. See Criminal Law, XXI, 10.

PEACE OFFICERS.

See Police.

PEDDLERS.

Exemptions of. See Exemptions, II, 1.
License. See Licenses, II, 7, g.

PENAL CODE.

Construction of. See Statutes, VIII, 1.

PENAL STATUTES.

See Statutes, VIII, 21.

PENALTIES.

See Forfeiture.

Fines. See Fines.

Liquidated damages and penalty. See Damages, I, 2.

Ordinance imposing, prohibits act. See Ordinances, 103.

What is not penalty. See Abatement, 38.

Highway, obstruction of, penalty for. See Highways, IV.

For excessive charges. See Common Carriers, IV, 4, b.

For neglect to have property assessed. See Taxation, V, 15.

Interest on delinquent taxes. See Taxation, 690.

Percentage on delinquent tax. See Taxation, 696.

Failure to transmit telegrams. See Telegraph Companies.

Failure of owner of vessel to give bond on entering port. See Shipping, V.

Usurpation of office, penalty for. See Quo Warranto, 9, et seq.

Demand and receipt of excessive tolls. See Turnpike Companies, VII.

Actions against sheriff, penalty. See Sheriffs, IV, 3, w.

Sureties, liability of for. See Suretyship, 36.

Contract in restraint of trade, penalty for. See Restraint of Trade, 22.

Legislature cannot delegate power to impose. See Constitutional Law, 172, et seq.

Action on street assessment, penalty. See Streets, XVI, 25, g, C.

Actions to abate nuisance and recover penalty, joinder of. See Joinder and Severance of Actions, I, 2, j.

Joinder of actions for. See Joinder and Severance of Actions, I, 2, j; Sheriffs, IV, 3, w.

Jurisdiction of police court in action to recover. See Jurisdiction, 157.

Action for, jurisdiction over. See Justices of the Peace, IV, 5, d.

Equity will not enforce. See Equity, 129.

Judgment for, relief in equity against. See Judgments, 749.

Judgment in action for is appealable. See Appeals, 3278.

Ordinance, limits of penalty must be reasonable. See Ordinances, IV, 2.

1. Penalties and forfeitures are not to be favored, but must be created by unambiguous language. (*Occidental Building and Loan Assn. v. Sullivan*, 62 Cal. 394.)

2. In an action to enforce a penalty or forfeiture imposed by statute the claim is to be strictly construed. (*Askew v. Ebberts*, 22 Cal. 263.)

3. Action founded upon statute to recover penalty, where no penalty is imposed by the statute, cannot be sustained. (*Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 197.)

PEOPLE.

See State.

Estoppel of. See Estoppel, II.

People of state, whether bound by judgment against city. See Judgments, X, 10, k.

PERCENTAGE.

See Costs, I, 7.

Delinquent tax, percentage on. See Taxation, XII, 4, l.

Word "fees" includes. See Offices and Officers, 160.

PERCOLATING WATERS.

From ditch, injury from. See Watercourses, XII, 10.

Percolating waters. See Watercourses, VIII.

PEREMPTORY CHALLENGE.

See Jury and Jurors, VII, 6.

PEREMPTORY MANDAMUS.

See Mandamus, III, 10.

PERFORMANCE.

Specific performance. See Specific Performance.

Tender. See Tender.

Before suit for specific performance. See Specific Performance, V, 4.

Nonperformance of conditions, effect on surety. See Suretyship, IV, 5, e.

Tender of, exoneration of surety by. See Suretyship, IV, 5, c.

Officers, performance by. See Offices and Officers, VII, 3.

Building contracts. See Building Contracts, II.

Street contract, performance of. See Streets, XV.

On contract for conveyance. See Vendor and Vendee, X.

Assignee, performance by. See Assignments for the Benefit of Creditors, VII.

Contracts, performance of. See Contracts, IV.

Part performance. See Statute of Frauds, II.

PERILS OF THE SEA.

Explosion of boiler. See Insurance, 201.

PERIODICALS.

See Newspapers.

PERJURY.

See Criminal Law, XXI, 44.

Equity will not relieve against judgment because of. See Judgments, 762, et seq.

1. Subornation of witnesses to swear falsely against a defendant in a criminal prosecution does not constitute a cause of action by him for damages. (*Taylor v. Bidwell*, 65 Cal. 489.)

PERMITS.

For interment, ordinances regulating. See Ordinances, IV, 7, q.

PERPETUITIES.

Charitable uses. See Wills, XI, 13.

Covenant for renewals, when creates. See Landlord and Tenants, 354.

PERSONAL COVENANTS.

See Covenants, II.

PERSONAL PROPERTY.

Fixtures. See Fixtures.

Chattel mortgages. See Mortgages, XXI.

Improvements on public lands. See Public Lands, X.

Buildings. See Buildings.

Interest of decedent in land under a covenant is not. See Estates of Deceased Persons, 276.

Shares of stock are. See Corporations, 155.

Promissory note is. See Criminal Law, 1568.

Water, ownership of. See Watercourses, XIV, 2, j.

Possession of as evidence of title. See Possession, VI.

Trust in personalty may be proved by parol. See Trusts and Trustees, I, 1.

Severance from realty, effect of. See Mortgages, 369, et seq.

Quieting title to. See Quieting Title, IV.

Replevin. See Replevin.

Sales. See Sales.

Trespass for injury to. See Trespass, 21.

Not in existence, lien on. See Liens, 3.

Enforcement of contracts relating to. See Specific Performance, IV, 10.

Personalty, how attached. See Attachments, IV, 2.

Levy, effect of on title to. See Attachments, IV, 3.

Sale of under execution, mode of. See Executions, IX, 4.

PERSONATION.

False. See Criminal Law, XXI, 25.

PETALUMA.

1. The town of Petaluma, which, prior to the passage of said act of Congress, was located on the public lands, had, by its proper municipal authorities, dedicated portions of the lands within its corporate limits to public use as streets, alleys, and squares; to which portions J. and C. had subsequently, and before March 1, 1867, acquired an adverse possession, and thereafter claimed to be bona fide holders thereof. Held, that under said act, the town acquired the right to the use of such streets, alleys, and squares, and that to the lands so occupied, while this right thereto so remained, J. and C. could not

acquire a bona fide occupancy within the meaning of the act of Congress of March 1, 1867, entitled "An act to quiet title to land in the towns of Santa Clara and Petaluma, in the state of California," and that the last-named act refers only to land embraced in lots, and not to land in use for streets, alleys, and squares. (*Jones v. City of Petaluma*, 36 Cal. 230.)

2. In attempting to avail themselves of the act of July 1, 1864, the trustees of the town of Petaluma had no power to change the plan of the town in such manner as to convert into a street, alley, or public square land which, under the previous existing plan, was a municipal division, intended for private use, and actually occupied for that purpose. (*Aleman v. Petaluma*, 38 Cal. 553.) Cited 2 Mont. 492.

3. Prior to the passage of the act of Congress of March 1, 1867, granting to the towns of Petaluma and Santa Clara the lands within their respective limits in trust for the parties in the bona fide occupancy thereof, B. was in such occupancy of a certain tract of land within the former town. He conveyed a portion thereof to H., reserving a right of way over a certain strip of the land granted. H. entered into the actual occupation of the whole of the land granted to him, and was in possession at the date of the passage of the said act, and he received a deed thereof from the town of Petaluma. He then conveyed to the plaintiff. B. conveyed the residue of said tract together with said right of way, to the defendant. Held, that the act, and the deed thereunder, did not operate to destroy but to protect the right of way in the defendant. (*Neil v. McNear*, 57 Cal. 424.) Cited 71 Cal. 25.

PETITIONS.

See Pleading and Practice.

In particular cases. See particular title. Evidence, petitions as. See Evidence, III, 8.

PETIT LARCENY.

See Criminal Law, XXI, 36, d.

PHONOGRAPHIC REPORTERS.

See Shorthand Reporters.

PHOTOGRAPHS.

See Evidence. See Evidence, IV; Legitimacy, 8.

PHRASES.

See Words and Phrases.

PHYSICIANS.

Practicing medicine without license. See Criminal Law, XXI, 45.

Practicing medicine after license revoked. See Criminal Law, 2550.

1. The state, in the exercise of the police power, may provide for boards authorized to examine persons seeking to be admitted to practice medicine, to be appointed by any citizen or citizens named. (*Ex parte Fraser*, 54 Cal. 94.) Cited 72 Cal. 128.

2. The second section of the act of April 3, 1876, "to regulate the practice of medicine," as amended in 1878, confers the power of appointing boards of examiners upon the three named societies, which are said to be "existing corporations," but it does not confer this power upon them as corporations, and is therefore not in contravention of the provision of the late constitution that corporations shall not be created by special laws. The words "existing corporations" are to be treated as merely descriptive personarum. (*Ex parte Fraser*, 54 Cal. 94.) Cited 62 Cal. 283; 69 Cal. 99; 77 Cal. 165; 81 Cal. 373.

Delegation of power to determine what is a misdemeanor to board of examiners. See Constitutional Law, 175.

3. The act of April 3, 1876, entitled "An act supplemental to and amendatory of an act to regulate the practice of medicine in the state of California," which requires that every person practicing medicine and surgery shall have certain qualifications, and procure a certificate from a board of examiners, appointed by a medical society, which may be revoked for unprofessional conduct, is not unconstitutional as a whole. Whether certain independent provisions are unconstitutional, query? (*Ex parte McNulty*, 77 Cal. 164.)

Laws regulating practice of medicine, validity of. See Constitutional Law, VIII, 13, g.

4. It is not within the police power of the legislature to enact a law punishing a physician, who has been decided to be competent to practice, for what is styled "unprofessional conduct," in advertising himself as a specialist in certain diseases. Per Thornton, J. (*Ex parte McNulty*, 77 Cal. 164.)

5. In an action against a physician to recover damages for alleged incompetency and negligence, evidence that the defendant had obtained a certificate from the state board of examiners, without an examination as to his qualifications, and upon the presentation of diplomas from certain medical schools which were irregularly obtained, is immaterial and irrelevant in support of the issue of negligence and incompetency. (*Bute v. Potts*, 76 Cal. 304.)

6. Where the action was brought against surgeons "for malpractice, by reason of which amputation became necessary," it was held to be error for the court to instruct the jury "that if they believe, from the evidence, that the defendants were guilty of negligence, carelessness, or inattention in their treatment of plaintiff's wounds, by which he was caused great bodily pain and suffering, the plaintiff is entitled to a verdict." (*Moor v. Teed*, 3 Cal. 190.)

7. A physician or surgeon, who is employed to render services before he has procured the certificate required by the laws of this state regulating the practice of medicine, cannot recover any compensation for the services rendered before the procuring of the certificate upon any contract, express or implied, the contract being illegal and against public policy, though he may recover upon an implied contract for services rendered after such

certificate is procured. (*Gardner v. Tatum*, 81 Cal. 370.)

8. A certificate applied and paid for by a physician, before a contract for his services is entered into, will not, when granted, relate to the date of the application and payment, so as to entitle him to recover for services rendered before the certificate is actually procured. (*Gardner v. Tatum*, 81 Cal. 370.)

County, liability of county for negligence of. See Counties, 50.

Action against county by one not licensed. See post, 15.

Services on post mortem examination. See Counties, 78.

9. A physician employed to attend a patient is the best and the proper judge of the necessity of frequent visits, and, in the absence of proof to the contrary, the court will presume that all the professional visits were deemed necessary and were properly made. (*Todd v. Myres*, 40 Cal. 358.)

10. In an action brought by a physician and surgeon to recover for the value of his professional services in attending upon persons wounded in a railroad collision, and placed in a private hospital, evidence on behalf of the defendant of the usual and customary charge in this state for all necessary medical and other attendance upon patients in hospitals received for treatment of wounds is irrelevant. (*Trenor v. Central Pacific R. R. Co.*, 50 Cal. 222.)
Distinguished 63 Cal. 503.

11. A physician cannot testify that in rendering the services sued for he made discoveries as to new and improved methods of treatment. Such discovery cannot bear upon the question of the defendant's liability, nor can he be asked for his opinion as to discoveries made, as distinguished from what he actually did. (*Gardner v. Tatum*, 81 Cal. 370.)

12. It is error to allow evidence, in behalf of a physician suing for his services, as to the nature or value of former treatment by another physician before the plaintiff's services were called in. (*Gardner v. Tatum*, 81 Cal. 370.)

13. The County Government Act requiring the board of supervisors to appoint some suitable graduate in medicine to attend to the indigent sick and dependent poor does not require that the county physician shall have received a degree in a medical college or university, but authorizes the appointment of one who has passed a satisfactory examination before the board of examiners of the state medical society, and is legally licensed to practice medicine and surgery under the laws of the state. (*People ex rel. Attorney General v. Eichelroth*, 78 Cal. 141.)

14. Physicians who contract with a county to attend and treat all the inmates of the county infirmary, whether afflicted with contagious diseases or not, and to receive a stipulated price therefor, cannot recover anything beyond the stipulated price for attending persons sick with contagious diseases and placed in a building apart from the one usually used as a county hospital, by order of the county

authorities. (*Johnson v. Santa Clara County*, 28 Cal. 545.)
Cited 9 Mont. 322.

15. In a suit by a physician against a county, on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer unless the demurrer distinctly present the objection. (*McDaniel v. Yuba County*, 14 Cal. 444.)

16. If, after such a contract, which compels the physician to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his salary. (*McDaniel v. Yuba County*, 14 Cal. 444.)

17. The board could not abrogate the contract, by rescinding the order under which plaintiff was appointed, or abolishing the office. (*McDaniel v. Yuba County*, 14 Cal. 444.)

Communications between physician and patient. See Privileged Communications, V, 1.

Medical testimony. See Evidence, V, 5, d. Examination of, what improper. See Witnesses, VI, 3.

Competency of as witness. See Insanity, 41; Negligence, 99, et seq.

Exclusion of testimony of as to sanity. See Evidence, 12.

Cross-examination, what proper. See Wills, 65.

Medical works as evidence. See Evidence, III, 7.

Hypothetical question to. See Wills, 64.

Claim for medical services. See Estates of Deceased Persons, 255.

Performing services after accident, liability of company. See Contracts, 336.

PILOTS AND PILOTAGE.

See Shipping, VII.

Action for usurpation, pleadings in. See Quo Warranto, 12.

Appointment of board may be tested by quo warranto. See Quo Warranto, 4.

1. The place of pilot in the port of San Francisco is an office. (*People ex rel. Palmer v. Woodbury*, 14 Cal. 43.)

2. The board of pilot commissioners, under the act of 1854, as amended by the act of 1858, have only the powers conferred by the act, and must appoint the pilot from the classes of persons named therein. They cannot appoint a man as pilot who has not served two years on a pilot-boat in the harbor or commanded a vessel in and out of port for three years. (*People ex rel. Palmer v. Woodbury*, 14 Cal. 43.)

3. The half pilotage allowed by the twenty-third section of the act of 1856, "To establish pilots and pilot regulations for the port and harbor of Benicia and Mare Island," is not a toll within the fourth section of article VI of the constitution of this state. (*Harrison v. Green*, 18 Cal. 94.)

4. Act of April 21, 1860, relative to pilots in port of San Francisco, did not legislate out of office pilots licensed under acts repealed by

the act of April 21st, whose terms of office had not expired when this act went into operation. (*People ex rel. Flynn v. Abbott*, 16 Cal. 358.)

5. The board of pilot commissioners is a quasi judicial body, intrusted with duties, the performance of which requires the exercise of judgment and discretion; and its members are not civilly answerable for their acts as such. (*Downer v. Lent*, 6 Cal. 94.) Cited 56 Cal. 69.

6. When a member of the board of pilot commissioners has been appointed by the governor and confirmed by the senate, and the senate has failed to confirm a nomination by the governor of another member in his place at its next session, the governor cannot, after the close of the session of the legislature, and during the interim, remove the incumbent and appoint a successor. (*People ex rel. Travers v. Freese*, 83 Cal. 453.)

7. The board of pilot commissioners for the ports of San Francisco, Mare Island, and Benicia was created by section 2240, article V, chapter 1, title 6, part 3, of the Political Code, and acquires all its powers from articles V and VI of that chapter, and section 2442 operates as an exception to the general rule established by section 369 of the Political Code. The board is appointed by the governor, with the advice and consent of the senate, and a commissioner can only be removed by the appointing power, and not by the governor alone. (*People ex rel. Travers v. Freese*, 76 Cal. 633.) Cited 83 Cal. 455; criticised 83 Cal. 456, 457.

PLACE OF TRIAL.

See Venue.

PLACER.

Definition of. See Mines and Mining, II.

PLACER COUNTY.

Act to separate offices. See Offices and Officers, 123.

Fees of auditor of. See Auditors, 7.

Statute authorizing subscription to road, constitutionality of. See Railroads, 11.

Compensation of county clerk of. See County Clerk, 7, et seq.

PLACERVILLE.

1. The charter of the city of Placerville (*Stats. 1859, p. 77*) does not authorize the authorities of the city to levy and collect a tax for making a survey of a railway route from that city to Folsom. The argument that a railroad extending from or to the city is as much a means of municipal benefit as a street in the city, gas or water-works, and that the length or extent of the road is not important in this respect—the municipal character of the work depending on its adaptation to the benefit of the municipality—is conclusively met by the fact that, whether this be a municipal work or not, it is not a work authorized by the charter, either expressly or by necessary implication. (*Douglass v. Mayor of Placerville*, 18 Cal. 643.)

2. The act incorporating the city of Placerville granted to the common council the right

to levy and collect certain taxes, and constituted the city marshal ex officio collector of taxes, and made it his duty to receive and collect all taxes due the city, authorized the sale of the property of delinquents for taxes due the city, and further enacted that the manner of assessing and collecting taxes, and proceedings for the sale of property in cases of delinquency, should be regulated by ordinance. The common council enacted by ordinance a mode of collecting delinquent taxes remaining unpaid after a certain date, whereby the entire duty was devolved upon the city attorney, and the services of the city marshal dispensed with. Held, that the ordinance prescribing such mode was void because in conflict with said incorporation act. (*City of Placerville v. Wilcox*, 35 Cal. 21.)

Cited 87 Cal. 504.

PLAINTIFFS.

See Parties; Pleading and Practice.

Plaintiff is necessary to sustain action. See Parties, I.

PLANKING.

Streets, planking of. See Streets, XII, 3.

PLANS.

Public works, plans of. See Counties, VII. Errors in judgment in. See Municipal Corporations, 220, 221; Offices and Officers, 97. Ordinance adopting, sufficiency of. See Eminent Domain, 119.

Building contract, registration of plans. See Building Contracts, I, 3, b.

Alteration of. See Building Contracts, II, 1.

PLATS.

See Maps.

Making of as dedication. See Dedication, II, 6.

Public land, filing and withdrawal of plat of. See Public Lands, IV.

PLEA.

See Criminal Law, XVII, 2.

PLEADING AND PRACTICE.

This subject covers the general principles relating to pleading and practice only. For pleading and practice in particular cases, see particular title.

I. Use of English Language in Judicial Proceedings.

II. Right of Action.

III. Rules of Procedure, Object and Construction of.

IV. Practice Act, Construction of; to what Actions Applies.

V. Creation of Right Without Remedy.

VI. Manner of Commencing Actions; Action When Commenced.

VII. Pleadings, General Rules Relating to.

1. Rule that there is but One Form of Action.

2. *Facts Necessary to Sustain Right and only Facts Necessary to be Stated.*
3. *Statements Should be Concise and Clear; Surplusage.*
4. *Ultimate and not Probative Facts Should be Stated; Allegations of Evidence.*
5. *Material Allegations and Matters of Substance, What are and How Averred.*
6. *Matters Equally Within Knowledge of Other Party.*
7. *Rights Dependent upon Exceptions to General Rules or Statutory Privileges, How Pleaded.*
8. *Allegations of Law or Conclusions or Presumptions of Law.*
9. *Papers and Contracts, How Made Part of.*
10. *Pleader, Whether Bound by His Allegations; Effect of Admissions in Pleadings.*
11. *Construction of Pleadings.*
12. *Defects in Pleading, How Cured; Review of.*
13. *Striking Out Pleadings.*
14. *Verification of Pleadings.*

VIII. Pleadings on Part of Plaintiff.

1. *Complaint Must Show Cause of Action at Commencement of Suit.*
2. *Facts Required to be Stated, and Manner of Statement; Information and Belief.*
3. *Matters of Inducement.*
4. *Anticipating Defenses in Complaint.*
5. *Signature to Complaint.*
6. *Separate Counts in Complaint.*
7. *Allegation of Facts Showing Turpitude, Effect of.*
8. *Complaint on Written Instrument.*
9. *Prayer of Complaint.*
10. *Objections to Complaint; How and When Taken.*
11. *Bill of Particulars.*
12. *Replication to New Matter Contained in Answer.*

IX. Pleadings on Part of Defendant.

1. *Time to Answer.*
2. *Serving and Filing of.*
3. *Pleas Allowed Defendant.*
4. *Form of Denial.*
5. *Answer Should be Explicit and Clear and Set up True Nature of Defense.*
6. *Where Allegations of Complaint are Conjunctively Stated.*
7. *Where Complaint Contains Several Counts, or Allegations in Count are Inconsistent.*
8. *Answer of One Defendant for Another.*
9. *Denials in Language of Complaint.*
10. *Sham and Evasive Answers.*
11. *Denial, Where Complaint Verified; Denial on Information and Belief.*
12. *Material and Substantial Allegations only Need be Denied.*

13. *Denials of Conclusions of Law.*
14. *Denials of Matters of Evidence.*
15. *Want of Capacity to Sue Must be Specially Pleaded.*
16. *General Denial, What Puts in Issue and Effect of.*
17. *Other Denials; Sufficiency to Raise Issue; Traverse in Affirmative Words.*
18. *Specific Denial is Confined to Specific Allegation.*
19. *Admissions by Failure to Deny; Denial of Contract Attached to Pleading.*
20. *Separate Defenses, How Stated.*
21. *Inconsistent Defenses.*
22. *Equitable Defenses; as Defenses in Actions at Law.*
23. *New Matter.*

X. Demurrer.

1. *Nature and Office of; What is; Statement of Facts in.*
2. *Demurring and Answering at Same Time.*
3. *Service of; Striking Out.*
4. *Form of; Statement of Grounds; General or Special Demurrer.*
5. *Joint Demurrer.*
6. *Grounds of Demurrer.*
 - a. *Statutory Grounds only Allowed.*
 - b. *Failure to Serve Copy of Complaint.*
 - c. *Multifariousness; Redundancy; Contradictory Allegations.*
 - d. *Omission of Christian Name; Mere Matters of Form.*
 - e. *Want of Capacity to Sue.*
 - f. *Want of Averment of Special Damages.*
 - g. *Failure to State Facts Sufficient to Constitute Cause of Action or Defense.*
 - h. *Ambiguity or Uncertainty.*
 - i. *Question as to Kind of Relief Cannot be Raised on.*
7. *Waiver by Failure to Demur.*
8. *Demurrer to Part of Cause of Action; Demurrer to Prayer.*
9. *Demurrer to Whole Complaint Where Part Good.*
10. *What is Admitted by Demurrer.*
11. *Submission of; Duty to Rule on and Waiver of Ruling.*
12. *Error in Ruling, When Immaterial; Ruling Pending Motion for Change of Venue.*
13. *Notice of Overruling.*
14. *Judgment on; Exception to Ruling; Review of.*
15. *Right to Amend.*
16. *Filing of Answer as Waiver of Ruling on Demurrer.*
17. *Trial After Ruling on Without Issue Joined.*
18. *Power of Defendant After Demurrer to Answer Sustained.*

XI. Amendments.

1. *Should be Liberally Allowed; Discretion as to.*
2. *Amendments as of Course.*

8. Power and Discretion of Justice to Allow.
4. Imposition of Terms as a Condition.
5. Time of.
6. Altering or Enlarging Description.
7. Matter Already Known, Substantially Alleged, or Provable under Original Pleadings.
8. Changing Nature or Cause of Action; Changing Parties.
9. Title Acquired or Facts Occurring Pending Action.
10. Setting up Statute of Limitations.
11. Setting up Pendency of Another Action or Prior Judgment.
12. Ambiguous Complaint, Amendment of.
13. Amendment of Prayer.
14. Inconsistent with Original; Evasive, Immaterial, or Redundant.
15. Amendment to Permit Evidence or to Conform to Proofs.
16. Amendment of Complaint to Correspond to Judgment.
17. Compelling Amendment.
18. Notice and Service of.
19. Manner of Making; Filing of; Waiver of Objection to.
20. Answer to Amendment.
21. Relation of Amendment.
22. Effect of Amendment on Original Pleading.
23. Motion for, When to be Passed on; Refusal or Allowance, When Immaterial; Review of.

XII. Transfer from One Department to Another.

XIII. Discontinuance and Retraxit.

XIV. Transfer of Interest Pending Action.

XV. Presumption Arising from Uniform Procedure.

XVI. Powers of Judges at Chambers.

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XVIII. Orders.

XIX. Lost Papers; How Supplied.

XX. Trial, Questions Relating to.

1. What Constitutes Trial; When Complete.
2. Order of Trial, Where Both Legal and Equitable Issues.
3. Separate Trials; Trying Separate Causes Together.
4. Setting Cause for Trial; Notice of.
5. Attorney as Witness; Argument of Counsel; Opening Statement; Right to Open and Close.
6. Presentment of Points; Points of Counsel Should be Consistent.
7. Ruling, Adherence to; Erroneous Ruling, Effect of Where Several Parties.
8. Notice to Produce Papers at Trial; Compelling Production.
9. Misconduct or Irregularity of Judge or Attorney; Irregularities during Trial.

10. View by Jury.
11. Agreed Statements.
12. Hearing Case on the Pleadings.
13. Special Issues; Submission of Case.
14. Objections; Exception, What is, and Necessity of.
15. Relief Authorized.
16. Re-examining Case After Rendition of Judgment.

Justices' courts, pleading and practice in. See Justices of the Peace, V.

Jurisdiction. See Jurisdiction.

Joinder and severance of actions. See Joinder and Severance of Actions.

Petition for letters is a pleading. See Executors and Administrators, 12.

Petition insulting to district court. See Certiorari, 151.

Cross-complaint. See Cross-complaint.

Supplemental pleadings. See Supplemental Pleadings.

Process. See Process.

Filing papers and documents. See cross-references under Filing.

Parties. See Parties.

Election. See Election.

Abatement. See Abatement.

Appearance. See Appearance.

Stipulations. See Stipulations.

Place of trial. See Venue.

Disclaimer. See Disclaimer.

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Evidence, questions relating to. See Evidence.

Judicial notice. See Judicial Notice.

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Variance. See Variance.

Continuance. See Continuance.

Puis darrein continuance. See Payment, 79.

Default. See Default.

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Instructions. See Instructions.

Jury trial. See Jury and Jurors, I.

Discovery. See Discovery.

Removal of causes. See Removal of Causes.

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Questions of law and fact. See Questions of Law and Fact.

Interpleader. See Interpleader.

Intervention. See Intervention.

Holidays. See Holidays.

Lis pendens. See Lis Pendens.

Oaths. See Oaths.

New constitution, effect of on authority of judges. See Constitutional Law, IV, 4.

Federal practice. See Federal Practice.

Costs. See Costs.

Findings. See Findings.

New trial. See New Trial.

Appeals. See Appeals.

Arrest. See Arrest.

I. Use of English Language in Judicial Proceedings.

1. All judicial proceedings in this state must be conducted, preserved, and published in no other than the English language. (People v. Ah Sum, 92 Cal. 648.)

II. Right of Action.

2. Under our system, probably, an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant. (*Ortman v. Dixon*, 18 Cal. 83.)

3. An act, however erroneous, which does no injury to a party, cannot be the subject of a legal complaint on his part. (*Whipley v. McKune*, 12 Cal. 352.)

III. Rules of Procedure, Object and Construction of.

4. Rules of procedure, whether statutory or made by the court, are intended to facilitate courts in doing justice between the parties, and, when not jurisdictional, are intended for the convenience of courts and litigants, and should be liberally construed. (*Smith v. Whittier*, 95 Cal. 279.)

5. A court should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits, and rules of procedure should be made to serve their true purpose of expediting and facilitating the disposition of causes according to their merits, rather than to convert them into a means of obstruction. (*Flagg v. Puterbaugh*, 98 Cal. 134.)

6. Statutes of several states regulating remedies by means of judicial proceedings are to be understood as intended to apply only to proceedings in the courts of the particular state where adopted, unless it clearly appears that they were intended to have a wider scope. (*Majors v. Cowell*, 51 Cal. 478.)

Rules of court. See Rules of Court.

Special act relating to procedure. See Constitutional Law, 483.

Rules of procedure to be liberally construed. See Statutes, 180.

Lex fori governs. See Conflict of Laws, 8.

IV. Practice Act, Construction of; to What Actions Applies.

Power of legislature over pleadings. See Constitutional Law, 285.

7. The Practice Act of April 29, 1851, is prospective in its operation, and to give it a retrospect beyond the time of its passage would be in violation of all settled rules of construction. (*People ex rel. Thorne v. San Francisco*, 4 Cal. 127.)

8. Where act amending laws of practice is passed to take effect at some future time, judicial proceedings, intermediate between the passage and the time of taking effect, are governed by the old law. (*Reddington v. Waldon*, 22 Cal. 185.)

9. Practice Act is entirely remedial. It does not affect the rights of the parties as to the subject matter of the controversy, but prescribes the mode in which redress may be had when these rights have been invaded. (*Hastings v. Cunningham*, 39 Cal. 137.)

10. The system of remedies provided by our Practice Act is exclusive, and when it provides an adequate remedy, no other can be

pursued. (*Humiston v. Smith*, 21 Cal. 129.) Cited 65 Cal. 651.

11. Our practice, while it enlarges the field of remedy, does not take away pre-existing remedies by implication. (*Lorraine v. Long*, 6 Cal. 452.)

12. Under the Practice Act of 1850, the rules of the old system of pleading and practice, whether legal or equitable, should be applied, irrespective of former technical distinctions, to all actions under the new system, where they may be properly applied, and are not inconsistent with statutory provisions. Per Bennett, J. (*Bowe v. Chandler*, 1 Cal. 167.)

Practice Act permits general issue. See post, IX, 16.

13. The term "civil action" in that section of the Practice Act, providing that "there shall be in this state but one form of civil action for the enforcement, etc.," includes the remedies provided for the enforcement of judgments. (*Humiston v. Smith*, 21 Cal. 129.)

14. Practice Act applies as well to legal as equitable actions, so far as its provisions are consistent with the rights and remedies administered in courts of equity. (*Duff v. Fisher*, 15 Cal. 375.)

15. Under our code of practice the same rules of pleading govern in all cases, both at law and in equity. (*Bowen v. Aubrey*, 22 Cal. 566.)

16. The old rules of chancery pleading are superseded by the Practice Act. (*Cordier v. Schloss*, 12 Cal. 143.)

Cited 1 Ariz. 387; 1 Idaho, N. S., 267; 2 Mont. 361.

Construction of provision relating to form of action. See post, VII, 1.

Creation of right without remedy. See post, V.

Distinction between verified and unverified answer. See post, 287.

Civil Practice Act governs mandamus. See Mandamus, III, 1.

State Practice Act does not apply to federal court. See Federal Practice.

Practice Act, head-lines of, effect of. See Statutes, 142.

Rules of pleading are general, and embrace all persons. See Default, 5.

V. Creation of Right Without Remedy.

17. Where legislature creates right of action, and makes no special provisions for its enforcement other than by directing that a civil action may be brought for that purpose, such action may be commenced and prosecuted pursuant to the provisions of the general law regulating proceedings in civil cases, and parties to such actions may take all steps authorized thereby. (*Burson v. Cowles*, 25 Cal. 535.)

Procedure, where no mode pointed out in code. See Homesteads, 459, 460.

Creating right without remedy. See Statutes, VIII, 17.

Appeals, how taken, where no mode provided by legislature. See Appeals, V, 2.

Procedure on appeal, where no mode provided. See Appeals, XIII, 3, a.

Papers, how identified, where no mode provided by statute. See Appeals, VI, 6, c.

VI. Manner of Commencing Actions; Action When Commenced.

18. The mode of commencing suits and acquiring jurisdiction of the parties is controlled by the Practice Act, and not by the practice which prevailed at common law. (*Dupuy v. Shear*, 29 Cal. 238.)
Cited 35 Cal. 125; 14 Or. 154.

19. For all other purposes, except to prevent the bar of the statute, an action can be commenced only by filing the complaint and issuing a summons, unless a defendant voluntarily appear and plead without summons, when he can compel plaintiff to proceed with the case. (*Sharp v. Maguire*, 19 Cal. 577.)

20. Where a complaint was filed on the thirtieth day of October, 1856, and no summons was issued thereon, and an amended complaint was filed on the 26th of January, 1857, and summons issued thereon, held, that the suit was not commenced until the issuing of the summons. (*Green v. Jackson Water Co.*, 10 Cal. 374.)
Cited 74 Cal. 263.

Commencement of action where amended complaint filed. See post, 643.

Actions, when commenced. See Statute of Limitations, X, 1.

Proceedings in eminent domain, when commenced. See Eminent Domain, IX, 3.

VII. Pleadings, General Rules Relating to.

1. Rule That There is but One Form of Action.

21. Under our system there is but one form of action; the statute makes no distinction in matters of form between actions of contract and those of tort, and relief is administered without reference to the technical and artificial rules of the common law. (*Jones v. Steamship Cortes*, 17 Cal. 487.)
Cited 97 Cal. 504; 1 Ariz. 387; 1 Utah, 286.

22. Under the code system of pleading, forms of action are cast aside, and every action is now, in effect, a special action on the case. (*Rogers v. Duhart*, 97 Cal. 500.)

23. There is but one form of civil action in this state, and where a complaint sets out a cause of action in clear and intelligible language, to which the defendants answer, the court is authorized to try the case as made, and grant any relief embraced in the issues. (*Hurlbutt v. N. W. Spaulding Saw Co.*, 93 Cal. 55.)

24. There is but one form of civil action in this state, and all the forms of pleadings, and the rules by which their sufficiency is to be determined, are prescribed by the Practice Act. Our system requires the facts to be alleged as they exist, and repudiates all fictions. (*Payne v. Treadwell*, 16 Cal. 220.)
Cited 1 Ariz. 387; 1 Idaho, N. S., 267.

25. Under our system there is but one form of action to enforce private rights, whether legal or equitable; and the action must be in the name of the real party in interest, with certain statutory exceptions, within which cases of assignment do not come. (*Wiggins v. McDonald*, 18 Cal. 126.)

Cited 64 Cal. 280; 86 Cal. 528; 1 Ariz. 387; 1 Idaho, N. S., 267.

26. Court cannot determine a case without regard to the form of the pleadings. (*Carpentier v. Brenham*, 50 Cal. 549.)

27. Act that declares that "there shall be but one form of civil action" extends only to the form and to the pleadings, dispensing with technicalities in the statement of the cause of action and defense, without regard to ancient forms, whether of assumpsit, trespass, or ejectment, etc. (*De Witt v. Hays*, 2 Cal. 464.)

28. Distinction in form of actions *ex delicto* and *ex contractu* was abolished by statute, but the general principles which govern such actions are retained. (*Lubert v. Chauviteau*, 3 Cal. 458.)
Cited 1 Ariz. 387.

29. There can be no proper recovery for a conversion upon a complaint stating a cause of action in claim and delivery, though perhaps, if it were found, after suit brought, that the defendant had wrongfully disposed of the property before suit, the plaintiff might be allowed to amend, so as to claim damages for a wrongful taking or conversion. (*Riciotto v. Clement*, 94 Cal. 105.)

30. Distinction between actions of assumpsit, trespass, ejectment, etc., has not been abolished by the act declaring that there shall be but one form of civil action. (*De Witt v. Hays*, 2 Cal. 464.)

31. The distinction between law and equity continues as marked as ever, though there is no difference in the form of a bill in chancery and a common-law declaration, under our system. (*De Witt v. Hays*, 2 Cal. 464.)

32. Judgment will be reversed where plaintiff mistakes his form of action, his remedy being in contract, and not in tort. (*Butler v. Collins*, 11 Cal. 391.)

Form of action immaterial. See Counterclaim, 5; Trespass, 26.

Form of proceeding immaterial on question of bar of judgment. See Judgments, 280.

Common-law rules of pleading changed. See Slander, 15.

2. Facts Necessary to Sustain Right and Only Facts Necessary to be Stated.

33. Those facts, and those only, must be stated which constitute the cause of action, the defense, or the reply. (*Green v. Palmer*, 15 Cal. 411.)

34. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged; and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved. (*Green v. Palmer*, 15 Cal. 411.)

35. Only such facts need be alleged as are required to be proved, except to negative a possible performance of the obligation which is the basis of the action, or to negative an inference from an act which is in itself indifferent. (*Payne v. Treadwell*, 16 Cal. 220.)

36. Pleadings should set forth facts and not

merely opinions of parties. (*Snow v. Halstead*, 1 Cal. 359.)

Argumentative pleading. See *Slander*, 75.

3. Statements Should be Concise and Clear; Surplusage.

37. Two of the leading ends contemplated by the code are simplicity and economy. As contributing to the attainment of these ends it was the intention of the code to require the pleadings to be so framed as not only to apprise the parties of the facts to be proved by them respectively, but to narrow the proofs on the trial. (*Piercy v. Sabin*, 10 Cal. 22.) Cited 63 Cal. 427; 3 Nev. 565.

38. Common-law system of procedure has been abolished with a view to substitute simplicity and directness for complexity and circuitry of action. (*Kimball v. Lohmas*, 31 Cal. 154.)

Cited 6 Mont. 385, 386.

39. All statements in a pleading must be concisely made, and when once made must not be repeated. (*Green v. Palmer*, 15 Cal. 411.)

40. In a complaint the necessary facts to constitute a cause of action must be stated in unequivocal language and not left to inference. (*Moore v. Besse*, 30 Cal. 570.)

41. In pleading, the essential facts upon which the legal points in the controversy depend should be stated with clearness and precision, so that nothing is left for the court to surmise. (*Gates v. Lane*, 44 Cal. 392.)

Cited 86 Cal. 637.

42. Allegations in a complaint which are absurd, and the truth of which is impossible, and which are inconsistent with other allegations in the same complaint, may be disregarded as surplusage. (*Sacramento County v. Bird*, 31 Cal. 66.)

43. The words "duly," "wrongfully," and "unlawfully," when used in connection with issuable facts, while they do not vitiate a pleading, are surplusage, and had better be omitted. (*Miles v. McDermott*, 31 Cal. 271.) Cited 86 Cal. 638.

44. An averment of a fact constituting the plaintiff's cause of action cannot be said to be irrelevant or redundant to itself. (*Jackson v. Lebar*, 53 Cal. 255.)

Facts, how to be alleged. See ante, 24.

Matters of substance must be stated distinctly and directly. See post, VII, 5.

Inducement, matters of, do not render complaint ambiguous. See post, VIII, 3.

Manner of statement of facts constituting cause of action. See post, VIII, 2.

Surplusage or redundant matter, striking out. See post, VII, 13.

Narration in pleading is redundant. See *Trover*, 29.

Surplusage, what is, in action for damages for diversion of water. See *Watercourses*, XIV, 2, p. B.

Redundant matter in, does not vitiate. See *Estates of Deceased Persons*, 362.

4. Ultimate and Not Probative Facts Should be Stated; Allegations of Evidence.

45. Under our system of pleading, facts

only must be stated. This means the facts, as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. (*Green v. Palmer*, 15 Cal. 411.)

Cited 18 Cal. 88; 19 Cal. 483; 22 Cal. 569; 23 Cal. 169; 26 Cal. 21; 28 Cal. 547; 30 Cal. 200, 364, 565; 32 Cal. 456; 36 Cal. 233; 37 Cal. 255; 42 Cal. 351; 63 Cal. 427; 79 Cal. 536; 82 Cal. 321; 82 Cal. 323; 2 Mont. 101; 6 Mont. 385; 8 Nev. 565; 7 Nev. 172; 3 Or. 346.

46. Ultimate facts only, and not such as are probative, should be stated in pleadings. (*Miles v. McDermott*, 31 Cal. 271.)

Cited 63 Cal. 427.)

47. In alleging facts, the ultimate facts should be stated, and where a complaint merely states the evidence from which such facts are deducible a demurrer lies. (*Thomas v. Desmond*, 63 Cal. 426.)

48. In pleading it is the ultimate and not the probative facts which should be averred; and it is error in the court to exclude evidence offered to establish the probative facts, although they are not averred in the complaint. (*Grewell v. Walden*, 23 Cal. 165.)

Cited 63 Cal. 427; 100 Cal. 255.

49. Even where a statement of evidentiary facts, if admitted to be true, would establish prima facie an ultimate or pleadable fact, they cannot be substituted in a pleading for an allegation of the fact to be put in issue. (*Harris v. Hillegass*, 54 Cal. 463.)

50. It is a cardinal principle in pleading that ultimate and not probative facts are to be pleaded, and though the fact that plaintiff was the owner and entitled to the possession of the property at a previous date is evidence from which the ultimate fact may be deduced by a presumption of continuance of the right, yet that principle has no application to the statement of facts in a pleading, and cannot dispense with the allegations of the ultimate fact of right of possession at the time of the commencement of the action. (*Fredericks v. Tracy*, 98 Cal. 658.)

51. The allegation that the plaintiff is "the owner" of the property is of an ultimate fact, unless the context shows that it was intended as a mere conclusion from the fact stated. (*Heeser v. Miller*, 77 Cal. 192.)

Cited 86 Cal. 130; 96 Cal. 605.

52. In general, the allegation that one is "the owner" of land is of an ultimate fact, but the context may be such as to show that it is a mere conclusion of law. The allegation in this case held to be a mere conclusion of law. (*Turner v. White*, 73 Cal. 299.)

Cited 77 Cal. 193, 273; 82 Cal. 9; 86 Cal. 130; 91 Cal. 578.

Ownership, averments as to. See *Mortgages*, 612.

53. Averments in the complaint of the facts constituting a deraignment of title are but averments of evidence, and are not admitted by a failure to deny them in the answer. (*Siter v. Jewett*, 33 Cal. 92.)

54. Evidence should not be alleged in a complaint. Averments of mere evidence are not admitted by failure to deny them in

the answer. (*Raconillat v. Rene*, 32 Cal. 450.)

Cited 33 Cal. 128; 36 Cal. 233; 43 Cal. 236.

55. A complaint, whatever may be the character of relief sought, must state only issuable facts, and not mere matters of evidence. Where this rule has been violated, a motion by defendant to strike out the irrelevant matter should be sustained. (*Bowen v. Aubrey*, 22 Cal. 566.)

Cited 23 Cal. 112.

56. An allegation in a complaint that B. executed an instrument in writing, purporting to convey to T. a tract of land which is recorded (stating where), is a mere allegation of evidence, and may be disregarded as surplusage. (*Gates v. Salmon*, 46 Cal. 361.)

Denials of matters of evidence. See post, IX, 14.

Matters of evidence, striking out. See post, 124, 127.

Allegations of evidence, pleader, whether bound by. See post, VII, 10.

Evidence of facts should be omitted. See Ejectment, V, 2.

Facts and not evidence to be alleged. See Malicious Prosecution, 55.

Probative facts should not be pleaded. See Suretyship, 71.

Matters of evidence in complaint should be stricken out. See Ejectment, 111, 112.

Ultimate fact, allegations of ownership are of. See Quieting Title, 97, et seq.

5. Material Allegations and Matters of Substance, What are and How Averred.

57. The test of the materiality of an averment in a pleading is this: could the averment be stricken from the pleading without leaving it insufficient. (*Whitwell v. Thomas*, 9 Cal. 499.)

58. An unessential, or, what is the same thing, an immaterial, allegation is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disproved. Whether an allegation be material may be determined by the question, "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. (*Green v. Palmer*, 15 Cal. 411.)

Cited 3 Or. 359.

59. Distinction between proof of allegations of matter of substance and allegations of matter of description stated. (*Castro v. Wetmore*, 16 Cal. 379.)

60. Material allegations must be distinctly stated in pleadings, and are not to be inferred from doubtful or obscure language. (*Campbell v. Jones*, 38 Cal. 507.)

61. Complaint should allege material fact by direct averment, and not by inference. (*Stringer v. Davis*, 30 Cal. 318.)

62. It is not sufficient to state a material fact in a complaint by way of recital; it should be directly averred. (*Denver v. Burton*, 28 Cal. 549.)

Cited 30 Cal. 321.

63. Matters of substance which are essen-

tial elements in a cause of action must be presented by direct averment, and not by way of recital, or merely as exhibits attached to the complaint. (*Burkett v. Griffith*, 90 Cal. 532.)

64. Matters of substance, which are necessary to be alleged in the complaint, cannot be left out, and the defect supplied by reference to an exhibit attached to and made a part of the complaint. (*City of Los Angeles v. Signoret*, 50 Cal. 298.)

Cited 80 Cal. 612; 82 Cal. 505; 90 Cal. 542; 7 Mont. 235; 3 Wyo. 143; distinguished 80 Cal. 613; 82 Cal. 636.

6. Matters Equally Within Knowledge of Other Party.

65. No averment of notice to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of the one party as of the other. (*People v. Edwards*, 9 Cal. 286.)

Matter peculiarly within defendant's knowledge, demurrer. See post, X, 6, h.

7. Rights Dependent upon Exception to General Rules or Statutory Privileges, how Pleased.

66. Party who relies upon exception to general rule must state the facts which bring his case within it. (*Senter v. Davis*, 38 Cal. 450.)

67. When pleader wishes to avail himself of statutory privilege, or right given by particular facts, he must show the facts; those facts which the statute requires as the foundation of the right must be stated in the complaint. (*Dye v. Dye*, 11 Cal. 163.)

Cited 22 Cal. 637; 35 Cal. 448; 52 Cal. 352; 71 Cal. 246; 4 Nev. 472; 18 Nev. 37.

68. In pleading title to land, under act of legislature which prescribes conditions upon the performance of which the title may be secured, it is necessary to aver a performance of all the acts required by the statute. (*People ex rel. Hastings v. Jackson*, 24 Cal. 630.)

Cited 25 Cal. 303; 52 Cal. 352; 8 Nev. 97; 19 Nev. 37.

Statutory rights, pleading of. See Statutes, XI.

8. Allegations of Law or Conclusions or Presumptions of Law.

69. When a petition or complaint states facts which, under the law, warrant the relief prayed for, there is no necessity to put the law itself into the pleadings. (*People ex rel. Miller v. Common Council of the City of San Diego*, 85 Cal. 369.)

70. Presumptions of law need not be averred in a complaint. (*Henke v. Eureka Endowment Assn.*, 100 Cal. 429.)

71. That which is implied by law need not be pleaded. (*Wilhoit v. Cunningham*, 87 Cal. 453.)

72. In pleadings, statements of mere conclusions of law are insufficient; the facts from which the conclusion is to be drawn must be stated. (*Levinson v. Schwartz*, 22 Cal. 229.)

Cited 3 Nev. 565.

73. Conclusions of law in a pleading, so far as they are correct, are useless, and when erroneous are worse than useless, and in either case will be treated as if not alleged, in considering objections to the pleading raised by demurrer. (*Ohm v. City and County of San Francisco*, 92 Cal. 437.)

74. Averments of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under the statute. (*Aurrecoechea v. Sinclair*, 60 Cal. 532, 549.)

75. An averment in a complaint, that an ayuntamiento had full power and lawful authority to do a particular act, is an averment of a conclusion of law, and does not tender an issue of fact. (*Branham v. Mayor and Common Council of San Jose*, 24 Cal. 585.)

Cited 72 Cal. 522.

Allegation of conclusion of law. See Bankruptcy and Insolvency, 66.

Erroneous conclusion of law, effect of alleging. See Guaranty, 25.

Conclusions of law, allegations of, what are. See Injunctions, 201; Insurance, 230; Suretyship, 74.

Allegation that one is owner, when an allegation of a conclusion of law. See ante, 52.

Conclusion of law, ownership is not. See Ejectment, 117.

Erroneous allegations as to construction of contract, surplusage. See post, VIII, 8.

Indebtedness is conclusion of law. See Contracts, 319, et seq; Judgments, 176.

Conclusion of law, averment that certain amount is due. See Bills and Notes, 368.

Conclusion of law, averment that petition contained no allegations of any legal cause. See Certiorari, 86.

Conclusions of law, allegation as to mining lands. See Mines and Mining, 71.

"Unlawfully" or "wrongfully," allegations that acts were, are conclusions of law. See False Imprisonment, 8.

Conclusion of law, allegation that possession is "wrongful or unlawful." See Ejectment, 136.

Averment that one unlawfully took property is averment of law. See Trover, 24.

Conclusion of law, averment that debt discharged in bankruptcy is. See Bankruptcy and Insolvency, 354.

Allegation that no notice was given. See Taxation, 678.

Conclusions of law, allegation of want of authority or jurisdiction. See Streets, 640.

Conclusion of law, allegation as to liability of city. See Municipal Corporations, 215.

Forfeiture, allegation of is legal conclusion. See Forfeiture.

Legal conclusion, allegations as to unlawful allowance. See Supervisors, 103.

Ultimate fact, allegation that road is public highway. See Injunctions, 251.

Ultimate and probative facts and conclusions of law. See Fraud, 115.

Denials of conclusions of law raise no issue. See post, IX, 13.

9. Papers and Contracts, how Made Part of.

76. Records and papers cannot be made a part of a pleading by merely referring to

them, and praying that they may be taken as a part of such pleading, without annexing the originals or copies as exhibits, or incorporating them with the answer, so as to form a part of the record in the cause. (*People ex rel. Carrillo v. De La Guerra*, 24 Cal. 73.) Cited 82 Cal. 505.

77. While under our system it is good pleading to set forth in full an instrument upon which the action or defense is founded, yet this does not apply to preliminary and collateral matters of substance. Such matters must be alleged, and recitals in the instrument cannot serve as such allegations. (*Lambert v. Haskell*, 80 Cal. 611.) Cited 82 Cal. 506.

Admission of truth of contract attached to pleading by failing to deny under oath. See post, IX, 19.

Exhibits attached to answer, how verified. See post, 155.

Complaint on written instrument. See post, VIII, 8.

10. Pleader, Whether Bound by his Allegations; Effect of Admissions in Pleadings.

78. Pleader's conclusions from admitted facts are not admitted to be correct. The proper deductions from the admitted facts must be drawn by the court. (*Glide v. Dwyer*, 83 Cal. 477.)

79. An allegation in a pleading does not estop the party pleading it from proving that the allegation is not correct, unless the allegation is made of an issuable fact. (*Patterson v. Keystone Min. Co.*, 30 Cal. 360.) Cited 42 Cal. 351.

Estoppel by matter of. See Estoppel, III. Estoppel from pleadings in ejectment. See Ejectment, V, 5.

Evidence, pleadings as. See Evidence, III, 8.

Attorney must stand by definition of his pleadings. See Counterclaim, 31.

80. Question as to what facts are admitted by pleadings is one for court and not for the jury; and the court should not submit such a question to a jury. (*Tevis v. Hicks*, 41 Cal. 123.)

Cited 15 Col. 215.

81. Both court and jury are bound by admissions of the pleadings as to the withholding of possession and as to the rental value of the premises, to the extent of those admissions. (*Johnson v. Visser*, 96 Cal. 310.)

82. A defendant on the trial cannot convert a fact admitted by the pleadings. (*Bradbury v. Cronise*, 46 Cal. 287.)

83. Where the admissions in an answer negative its general denials, the latter may be disregarded and judgment asked upon the former, where the complaint is verified, and the answer consists of such admissions and denials. (*Fremont v. Seals*, 18 Cal. 433.) Cited 1 Utah, 225.

84. If the allegations of the complaint are sufficient in law to entitle the plaintiff to recover, the defendant cannot dispute his right to recover while he admits the facts stated, unless he avers new facts which defeat their

otherwise legal operation. (*McDonald v. Davidson*, 30 Cal. 174.)

85. An admission in the answer of the averments of the complaint that defendant received money to plaintiff's use, and refused to pay the same on demand, does not preclude the defendant from proving payment, if he sets up payment as new matter in the answer. (*McDonald v. Davidson*, 30 Cal. 174.) Cited 80 Cal. 322; 7 Nev. 40.

Admissions by failure to deny. See post, IX, 19.

Admissions of validity of contract attached to pleading by failure to deny. See post, IX, 19.

Admissions in. See Assault and Battery, 1. Admissions in petition for letters. See Executors and Administrators, I, 2.

Admissions in pleadings in suit to quiet title. See Quieting Title, III, 6.

Admission of falsity of charge in. See Slander, 30.

Declaration of trust in verified answer. See Trusts and Trustees, 3.

Admissions in pleadings, binding effect of. See Quieting Title, 116.

Evidence assailing admissions in pleading. See Specific Performance, 196.

Admissions in, findings contrary to. See Findings, X, 4.

Admission of contract in answer waives statute of frauds. See Statute of Frauds, 146.

11. Construction of Pleadings.

86. Construction of pleadings is the duty of the court, and it is error to instruct the jury in such a manner as to leave it for them to determine whether or not the answer denies certain allegations of the complaint. (*Taylor v. Middleton*, 67 Cal. 656.)

87. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice. (*Moore v. Moore*, 56 Cal. 89.) Cited 71 Cal. 530.

88. It is presumed that the pleader states his case as favorably for his side of the controversy as the facts will justify; and hence the rule that his pleading must be construed most strongly against him, and that its ambiguities must be resolved against him. (*Rogers v. Shannon*, 52 Cal. 99; *Green v. Covillaud*, 10 Cal. 317, cited 29 Cal. 16.)

Presumption against pleader does not require him to anticipate matters of defense. See post, VIII, 4.

89. Pleadings must be most strongly taken against pleader. (*Chipman v. Emeric*, 5 Cal. 49; *Dickinson v. Maguire*, 9 Cal. 46; *Collins v. Townsend*, 58 Cal. 608; *Hays v. Steiger*, 76 Cal. 556.)

90. When the plaintiff stands on the sufficiency of his pleading, as against a demurrer pointing out the particulars wherein it is alleged to be insufficient, the rule that the pleading must be construed most strongly against the pleader clearly applies. (*Glide v. Dwyer*, 83 Cal. 477.)

91. Pleadings when ambiguous are construed most strongly against pleader. (*Snow*

v. Halstead, 1 Cal. 359; *Moore v. Besse*, 30 Cal. 570; *Triscony v. Orr*, 49 Cal. 612; *People v. Wong Wang*, 92 Cal. 277.)

92. The common-law rule, that a pleading must be taken most strongly against the pleader where the language used is ambiguous, has no application where the pleader confesses that his pleading is ambiguous and asks to amend it. Per *Sanderson, C. J.*, *Currey, J.*, concurring. (*Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 673.) Cited 32 Cal. 192.

93. Presumption is that complaint correctly states contract which was the cause of action as against the plaintiff. (*Johnson v. Moss*, 45 Cal. 515.) Cited 99 Cal. 619.

94. The rule requiring the pleading to be most strongly construed against the pleader does not require such a construction to be given (if it will reasonably bear a different one) as will make the pleading absurd. (*Marshall v. Shafter*, 32 Cal. 176.)

Construed most strongly against pleader. See *Eminent Domain*, 97; *Mandamus*, 150; *Negligence*, 61; *Slander*, 77; *Venue*, 58.

Ambiguity is resolved against pleader. See *Cross-complaint*, 28.

95. Whole pleading must be construed together; and it is not proper to eliminate a single paragraph from an answer, and give effect to it as a denial, when it appears from the context, and other portions of it, that the denial was intended to be hypothetical. (*Aleman v. City of Petaluma*, 38 Cal. 553.)

96. In construing pleading it must be taken as a whole. (*Glide v. Dwyer*, 83 Cal. 477.)

97. In construing a pleading, it is not permissible to take an isolated sentence, separated from its context, and give effect to it as an independent averment, unless, upon the whole pleading, it appears to have been so intended. (*Farish v. Coon*, 40 Cal. 33.)

98. The character and effect of an averment that may be uncertain in one of its clauses is not limited to a construction of that clause merely, but the averment is to be considered as a whole, and in connection with the entire complaint. (*Bates v. Babcock*, 95 Cal. 479.)

99. If complaint contemplated certain end, it equally intended the use of all the necessary means. (*Adams v. Woods*, 8 Cal. 306.)

100. An averment that the defendant promised and agreed to pay the plaintiff seven hundred and fifty dollars, if he, the plaintiff, succeeded in defeating two certain actions designated in the complaint, is, unless demurred to, good as an averment that he promised to pay when the plaintiff succeeded. (*Cummings v. Howard*, 63 Cal. 503.)

101. An averment that a given person was "during his lifetime" the owner of a piece of land is equivalent to an averment that he was the owner continuously throughout his lifetime. (*Riddell v. Harrell*, 71 Cal. 254.)

General and special allegation which controls. See *Mechanics' Liens*, 45.

Character of pleading, how determined. See *Cross-complaint*, 5, 24.

Denomination of pleadings. See *Counterclaim*, 29-31; *Cross-complaint*, 25.

Justices' courts, construction of pleadings in. See *Justices of the Peace*, V, 2.

12. Defects in Pleading, how Cured; Review of.

102. Although the allegations of a pleading are defective, yet, if there is not an entire want of allegations constituting a cause of action, and no demurrer is filed or objection made in the court below, the judgment will not be disturbed. (*Lee v. Figg*, 37 Cal. 328.) Cited 87 Cal. 403.

103. A defective averment in a complaint is immaterial, if the defect is supplied by the answer. (*Burns v. Cushing*, 96 Cal. 669.)

104. When a complaint fails to set forth material facts so that no cause of action is stated, but the answer avers such facts, the omission in the complaint becomes immaterial, and the defect therein is cured by the answer. (*Shively v. Semi-Tropic Land etc. Co.*, 99 Cal. 259.)

105. The omission of a material fact in a complaint is cured by its averment in a cross-complaint of the defendant, and the admission of such averment in the answer to the cross-complaint; and the fact that there is a demurrer to the complaint does not take the case out of the rule of express aider. (*Cohen v. Knox*, 90 Cal. 266.)

106. A party who seeks relief must himself state the facts upon which he relies; failing in this, he cannot derive benefit from a cross bill which states another and different cause of action in his behalf. (*Mercier v. Lewis*, 39 Cal. 532.) Cited 55 Cal. 440.

Defects in complaint supplied by answer. See *Vendor and Vendee*, 380.

Objection to complaint waived by answering to merits. See *Judgments*, 682.

Defect in complaint, what not cured by answer. See *Taxation*, 635.

Uncertainty cured by answer and judgment. See *Licenses*, 97.

Omissions cured by averments of answer. See *Insurance*, 134.

Complaint, defects in cured by allegations in counterclaim, when. See *Landlord and Tenant*, 237.

107. A defective allegation of a fact may be cured by default or verdict; but not so the entire absence of any allegation whatsoever. (*Hentsch v. Porter*, 10 Cal. 555.) Cited 23 Cal. 130.

108. Defects in the statement of a cause of action may be cured by failing to answer or by verdict, but not a defective cause of action. (*Harmon v. Ashmead*, 60 Cal. 439.)

109. When a complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by a verdict or default. (*People v. Rains*, 23 Cal. 127.)

110. Where a complaint for money received by defendant to plaintiff's use, to be paid when requested, avers that defendant, though requested, has not paid, the defect in such form of averment of a demand of payment, if any there be, is cured by a verdict. (*Jones v. Block*, 30 Cal. 227.)

111. The general rule as to the effect of a

verdict upon defects in pleading is, that wherever facts are not expressly stated which are so essential to a recovery that, without proof of them on the trial, a verdict could not have been rendered under the direction of the court, then the want of the express statement is cured by the verdict, provided the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment. (*Garner v. Marshall*, 9 Cal. 268.)

Cited 10 Cal. 559; 23 Cal. 130; 3 Mont. 452; 3 Or. 405.

112. While the entire absence of an averment which is essential to a cause of action is at any time available to the defendant, yet the defective allegation of a cause of action is cured by verdict, and it is too late after trial and decision for a defendant to make objections to a complaint that should have been raised by special demurrer. (*City and County of San Francisco v. Pennie*, 93 Cal. 465.)

113. A verified complaint, which, in stating a special demand essential to the cause of action, contains only the general averment that "defendants though often requested have refused," etc., is sufficient in this respect unless demurred to for want of certainty. If not demurred to the defective averment is cured by verdict and judgment, and the objections cannot be raised for the first time in the appellate court. (*Mills v. Barney*, 22 Cal. 240.)

114. The doctrine that a defective pleading may be cured by verdict has no application where there is an entire absence of a material allegation. (*Richards v. Travelers' Ins. Co.*, 80 Cal. 505.)

Cited 2 Idaho, 1207.

Objection cured by verdict. See *Variance*, 35.

Defective allegation as to ouster waived after verdict. See *Ejectment*, 134.

Complaint, defect, what not cured by verdict. See *Insurance*, 126.

Defect in, cured by judgment. See *Estates of Deceased Persons*, 231.

Defect in complaint, what not cured by default. See *Ejectment*, 128.

115. Where a defense is required to be pleaded specially, the omission to plead it is not cured by the introduction of evidence in support of it on the trial without objection on the part of the plaintiff. (*Smith v. Owens*, 21 Cal. 11.)

Cited 28 Cal. 284.

116. A defense which is not pleaded cannot be considered, although shown by the evidence. The rule as to curing defects by litigating a matter without objection applies only where the pleading is defective, and not where there is a total absence of averment. (*Wilson v. White*, 84 Cal. 239.)

117. Where certain material averments of the plaintiff's complaint were so defectively denied that, upon motion, such denials might properly have been stricken out as sham and irrelevant, yet without such objection made thereto the plaintiff introduced proof at the trial in their support, held, that, by introducing said proof, the plaintiff waived all objec-

tions to the sufficiency of said denials, and the court properly refused an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of said trial. (*Tynan v. Walker*, 35 Cal. 634.) Cited 60 Cal. 630.

118. In such case, if the plaintiff had regarded said denials as insufficient, and desired to take advantage of the fact, he should have moved to strike them out on the ground that they were sham and irrelevant. Under the provisions of section 50 of the Practice Act, denials contained in an answer, which do not explicitly traverse the material allegations of the complaint, may be stricken out, on motion, as sham and irrelevant. (*Tynan v. Walker*, 35 Cal. 634.)

119. The rule that, where proof has been admitted on the trial without objection that the answer was insufficient to raise an issue upon the subject matter of the proof, the defect is cured, rests partly upon the estoppel of the plaintiff to object to a defect in the pleading until it was too late to remedy it, thereby inducing his opponent to rely upon the pleading as sufficient, and partly on the ground that the issue has been fairly tried, and neither party has been prejudiced by the want of a good pleading; but this rule does not apply where the evidence given was relevant to issues actually joined upon the sufficiency of the proofs of loss under a fire insurance policy, and where the answer of the insurance company raised no issue as to fraud of the plaintiff or forfeiture of the policy, and the defendant was not misled by the conduct of the plaintiff. (*Greiss v. State Investment and Ins. Co.*, 98 Cal. 241.)

Supplying defects by evidence. See *Estates of Deceased Persons*, 381, 386.

Waiver of defective, by evidence introduced without objection. See *Estoppel*, 117.

Defects not supplied by evidence. See *Estates of Deceased Persons*, 353.

Order remedying defect in petition. See *Estates of Deceased Persons*, 388.

Appealability of rulings on pleadings. See *Appeals*, II, 17.

Review, sufficiency of pleadings, now presented for. See *Appeals*, VII, 2.

Appeals, pleadings how identified or authenticated. See *Appeals*, VI, 6, d, B.

Sufficiency, objection first taken on appeal. See *Appeals*, XI, 14, d.

Pleadings, service of, objection first taken on appeal. See *Appeals*, XI, 14, d.

Appeal, immaterial errors in pleadings. See *Appeals*, XI, 12, c.

Presumptions in favor of pleadings. See *Appeals*, XI, 24, e.

Certiorari, review of insufficient pleadings by. See *Certiorari*, III, 2, a.

13. Striking Out Pleadings.

120. To strike out a pleading, which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense to an action, is a harsh proceeding, and should only be resorted to in extreme cases. (*Burns v. Scooffy*, 98 Cal. 271.)

121. Where a plaintiff commences an action by filing a complaint and issuing summons, but makes no service on the defendant until nine years have elapsed, an order of the court, made on defendant's motion, striking out the complaint for want of prosecution, is not such an abuse of discretion as to justify the appellate court in reversing the order. (*Dupuy v. Shear*, 29 Cal. 238.) Cited 39 Cal. 451.

122. The existence of superfluous matter in a complaint may be remedied by a motion to strike out. (*Mora v. Le Roy*, 58 Cal. 8.)

123. Superfluous matter in a complaint, when inserted by itself, should be struck out, or disregarded as surplusage. (*Boles v. Cohen*, 15 Cal. 150.)

124. Matters of evidence and unnecessary matters of description of demanded premises, should be stricken out of a complaint to recover possession of land. (*Willson v. Cleaveland*, 30 Cal. 192.) Cited 30 Cal. 565; 32 Cal. 456; 36 Cal. 233; 2 S. Dak. 140.

125. Immaterial matter inserted in a complaint is irrelevant, and should be stricken out as such on motion duly made. (*Larco v. Casanueva*, 30 Cal. 560.)

126. It is only irrelevant and redundant matter which may be stricken from a pleading by virtue of the provisions of section 453 of the Code of Civil Procedure. (*Jackson v. Lebar*, 53 Cal. 255.) Cited 76 Cal. 303.

Redundancy, remedy for is by motion to strike out. See post, X, 6, c.

Matters not essential, striking out. See post, X, 6, g.

Surplusage, striking out. See post, IX, 8.

127. It is proper to strike from a complaint the statement of matter which, though it may be proper to be shown in evidence upon the trial of the action, adds nothing to the ultimate and issuable facts alleged in the complaint. (*County of San Joaquin v. Budd*, 96 Cal. 47.)

128. Material averment which is defectively stated should not be stricken out. The remedy is a special demurrer. (*Swain v. Burnette*, 76 Cal. 299.)

129. If some of denials of answer are deemed good, and others bad, the plaintiff may move to strike out the latter. This practice is justified by the fiftieth section of the Practice Act. Answers consisting of denials, which do not explicitly traverse the material allegations of the complaint, are sham and irrelevant within the meaning of the statute. (*Gay v. Winter*, 34 Cal. 153.)

130. Suit for services as agent of defendant under a contract. Defendant in answer sets up a violation of the contract on the part of plaintiff, and also certain other matters amounting to a tort on his part—as conspiracy to have the property of defendant sold and bought in by him, circulating false reports that defendant was bankrupt, its affairs a swindle, etc. Held, that this latter portion of the answer was properly struck out on motion of plaintiff. (*Bates v. Sierra Nevada etc. Min. Co.*, 18 Cal. 171.)

131. Though certain defenses, by way of setoff, are pleaded in the answer in a very informal and inartificial manner, still if the facts showing that they constitute valid claims against the plaintiff, are sufficiently stated, the defenses ought not to be struck out. (*Wallace v. Bear River W. & Min. Co.*, 18 Cal. 461.)

Cited 1 Idaho, N. S., 591.

Sham answer, may be stricken out. See ante, 118.

132. F. recovered judgment against H., foreclosing a mortgage on certain lands, and under an order of sale duly issued thereon the sheriff sold and in due course conveyed the said lands by deed to B., who, under a writ of assistance, duly issued, procured C. to be dispossessed of a certain tract of land as being within said deed. C. subsequently procured from the court rendering said judgment, upon proper motion and notice thereof to B., and after trial, on the merits of the issues arising thereon, an order to be restored to said possession, on the ground that said tract of land was not within said deed, and was so restored, under said order, which became final. Subsequently B. brought ejectment against C. to recover said land, to which C., in answer, after setting up said facts, and that B. had and claimed no other title to said land except under said deed, pleaded that, as between B. and C., the title thereto was res adjudicata. Held, that the facts so pleaded constituted no bar or legal defense to B's action against C. to recover said land, and that the court below did not err in striking out so much of C's answer as set up the same. (*Boggs v. Clark*, 37 Cal. 236.)

133. A motion should be granted to strike out an unverified answer, or one which is insufficiently verified by the attorney of the party making the answer. (*Silcox v. Lang*, 78 Cal. 118.)

134. In all cases not within the exception of the statute, an answer without a verification to a complaint duly verified may be stricken out on motion; and application for judgment, as upon a default, may be made at the same time. (*Drum v. Whiting*, 9 Cal. 422.)

Cited 28 Cal. 297; 14 Col. 65; 1 Idaho, N. S., 552.

135. Inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out and for judgment after the answer is filed. (*Drum v. Whiting*, 9 Cal. 422.)

Allowing verification on motion to strike out. See post, VII, 14.

136. A rule of court provided that notice be given of all motions not ex parte. Held, that it was error to strike out an answer as sham and irrelevant without notice to the defendant. (*Arata v. Tellurium Gold etc. Min. Co.*, 65 Cal. 340.)

137. It is irregular to entertain an ex parte motion to take the defendant's answer off the files, without proof that a copy of the affidavit on which the motion is founded, together with notice of the motion, has been served on the defendant's attorney a reasonable time

before making the motion. (*Stevens v. Ross*, 1 Cal. 94.)

138. A motion made to strike out portions of a complaint that does not specifically point out the objectionable matter is too general, and the court might properly deny the motion on that ground. (*People v. Empire Gold etc. Min. Co.*, 33 Cal. 171.)

139. When a case is tried without any motion to strike out certain denials in the answer, and, after judgment upon such trial is reversed upon appeal, no motion to strike out is made for a series of years after the remittitur is filed until just before the commencement of the second trial, the delay operates as a waiver, and a motion to strike out comes too late to be regarded. (*Silvarer v. Hansen*, 77 Cal. 579.)

140. If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it cannot then strike out the answer of the defendant, and enter his default, and render judgment for plaintiff for the amount claimed in the complaint. (*Abbott v. Douglass*, 28 Cal. 295.)

141. A motion to strike out portions of a pleading admits only those averments contained in said portions which are well pleaded. (*Oroville etc., R. R. Co. v. Plumas County*, 37 Cal. 354.)

142. An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment-roll. (*Abbott v. Douglass*, 28 Cal. 295.)

143. Where an amended complaint is filed after the action of the court in striking out portions of the original complaint, the error, if any, in the order striking out is thereby waived. (*Collins v. Scott*, 100 Cal. 446.)

144. An order refusing to strike out a pleading is not deemed excepted to unless made in the absence of the party complaining; and an assignment of error in such refusal will not be considered upon appeal, where the record fails to show either that the appellant excepted to the ruling of the court, or that he was absent when the ruling was made, and no bill of exceptions was prepared embodying the action of the court. (*Ganceart v. Henry*, 98 Cal. 281.)

Amendment, motion to strike out. See post, 577.

Sham answer, striking out. See post, IX, 10.

Answer filed after time expired, discretion as to striking out. See post, IX, 1.

Answer filed but not served in time, striking out. See post, IX, 2.

Answer, striking out, for failure to pay demurrer fee. See post, X, 2.

General denial should not be stricken out as sham. See post, 333.

General denial to verified complaint, striking out. See post, 292.

Demurrer for want of or insufficient service, striking out. See post, X, 3.

Irrelevant matter, striking out. See ante, 55; *Mines and Mining*, 275.

Reading pleadings which were stricken out in argument to jury. See post, XX, 5.

Answer, when properly stricken out. See Ejectment, 186, 187.

Action to abate nuisance, allegations as to cost are properly stricken out. See Watercourses, 93.

Striking answer of unauthorized guardian ad litem from files. See Infancy, 46.

Refusal to strike out allegation of mitigating circumstances, what cures. See Slander, 22.

Motion to strike out, misjoinder cannot be remedied by. See Joinder and Severance of Actions, 64.

Allegations properly stricken out, when. See Public Lands, 303.

Striking out cross-complaint filed after dismissal. See Dismissal, 7.

Striking out counterclaim. See Cotenancy, V, 1.

Striking out claim for damages. See Damages, 96.

Striking out answer for disobedience of subpoena. See Contempt, IV, 4; Witness, I.

Special appearance to strike out complaint. See Appearance, III, 5.

Striking out statement, appealability of motions on. See Appeals, II, 28.

Appealability of rulings on motions to strike out pleadings. See Appeals, II, 17.

Order striking out complaint, when to be appealed from. See Appeals, 468.

Review, order striking out pleadings, how presented for. See Appeals, VII, 2.

Striking out, reviewing order by certiorari. See Certiorari, III, 2, a.

Dismissal where complaint stricken out. See Dismissal, IV, 4.

Striking out pleadings, presumptions as to. See Appeals, 2778, et seq.

14. Verification of Pleadings.

145. Object of verification is to insure good faith in the averments of a party. (Patterson v. Ely, 19 Cal. 28.)

146. The object of the code was to narrow the proofs upon the trial; and to accomplish this end, the plaintiff was allowed to verify his complaint, and thus compel the defendant to deny specifically each separate allegation. (San Francisco Gas Co. v. San Francisco, 9 Cal. 453.)

147. The attorney of plaintiff, being a notary public, may take the affidavit verifying the complaint. (Kuhland v. Sedgwick, 17 Cal. 123.)
Cited 56 Cal. 591.

148. A jurat to an answer is, in form and substance, an affidavit, and may be taken before a county recorder. (Pfeiffer v. Riehn, 13 Cal. 643.)

149. The verification prescribed by sections 55 and 113 of the Practice Act, though differing in form, is the same in substance. A party who swears to the truth of a pleading thereby affirms a knowledge of its contents, even though his affidavit does not contain the statement that he has read or heard it read, and knows the contents thereof. (Patterson v. Ely, 19 Cal. 28.)

150. If one aver matters positively, the verification will be sufficient if his affidavit state that the pleading is true of his own

knowledge; if he aver matters "upon information and belief," or "upon information or belief," the verification will be sufficient, if his affidavit state that as to the matters thus averred he believes the pleading to be true. (Patterson v. Ely, 19 Cal. 28.)

151. If a pleading does not contain a statement of any matters on information or belief, there is no occasion for any expression of belief in the verification under section 55 of the Practice Act as to any such matters. (Patterson v. Ely, 19 Cal. 28.)

152. Where the affidavit of a defendant to his answer states that the matters set forth in the foregoing answer are true, except as to those matters therein stated on information or belief, and as to those matters that he believes them to be true, it is a sufficient verification; it is not necessary that the defendant should state in the affidavit that he has heard the answer read, and knows the contents thereof. (Fleming v. Wells, 65 Cal. 336.)

153. Where, in ejectment, the verification to the complaint made by one of the plaintiffs is that "the foregoing complaint is true of his own knowledge, except as to the matters therein stated on the information and belief of plaintiffs, and as to those matters he believes it to be true," held, that the verification is sufficient, although the person making the oath does not state that he "has read the complaint or heard the complaint read, and knows the contents thereof." (Patterson v. Ely, 19 Cal. 28.)
Cited 78 Cal. 122.

154. Defendants in this case, in answer to a rule to show cause why an injunction should not issue, filed their answer denying fully the allegations of the complaint, and verified in substance thus: "Wm. H. P., one of the defendants, being sworn, says his co-defendant F. left this state for the state of New York before the complaint herein was filed, and is not in this state; that the foregoing answer is true, of this defendant's own knowledge, except as to the matters therein stated to be upon the information and belief of defendants, and as to those matters he, this defendant, believes the same to be true." Held, that the verification of the answer, though not complying in form with the exact language of the statute, is sufficient to entitle the answer to be used as an affidavit. (Ely v. Frisbie, 17 Cal. 250.)

155. The exhibits attached to the answer, consisting of copies of the pleadings and proceedings in the action in the United States circuit court, needed no further verification than what arises from the statement in the answer that they are such copies; no distinct verification of them was requisite; and were it otherwise, then the certificate of the United States circuit court clerk was sufficient. (Ely v. Frisbie, 17 Cal. 250.)

156. The defendants in an action brought by the city are not required to verify their answers, if the complaint was not verified. (San Francisco v. Itsell, 80 Cal. 57.)
Cited 83 Cal. 515.

157. Verification of pleading by one co-plaintiff or codefendant is a sufficient verifi-

cation under section 446 of the Code of Civil Procedure. (*Claiborne v. Castle*, 98 Cal. 30.)

158. A verification to a complaint is sufficient, though made by only one of the plaintiffs. (*Patterson v. Ely*, 19 Cal. 28.)

159. When a verification of a pleading by an attorney states that the parties for whom he is attorney are absent from the county, it states a sufficient statutory reason for the verification by their attorney; and no additional force would be given to the verification by adding that it is for that reason that the verification is made by the attorney. (*Stephens v. Parrish*, 83 Cal. 561.)

160. The verification of a pleading by an attorney, which shows no inability of the party to make the verification, must state directly that the facts verified are within the knowledge of the attorney. He cannot verify upon information and belief in such case, nor is it sufficient to state that the facts are more fully known to him than to the party he represents. (*Silcox v. Lang*, 78 Cal. 118.)

Answer insufficiently verified by attorney, striking out. See ante, 133.

161. In an action of unlawful detainer, the complaint was verified by an agent of the plaintiff, who stated in the affidavit that the facts stated in the complaint were within the knowledge of affiant. Held, the complaint was properly verified. (*Newman v. Bird*, 60 Cal. 372.) Cited 78 Cal. 123.

162. A rule of court required the pleadings to be paged, and if the answer contained separate defenses, the same to be numbered. The answer of defendant, which was verified, was stricken out for want of conformity to this rule; but subsequently, having been paged and numbered, was, by leave of court, refiled without a reverification, and the defendant moved to strike it out upon this ground. Held, the corrections made in the answer did not change or modify its denials or averments so as to render necessary its reverification; and if any necessity had existed for its reverification, it was within the discretion of the court to allow it to be done at any time before trial. (*Buell v. Beckwith*, 59 Cal. 480.)

163. Service of an answer to a verified complaint, consisting of a general denial only, was admitted by plaintiff's attorney and "verification thereof waived." Held, the waiver of verification did not admit the sufficiency of the answer or dispense with the necessity of a specific denial. (*Harney v. Porter*, 62 Cal. 511.)

164. The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer. (*Greenfield v. Steamer Gunnell*, 6 Cal. 67.) Cited 6 Cal. 231; 1 Idaho, N. S., 552.

165. If the plaintiff goes to trial on the merits, without objection to the verification of an answer, he will not be allowed to raise the point in the appellate court that it was not properly verified. (*McCullough v. Clark*, 41 Cal. 298.) Cited 76 Cal. 276; 80 Cal. 61.

166. If a plaintiff goes to trial without objection for the want of a verification of the answer, he cannot raise the question after a decision is rendered against him. (*San Francisco v. Itzell*, 80 Cal. 57.)

167. The objections to the verification to a complaint that it was not authenticated by the seal of the notary, that there was no venue to the affidavit, that there was no evidence that the officer was a notary public, etc., being technical, should be taken in the court below, and cannot be raised for the first time in this court. (*Kuhland v. Sedgwick*, 17 Cal. 123.)

168. Where the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. (*Angier v. Masterson*, 6 Cal. 61.) Cited 59 Cal. 482.

169. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading, and subsequently went to trial. After the close of the plaintiff's evidence, his counsel, then, for the first time, brought the mistake to the notice of the court by moving for judgment by default, which motion the court sustained, and refused to allow defendant to then verify his answer. Held, that the court erred, and should have allowed the defendant to have verified his answer. (*Arrington v. Tupper*, 10 Cal. 464.) Cited 20 Cal. 633; 80 Cal. 61.

170. To a complaint against three persons upon a promissory note, executed under a firm name, one of the defendants answered, denying his liability, and that he was one of the firm by whom the note was executed. Neither of the pleadings was verified. When the cause came on for trial, plaintiff moved to strike out defendant's answer for want of a verification, and, pending the motion, defendant asked leave to then verify the answer. The court denied defendant's motion, and struck out the answer. Held, that the refusal by the court to allow the verification was such an abuse of discretion as to amount to error. (*Lattimer v. Ryan*, 20 Cal. 628.) Cited 96 Cal. 77.

171. By the verification of a complaint the plaintiff makes its statements his own. (*Johnson v. Powers*, 65 Cal. 179.)

Unverified answer, striking out. See ante, VII, 13.

Petition for habeas corpus must be verified. See Habeas Corpus, 45.

Signature need not be denied under oath, when. See Executors and Administrators, 326.

Verification of petition for sale. See Estates of Deceased Persons, VII, 4, e, D.

Verification of petition in insolvency by firm. See Partnership, 285.

Verification of schedule in insolvency. See Bankruptcy and Insolvency, VI, 5.

Verification of accusation for disbarment. See Attorney and Client, 187.

Answer to petition in eminent domain by county need not be verified. See Eminent Domain, 101.

Verification, preventing general denial by means of. See Bills and Notes, 382.

Verification, sufficiency of. See Offices and Officers, 265; Taxation, 433.

Verification, schedules following, effect of. See Estates of Deceased Persons, 398.

Verification, want of, objection when taken. See Appeals, 2302.

Objection to verification cannot be heard on demurrer. See Bankruptcy and Insolvency, 108.

Verified answer is not perjury, when. See Criminal Law, 2511.

Verification, one cannot claim want of verification of his own pleading. See Homesteads, 304.

Admission of genuineness by unverified answer. See Mortgages, 638.

Presumption as to verification of answer. See Appeals, 2770.

Certified copy, presumption as to proper certification. See Appeals, 2773.

VIII. Pleading on Part of Plaintiff.

1. Complaint Must Show Cause of Action at Commencement of Suit.

172. Complaint, to be good, must show a cause of action in favor of the plaintiff and against the defendant, existing at the time the action is commenced. (*Afferbach v. McGovern*, 79 Cal. 268, 269.)

173. The cause of action mentioned in the code is a present subsisting cause of action, entitling the plaintiff to judgment at the time the action was commenced. (*Hentsch v. Porter*, 10 Cal. 555.)

2. Facts Required to be Stated and Manner of Statement; Information and Belief.

174. Every fact which, if controverted, plaintiff must prove to maintain his action, must be stated in the complaint. (*Jerome v. Stebbins*, 14 Cal. 457.)
Cited 26 Cal. 21; 28 Cal. 547; 3 Nev. 565.

175. The forms alone of the several actions have been abolished by statute, but the substantial allegations of the complaint in a given case must be the same under our practice as are required at common law. (*Miller v. Van Tassel*, 24 Cal. 458.)
Cited 1 Idaho, N. S., 267; 1 Utah, 286.

176. Under our practice, whichever ground of recovery the pleader adopts, his complaint must contain the same allegations of fact as were required at common law. (*Miller v. Van Tassel*, 24 Cal. 458.)

177. Under the Practice Act, while the mere forms of proceedings are simplified, all that is substantial in the body of the law is preserved, to give it certainty and logical conclusiveness as a science. (*Sampson v. Schaeffer*, 3 Cal. 196.)

178. The statute requiring the complaint to contain a statement of the facts constituting a cause of action, in ordinary and concise language, is only declaratory of the common law. (*Gladwin v. Stebbins*, 2 Cal. 103.)

179. Any pleading is sufficient in form which properly states the facts essential to recovery under our system of practice. (*Stanwood v. Sage*, 22 Cal. 516.)

180. Under our system of pleading, it is only necessary that the cause of indebtedness should be stated in such manner as to apprise the defendant of the object of the suit. (*Muliken v. Hull*, 5 Cal. 245.)

181. A complaint need only state the cause of action in ordinary and concise language; and if the facts alleged and proved are such as to entitle the plaintiff to relief under any of the recognized forms of action at common law, they are sufficient as the basis of relief, whatever it may be. (*Rogers v. Duhart*, 97 Cal. 500.)

182. Defendant is entitled to a distinct averment in the complaint of the facts which the plaintiff claims to exist, and if the averments are in the alternative, the complaint is ambiguous, even if either averment states a cause of action. (*Jamison v. King*, 50 Cal. 132.)

Cited 2 Idaho, 293.

Statute prescribing form of complaint. See Streets, 619, et seq.

Power of legislature to prescribe form of complaint. See Taxation, 612.

Allegations as to adverse claim on information and belief. See Watercourses, 403.

Allegations on information and belief in action on note. See Bills and Notes, 364.

Information and belief, complaint on in slander. See Slander, 20.

Allegation in complaint on information and belief. See Quieting Title, 103.

Information and belief, when insufficient. See Certiorari, 153.

Information and belief, affidavit on. See ante, VIII, 14; Contempt, 101.

Denials on information and belief. See post, IX, 11.

3. Matters of Inducement.

183. Matter of inducement leading up to the written contract upon which the cause of action is based does not render the complaint ambiguous, uncertain, or unintelligible. (*Henke v. Eureka Endowment Assn.*, 100 Cal. 429.)

4. Anticipating Defenses in Complaint.

184. Presumption against pleader does not require him to anticipate matters of defense. (*Jaffe v. Lillenthal*, 86 Cal. 91.)

185. The presumption against the pleader does not require the plaintiff to anticipate matters of defense, or to negative the existence of all other facts whatsoever. The court will not presume the existence of a novation, or an accord and satisfaction, or other collateral arrangement. (*Woodrooff v. Howes*, 88 Cal. 184.)

186. A complaint, which, after stating a good cause of action, proceeds to anticipate an expected defense, violates a plain rule of pleading, and is liable to a special demurrer for ambiguity and uncertainty; but the objection cannot be raised upon general demurrer. (*Munson v. Bowen*, 80 Cal. 572.)

187. Only object to be gained by a plaintiff in anticipating a defense and replying to it in advance is to put the adverse party upon his oath without making him a witness, and the effect of allowing this would be to establish a

system of discovery in conflict with the spirit of the statute. (*Canfield v. Tobias*, 21 Cal. 349.)
Cited 97 Cal. 346; 6 Mont. 385.

188. The complaint stated a cause of action for goods sold, and, in addition, with a view to meet a probable defense of payment based upon the giving of certain notes by defendant and a receipt in full by plaintiff, stated the making of the notes and receipt and alleged facts attending the transaction which, if true, avoided its effect as payment by reason of fraud and misrepresentation on the part of defendant. The answer admitted the original demand and averred payment by the notes referred to in the complaint, but did not deny in proper form the allegations in the complaint respecting the fraud of defendant in the transaction. The case was submitted on the pleadings, and plaintiff had judgment. Held, that the judgment was erroneous; that the allegations of the complaint in reference to the transaction claimed to operate as payment were not material allegations requiring a denial, and were not, therefore, admitted by the failure of defendant to deny them. (*Canfield v. Tobias*, 21 Cal. 349.)
Cited 33 Cal. 128.

Allegations to meet anticipated defense need not be denied. See post, IX, 12.

Anticipating defense. See *Fraudulent Conveyances*, 220; *Rescission of Contracts*, 126.

Matters of defense need not be alleged in complaint. See *Taxation*, 632.

5. Signature to Complaint.

189. A judgment is not void or erroneous, because the name of the plaintiff's attorney attached to the complaint is printed instead of being written. (*Hancock v. Bowman*, 49 Cal. 413.)
Cited 76 Cal. 611.

Signing complaint after attachment issued. See *Attachments*, 8.

Attorney may sign petition in insolvency. See *Bankruptcy and Insolvency*, 104, et seq.

Attorney need not subscribe complaint. See *Justices of the Peace*, 68.

6. Separate Counts in Complaint.

190. The statement of a cause of action in several counts, instead of embodying it in one, does not, of itself, render a complaint ambiguous and uncertain or open to a general demurrer. (*Demartin v. Albert*, 68 Cal. 277.)
Cited 96 Cal. 605.

191. Under our code, which provides that the complaint must contain "a statement of the facts constituting a cause of action in ordinary and concise language," the plaintiff may set them out in two separate forms, when there is a fair and reasonable doubt of his ability to safely plead them in one mode only. (*Wilson v. Smith*, 61 Cal. 209.)

192. In an action for work and labor, the complaint contained two counts, one upon an agreement to pay an agreed price, and the other upon the quantum meruit; and, the plaintiffs' counsel having stated that the work mentioned in both counts was the same, the defendants moved the court to require

the plaintiffs to elect on which count they would proceed to trial; and the court denied the motion. Held, there was no error. (*Wilson v. Smith*, 61 Cal. 209.)

193. It is a slovenly mode of pleading, which should not be tolerated, to aver, in subsequent counts, that certain paragraphs of the first count are true. Each count of a complaint must state a cause of action, and be complete in itself, without reference to any other count. But if separate counts are not necessary, a cause will not be reversed on this ground. (*Pennie v. Hildreth*, 81 Cal. 127.)

Cited 94 Cal. 52; distinguished 94 Cal. 497.

Prayer, where complaint contains several counts. See post, VIII, 9.

Failure to state causes of action separately. See post, 206, 220.

Separate causes of action, how stated. See *Joinder and Severance of Actions*, I, 2, a.

Uniting claims, separate statements, sufficiency of. See *Mechanics' Liens*, 331.

Separate counts, repetition and reference. See *Corporations*, 293.

Separation of counts, reference to first count. See *Mechanics' Liens*, 330.

Each count must be complete in itself. See *Marriage and Divorce*, 123.

Complaint alleging inconsistent causes of action. See *Landlord and Tenant*, 12.

7. Allegation of Facts Showing Turpitude, Effect of.

194. Where the facts, averred by plaintiff as constituting his cause of action, show turpitude on his part, he states himself out of court. (*Abbe v. Marr*, 14 Cal. 210.)
Cited 15 Cal. 415; 34 Cal. 90; 60 Cal. 441; 14 Nev. 183.

Complaint showing cause of action against public policy. See post, 206.

8. Complaint on Written Instrument.

195. In suit upon an agreement under seal, the complaint setting out the agreement in *hæc verba* need not aver any consideration for the agreement. The seal imports a consideration. (*Wills v. Kempt*, 17 Cal. 98.)
Cited 80 Cal. 613.

196. A written contract may be declared on according to its legal effect, or it may be set forth in *hæc verba*. If declared on according to its legal effect, the defendant may, by the rule of the common law, in a proper case, craveoyer of the instrument, and if it appear that its provisions have been misstated, he may set out the contract in *hæc verba*, and demur on the ground of the variance. (*Stoddard v. Treadwell*, 26 Cal. 294.)

Cited 32 Cal. 649; 34 Cal. 175; 37 Cal. 253; 38 Cal. 603; 80 Cal. 613; 82 Cal. 657; 7 Mont. 234.

197. If a complaint be based upon a written contract, a correct copy of which is attached to and made a part of the complaint, and if the averments of the complaint put a false construction in law upon the terms of the contract, the complaint will not for that reason be bad, but the erroneous allegations will be regarded as surplusage. (*Stoddard v. Treadwell*, 26 Cal. 294.)

Admission by failure to deny contract attached to complaint. See post, IX, 19.

Setting out contract in *hæc verba*. See Sales, 263.

Making contract part of complaint. See Counties, 131.

Exhibit of note annexed to complaint. See Bills and Notes, 381.

9. Prayer of Complaint.

198. Section 39 of the Practice Act requires the complaint to contain "a demand of the relief which the plaintiff claims." The policy is to require the plaintiff to apprise the party of the extent of the judgment he demands. For this purpose the prayer is sometimes significant. (*Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.)

199. Court will not resort to rules of construction to determine the species of relief demanded. (*Bigelow v. Gove*, 7 Cal. 133.) Cited 37 Cal. 304.

200. If the relief prayed for is appropriate to the facts alleged, the defendant has a right to assume that the case will be tried in accordance with the theory of the prayer; and where the case is so tried, it would work injustice to allow the prayer for relief to be amended after verdict by inserting a prayer for other and different relief, that might be brought within some of the issues without regard to the question as to whether such issues were actually tried and determined. (*Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.)

201. If complaint contains two independent counts, each complete within itself, and concluding with its own appropriate prayer for relief, and separately signed by counsel, the prayer to the second count will not be deemed to have any reference to the first, and on a verdict on the first count only, the relief granted will follow the prayer of that count. (*Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.)

202. Objections to the prayer of a complaint cannot be taken by demurrer. If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes may be had under the clause in the prayer for general relief, and, even in the absence of such clause, where an answer is filed. (*Rollins v. Forbes*, 10 Cal. 299.) Cited 15 Cal. 495; 38 Cal. 234; 71 Cal. 37.

203. The prayer of a complaint is not subject of demurrer. (*Althof v. Conheim*, 38 Cal. 230.) Cited 71 Cal. 37; 2 Mont. 309.

Prayer of complaint, amendment of. See post, XI, 13.

Relief authorized under prayer. See post, XX, 15.

Prayer for relief in petition for sale. See Estates of Deceased Persons, VII, 4, e, D.

Prayer of complaint questioning sufficiency. See Attachments, 11.

10. Objections to Complaint, How and When Taken.

204. If a complaint fails to state facts sufficient to constitute a cause of action, advantage may be taken of the defect by demurrer, by motion for judgment on the pleadings, or

upon motion for a new trial. (*Kelley v. Kriess*, 68 Cal. 210.)

205. The complaint, on its face, must show that the plaintiff has the better right, and the objection that it does not state facts sufficient to constitute a cause of action may be taken at any stage of the controversy. (*Rogers v. Shannon*, 52 Cal. 99.)

206. If several causes of action in a complaint are not separately stated, or if a cause of action stated is against public policy, the defects cannot be taken advantage of by a motion to dismiss the action, or by a motion for judgment on the pleadings. (*Watson v. San Francisco etc. R. R. Co.*, 50 Cal. 523.) Cited 68 Cal. 212.

207. When a demurrer to the complaint, on the ground of a misjoinder of parties plaintiff (or other ground which would be waived if not taken in time), has been overruled, the objection cannot be again taken on the trial, but the case must proceed on its merits, so far as such objection is concerned. (*Tenant v. Pfister*, 45 Cal. 270.)

208. On the trial no objection to the complaint is open to inquiry, except the want of jurisdiction, or that it does not state facts sufficient to constitute a cause of action. (*Tennant v. Pfister*, 45 Cal. 270.)

209. Entire absence of an averment which is essential to a cause of action is at any time available to the defendant. (*City and County of San Francisco v. Pennie*, 93 Cal. 465.)

210. If complaint do not show good cause of action, the judgment will be reversed, though no objection be taken below. (*Russell v. Byron*, 2 Cal. 86.) Cited 37 Cal. 228.

Failure to object cures defect when there is not entire want of allegations. See ante, 102.

Objection that complaint does not state cause of action may be first taken on appeal. See post, IX, 7.

Waiving of insufficiency. See Fraud, 121, et seq.

Defect in complaint must be taken advantage of by special demurrer. See Quo Warranto, 14.

Objection for insufficiency must be raised by demurrer. See Fraud, 120.

Complaint claiming more damages than one entitled to is not ground of reversal. See Appeals, 2468.

Misnomer of court in complaint. See Contempt, 135.

Supplemental cross-complaint, objection to must be taken below. See Appeals, 2323.

11. Bill of Particulars.

211. A count in a complaint for a sum of money alleged to be due by the defendant, for the use and occupation of the plaintiff's land, does not present a claim upon which a bill of particulars can be required. (*Moore v. Bates*, 46 Cal. 29.)

212. It is too late to object at the trial that a bill of particulars is not properly verified by the oath of the party. The party upon whom a bill of particulars is served, if he is not satisfied with it, either because it is defective in

form or substance, or because it is not verified by the plaintiff, should immediately return it, or move the court for a further or amended bill. (*Dennison v. Smith*, 1 Cal. 437.)

Cited 82 Cal. 637; 11 Or. 516; 3 Wash. 774.

213. If bill of particulars is too general, the party receiving it should obtain an order for further particulars of the account. If he does not he cannot proceed as if no bill of particulars was rendered. (*Providence Tool Co. v. Prader*, 32 Cal. 634.)

Cited 74 Cal. 73; 77 Cal. 186; 3 Wash. 774.

214. The plaintiff is only required to furnish a correct copy of his books of account in a bill of particulars when demanded pursuant to section 454 of the Code of Civil Procedure. The truth of the items of the account is the very point in issue, and the penalty of being precluded from giving evidence of the account only applies where the party of whom the copy of the account is demanded in writing refuses to furnish the same. (*Graham v. Harmon*, 84 Cal. 181.)

215. When the bill of particulars furnished in an action upon an account contains certain erroneous charges and credits which constitute an offset to each other, it is proper to allow the plaintiff to explain the items in the bill of particulars, and to show that such charges and credits grew out of the blending of several distinct accounts in one by mistake. (*Graham v. Harmon*, 84 Cal. 181.)

216. If a complaint in an action to recover money for legal services is general in its language, and the defendant demands and receives a bill of particulars, he cannot object to the admission of evidence under it. (*Tompkins v. Mahoney*, 32 Cal. 231.)

Cited 77 Cal. 186.

217. After the plaintiff had, on the demand of the defendants, served a bill of particulars, and, under an order of the court, had furnished the defendants a further account in writing of the items of the plaintiff's claim, the defendants, without asking an order for a still further account, moved the court for an order that the plaintiff be precluded from giving any evidence in support of his complaint, which motion was denied. Held, an order precluding a party from giving evidence in support of his claim is proper only where such party has failed or refused to deliver to the adverse party on demand a copy of his account; and that the motion in this case was properly denied. (*Hart v. Spect*, 62 Cal. 187.)

Cited 96 Cal. 671.

218. To suit on a note, defendant, in general terms, without items, set up an account for work and labor, and for money paid, etc. Plaintiff asked for a copy of the account, which defendant furnished. Plaintiff gave notice that he would move the court "for a further account of particulars, etc." and on hearing the court ordered that "defendant furnish said further bill," which he did. On the trial plaintiff offered his note and rested. Defendant offered evidence of the account set up in the answer, to which plaintiff objected, on the ground that "defendant had not furnished an additional bill of particulars," and the court ruled out the evidence.

Held, that the court erred (1) because the order for a further account was defective, in not stating the particulars in reference to which a further specification was required; and because, (2) if the bill of particulars delivered under the order of the court was not satisfactory, and plaintiff intended to object to any evidence upon the subject, he should have obtained, previous to the trial, an order excluding such evidence. (*Conner v. Hutchinson*, 17 Cal. 280.)

Cited 3 Wash. 774.

219. Without an order before the trial excluding evidence of the account in such cases the court cannot on the trial exclude it. (*Conner v. Hutchinson*, 17 Cal. 280.)

220. If complaint contains several counts, on one of which a bill of particulars cannot be required, and the defendant demands a bill of particulars, which is not given, the court should not, on the trial, exclude evidence on the count on which a bill of particulars was not required. (*Moore v. Bates*, 46 Cal. 29.)

12. *Replication to New Matter Contained in Answer.*

221. New matter set up as a defense is deemed denied. (*Jones v. Throckmorton*, 57 Cal. 368, 386.)

222. The plaintiffs must be considered to have pleaded any new matter in avoidance of a counterclaim or affirmative defense set up in the answer, and may give evidence of such matter in avoidance. (*Grangers' Business Association of California v. Clark*, 84 Cal. 201.)

Cited 97 Cal. 346.

223. Under the statute the affirmative allegations of an answer stand controverted by the plaintiff, and the burden is on the defendant to prove the truth of such allegations. (*Bryan v. Maume*, 28 Cal. 238.)

Cited 94 Cal. 172.

224. Replication traversing new matter alleged in answer is unnecessary, and has no place in our system of pleading; but such new matter must, on trial, be deemed controverted by the opposite party. (*Grangers' Business Association v. Clark*, 84 Cal. 201.)

225. Under our system of pleading, the plaintiff is not required to reply to any new matter or affirmative defense set up in the answer, but may meet it by any competent proof. (*Rankin v. Sisters of Mercy*, 82 Cal. 88.)

226. A plaintiff need not reply to any affirmative matter set up in defense, or by way of avoidance or counterclaim. (*Doyle v. Franklin*, 40 Cal. 106.)

227. If the pleadings are under oath, and the replications in response to a material averment of the answer undertake to deny, by saying "It is not true," etc., the replication is evasive and does not specifically deny the averment. (*Verzan v. McGregor*, 23 Cal. 339.)

New matter, controverting. See Evidence, IX, 7.

Replication on application for letters of

administration. See Executors and Administrators, 1, 2.

Replication, statute does not require. See Mandamus, 230.

Plea of statute of limitations is deemed replied to. See Statute of Limitations, 356, et seq.

New matter in answer is deemed denied. See Evidence, 462, 463.

Matter of confession and avoidance deemed controverted. See Replevin, 76.

IX. Pleadings on Part of Defendant.

1. Time to Answer.

228. The Practice Act allows a party ten days after the service of the summons to file his answer if served in the county, twenty days if out of the county but within the judicial district, and forty days in all other cases. A nonresident of the state would come under the last clause, and be entitled to forty days after the service of the summons. (*Grewell v. Henderson*, 5 Cal. 465.)

229. The second subdivision of the twenty-fifth section of the Practice Act, requiring the defendant to appear within twenty days after the service of a summons, had no application to the superior court of the city of San Francisco, because its jurisdiction was confined to the county of San Francisco. (*McCauley v. Fulton*, 44 Cal. 355.)

230. An answer filed without leave of court after the time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity. (*Bowers v. Dickerson*, 18 Cal. 420.)
Cited 45 Cal. 463; 90 Cal. 220.

231. Pendency of motion "to dismiss, vacate, and set aside the pretended service of summons and copy of complaint," does not extend the time specified in the summons for answering. (*Shinn v. Cummins*, 65 Cal. 97.)
Cited 78 Cal. 259.

232. The Practice Act provides, in relation to service on nonresidents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication." Held, that the publication only affects the service of the summons, and the defendant is entitled to forty days after the period of publication to file his answer. (*Grewell v. Henderson*, 5 Cal. 465.)
Cited 6 Cal. 213.

233. The continuance of the publication of the summons in the newspaper beyond the required time does not operate to extend the time to answer beyond the periods fixed by the order of publication and the statute. (*Anderson v. Goff*, 72 Cal. 65.)

234. The court, in its discretion, may strike out an answer so filed, or retain it, or permit another to be filed; but plaintiff cannot, as of right, have such answer struck out. For these purposes, defendant is not in default until his default has been actually entered in accordance with the statute. (*Bowers v. Dickerson*, 18 Cal. 420.)

235. The statute having declared that the defendant "may file his answer at any time before the judgment is made final," held, that

it was not a matter resting in the discretion of the district court whether he should be permitted to file an answer after default but before final judgment. (*Stevens v. Ross*, 1 Cal. 94.)

236. A motion by the defendant to dismiss the action does not extend the time to answer; and a refusal to set aside a default entered pending such a motion is not an abuse of discretion. (*McDonald v. Swett*, 76 Cal. 257.)

237. Although the code does not require an order extending time to answer to be filed or served, yet the more correct practice is to file and serve it. (*Swift v. Canovan*, 47 Cal. 86.)

238. When a demurrer is overruled, with leave to answer, it is not necessary that the order fix the time within which the answer must be filed. The court has power to fix such time for answering as it may deem proper; but where no time is fixed, the defendant should answer within the same time as in case of a service of a copy of the original complaint. (*People v. Rains*, 23 Cal. 127.)

Extension because of inability to obtain verification. See ante, 135.

Filing answer after entry of default. See Default, VII.

Time to answer. See Default, VI, 1.

Extension of time to answer, last day falling on Sunday. See Time, 5.

Filing answer nunc pro tunc. See Parties, 80.

Oral extension of time to answer. See Stipulations, 11.

Mistake as to time to answer, setting aside default for. See Default, 183, et seq.

2. Serving and Filing of.

239. Under no circumstances is the discretion of the court as to striking out pleadings to be exercised arbitrarily, but it is a discretion governed by legal rules to do justice according to law, or to the analogies of law, as near as may be. It must be exercised within the limitations above stated to promote substantial justice in the case. Held, accordingly, that it was error in the court to strike out an answer filed in time, but not served until two days afterwards. (*Lybecker v. Murray*, 58 Cal. 186.)

240. On a suit to foreclose a mortgage, where one claiming a lien is made a party defendant, and such defendant, in his answer, prays affirmative relief against his codefendant, but never serves the answer on his codefendant, it is error to give judgment in his favor against his codefendant, and decree the same to be a lien on the premises after paying the plaintiff. (*Hibernia Sav. and Loan Soc. v. Fella*, 54 Cal. 598.)

No service necessary where attorney lives out of county. See post, X, 8.

241. If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made. (*Mulford v. Estudillo*, 32 Cal. 131.)

3. Pleas Allowed Defendant.

See Abatement.

242. Wherever the subject matter of the

plea or defense is that the plaintiff cannot maintain any action at any time, whether present or future, in respect of the supposed cause of action, it may, and usually must, be pleaded in bar; but one which merely defeats the present proceeding and does not show that the plaintiff is forever concluded should in general be pleaded in abatement. (*Primm v. Gray*, 10 Cal. 522.)

243. Under section 46 of the code there are only two classes of defense allowed. The first consists of a simple denial and the second of the allegation of new affirmative matter. And as the code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense, these two classes of defense must be the same in all cases. (*Piercy v. Sabin*, 10 Cal. 22.)

244. The intention of the code is to adopt the true and just rule that the defendant must either deny the facts as alleged or confess and avoid them. (*Piercy v. Sabin*, 10 Cal. 22.)

Waiver of defense in abatement by failure to plead. See *Estates of Deceased Persons*, 237.

Appeal, review of order allowing new plea or answer. See *Appeals*, XI, 13, d.

General denial. See post, IX, 16.

4. Form of Denial.

245. An answer which commences by stating that the defendant for answer says he denies, etc., is in form of expression unexceptional, and the court will not call in question the fact of denial. (*Espinosa v. Gregory*, 40 Cal. 58.)

General denial, where complaint verified. See post, IX, 11.

Stipulation taking place of denials in answer. See *Stipulations*, VII.

5. Answer Should be Explicit and Clear, and Set up True Nature of Defense.

246. Before entering on trial of action, plaintiff is entitled to explicit denial of the material allegations of the complaint, or an admission of their truth, either by direct statement or by silence; and it is the duty of the court to enforce this right. (*Gay v. Winter*, 34 Cal. 153.)
Cited 35 Cal. 646.

247. Defense should be so pleaded that, being admitted as pleaded, judgment must go for the defendant, and this rule is especially rigid in pleading fraud or a forfeiture. (*Greiss v. State Investment etc. Co.*, 98 Cal. 241.)

248. Though answer may not be a model, still if, by denials and affirmative averments, it sets forth enough to entitle the defendants to a trial to the merits, a demurrer to it should be overruled. (*Wilcox v. Hausch*, 57 Cal. 139.)

249. Defendant should set forth true nature of his defense in his answer, and, in case he does not, should not be permitted to insist upon it. (*Walton v. Minturn*, 1 Cal. 382.)
Cited 10 Cal. 30.

6. Where Allegations of Complaint are Conjunctively Stated.

Complaint containing several counts. See post, IX, 7.

250. If several averments in a complaint are conjunctively stated, an answer attempting to deny them by repeating them in their conjunctive form does not raise an issue. (*Reed v. Calderwood*, 32 Cal. 109.)

251. Where several allegations of a complaint are connected by the conjunction "and," a denial in the answer of these allegations, conjunctively, does not amount to a denial of the allegation to which the defendant professes to respond. (*Fitch v. Bunch*, 30 Cal. 208.)

252. If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, as conjunctively stated, is evasive, and an admission of the allegation thus attempted to be denied. (*Fish v. Redington*, 31 Cal. 185.)

Cited 31 Cal. 469; 32 Cal. 110; 6 Mont. 9; 2 N. Mex. 373.

253. Where certain allegations in a verified complaint are compound, embracing several particulars, and are denied as a whole, in the language of the complaint, the allegations will be taken as admitted. (*Blood v. Light*, 31 Cal. 115.)

Cited 38 Cal. 290.

254. If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny these averments as a whole, conjunctively stated, is evasive, and an admission of the allegations thus attempted to be denied. (*Doll v. Good*, 38 Cal. 287.)

255. If an allegation of a complaint consists of several clauses or propositions connected by the copulative conjunction "and," a denial of the entire allegation is evasive and insufficient. Each proposition should be separately denied. (*More v. Del Valle*, 28 Cal. 170.)

256. Where an allegation in a verified complaint embraces several distinct propositions, stated conjunctively, a denial, in the answer, of the entire allegation, following the language of the complaint, is insufficient and raises no issue. (*Woodworth v. Knowlton*, 22 Cal. 164.)

Cited 5 Mont. 100; 5 Or. 449; 7 Utah, 161, 162.

Conjunctive denials. See *Mortgages*, 626; *Replevin*, 64.

Literal and conjunctive denials insufficient. See *Mortgages*, 627.

7. Where Complaint Contains Several Counts, or Allegations in Count are Inconsistent.

257. If complaint contains more than one count, and one of counts does not state cause of action, the answer need not deny the allegations of such count, and objections may be made to it for the first time in the supreme court. (*Haskell v. Moore*, 29 Cal. 437.)

258. If complaint contains two counts, and answer takes issue on allegations of one only, plaintiff is entitled to judgment on the other. (*Leffingwell v. Griffing*, 31 Cal. 231.)

259. A plea, professing to answer the whole complaint, but in fact only answering one of the two counts, is bad. This was the rule at common law, and it applies under our sys-

tem. (*Wallace v. Bear River W. & Min. Co.*, 18 Cal. 461.)

260. If the plaintiff places inconsistent allegations in the same count of his complaint, and the defendant does not choose to demur for uncertainty, it is sufficient for him to deny the allegation which he wishes to controvert, leaving the other unnoticed. (*Perkins v. Brock*, 80 Cal. 320.)

8. Answer of One Defendant for Another.

261. One defendant cannot answer for another who does not join in the answer; and an allegation in the answer of one defendant that a codefendant is working the mine in controversy as an employee may be stricken out as surplusage. (*Wheeler v. West*, 78 Cal. 95.)

9. Denials in Language of Complaint.

262. A denial that property sued for is of exact value alleged in complaint is an admission of any lesser value. (*Towdy v. Ellis*, 22 Cal. 650.)

263. Where answer denied allegations of indebtedness as to time, amount, and work in the very words of the complaint, held, that the answer raised an immaterial issue upon these particulars, instead of meeting the substantial matter averred. (*Caulfield v. Sanders*, 17 Cal. 569.)
Cited 4 Or. 290; 5 Or. 449; 7 Utah, 162.

264. Where the complaint, verified, avers that defendant is indebted to plaintiff for goods, wares, and merchandise, sold and delivered, in the sum of eight hundred and twenty-eight dollars and sixteen cents, and the answer denies that defendant is indebted in the sum of eight hundred and twenty-eight dollars and sixteen cents, as is set out in said complaint, held, that the denial is insufficient. (*Higgins v. Wortell*, 18 Cal. 330.)
Cited 21 Cal. 218; 22 Cal. 168; 32 Cal. 175; 38 Cal. 290; 45 Cal. 553; 7 Mont. 579; 1 Utah, 223.

265. If the complaint avers that the defendant is indebted to the plaintiff in the sum of three thousand dollars gold coin, for so much money received by defendant for plaintiff's use, and the answer denies that defendant received three thousand dollars in gold coin for plaintiff's use, it is only a denial of its receipt in gold coin, and does not raise an issue. (*Leffingwell v. Griffing*, 31 Cal. 231.)
Cited 4 Or. 289.

266. A denial of value of property sued for in terms of allegation is evasive, and in fact no denial at all. (*Marsters v. Lash*, 61 Cal. 622.)

267. The allegation of a complaint that M., at the time of his death, owned and was in possession of twenty-two head of work-oxen, each worth seventy-five dollars, is not put in issue by a denial "that M., at the time of his death, was in the possession of, or the owner of, twenty-two head of work-oxen, worth seventy-five dollars per head." On the contrary, it is evasive, and equivalent to an admission of the allegation. (*Doll v. Good*, 38 Cal. 287.)

268. An allegation in a sworn answer that

"on the twenty-fourth day of March, 1862, the said French and Robinson, by deed duly executed, acknowledged, and recorded, conveyed said premises to this defendant for the sum of seven thousand seven hundred and fifty dollars," is not denied by a statement in the replication that "the plaintiffs further deny that said French and Robinson, or either of them, conveyed said premises to the defendant for the sum of seven thousand seven hundred and fifty dollars, or for any other sum." Such denial is a mere denial that French and Robinson conveyed the premises, without denying the facts which constitute the conveyance; besides, it does not deny the conveyance—the material fact—but only a conveyance for a consideration. Under such denial the party making the averment is not required to offer his deed in evidence on the trial. The allegation of the answer is deemed admitted under the provisions of the statute. (*Landers v. Bolton*, 28 Cal. 393.)
Cited 28 Cal. 172; 29 Cal. 191; 31 Cal. 195; 38 Cal. 290; 2 Idaho, 319; 4 Or. 290.

269. If the complaint alleges that an act was wrongfully and maliciously done, a denial in the answer that it was wrongfully and maliciously done does not put in issue the doing of the act. (*Kinsey v. Wallace*, 36 Cal. 463.)

270. If the complaint avers that the defendant wrongfully broke down the plaintiff's flume for carrying water, and the answer denies that the defendant, wrongfully or otherwise, broke down the flume, it is an admission that the defendant broke down the flume, and only a denial of its wrongful character. (*Feely v. Shirley*, 43 Cal. 370.)

271. If the complaint alleges that the defendant wrongfully and unlawfully entered upon a building and closed up several windows, a denial in the answer that the defendant wrongfully and unlawfully entered upon the premises and closed up the windows is an admission that the defendant closed the windows. (*Larney v. Mooney*, 50 Cal. 610.)
Cited 7 Utah, 162.

272. Where the complaint avers that the defendant wrongfully and unlawfully took and carried away personal property, and the answer denies that defendant wrongfully and unlawfully took and carried it away, it is a confession of the taking and carrying away, and a denial merely of its wrongful character. (*Lay v. Neville*, 25 Cal. 545.)
Cited 9 Or. 489.

273. Where the form of the allegation was that defendant "unlawfully and wrongfully seized and took said property into his possession from said plaintiff," and the denial was "that he (defendant) wrongfully and unlawfully seized, took, or carried away the said property," held, that the fact that defendant took the property from the plaintiff was not denied, but admitted. (*Woodworth v. Knowlton*, 22 Cal. 164.)
Cited 26 Cal. 418; 38 Cal. 290; 7 Utah, 161, 162.

274. One of the allegations of the complaint was that "the defendant fraudulently transported plaintiff into Kern county for the purpose of having her served with a copy of the summons and complaint." The answer to

which was as follows: "Defendant denies, and it is not true, that he fraudulently transported plaintiff into Kern county for the purpose of having her served with a copy of the complaint and summons in said aforesaid action." Held, to be a palpable evasion of the substance of the charge which it pretended to answer. (*De Godey v. Godey*, 39 Cal. 157.)

275. In equity, general denials, made by traversing literally and conjunctively the statements of a sworn bill, are not legitimate for the purpose of putting in issue specific allegations; for, in this way, a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge or even the substantial fact. (*Blankman v. Vallejo*, 15 Cal. 638.) Cited 7 Utah, 162.

Denials of the literal truth are insufficient. See post, 291.

Negative pregnant. See Bills and Notes, 393; Ejectment, 193, 194; Insurance, 138; Taxation, 645, 646.

Denial in language of complaint. See Forcible Entry and Unlawful Detainer, 186; Mechanics' Liens, 347; Replevin, 65, et seq.

Negative pregnant in ejectment. See Ejectment, 194.

Negative pregnant in action for damages. See Damages, 100.

Negative pregnant in action for dividend. See Corporations, 332.

Negative pregnant in suit to recover money paid under duress. See Taxation, 566.

Answer in language of complaint, when not an admission. See Mines and Mining, 273, 274.

Denial by repeating conjunctive allegations in their conjunctive form. See ante, 256.

10. Sham and Evasive Answers.

276. A sham answer is one good in form, but false in fact, and not plead in good faith. It sets up new matter which is false. (*Piercy v. Sabin*, 10 Cal. 22.) Cited 18 Cal. 388; 57 Cal. 287; 4 Or. 95.

Sham answer, definition of. See post, 286. What are. See ante, 118, 129.

277. In a case where a general denial may be interposed, if the pleader does not plead it, but resorts to specific denials, such specific denials must be actual denials, and not evasive. (*Marsters v. Lash*, 61 Cal. 622.)

278. In order to determine whether denials of answer are evasive, each separate denial of each separate allegation must be taken by itself. If the answer to a particular allegation is a denial of it, and there is no admission in the answer inconsistent with this denial, an issue is fairly made. (*Racouillat v. Rene*, 32 Cal. 450.)

279. Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial cannot be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on an application of the plaintiff. (*Fay v. Cobb*, 51 Cal. 313.) Cited 57 Cal. 288.

280. An answer verified by defendant, and setting up sufficient defense, cannot be

stricken out as sham, whether such answer consists of denials or sets up an affirmative defense. (*Greenbaum v. Turrill*, 57 Cal. 285.) Cited 58 Cal. 188.

281. Answer, though unverified, containing denials of material allegations of the complaint, cannot be stricken out as sham and irrelevant. (*Lybecker v. Murray*, 58 Cal. 186.)

Cited 59 Cal. 482.

282. A plea of the statute of limitations in an unverified answer to a complaint of foreclosure of a mortgage is properly stricken out as sham, where it appears from the copies of the note and mortgage set out in the complaint that the action was commenced within four years after the maturity of the note. (*Bank of Shasta v. Boyd*, 99 Cal. 604.)

283. In verified answer evasion of controlling fact in issue is strong circumstance against the defendant. (*Baker v. Baker*, 13 Cal. 87.)

284. Whether fiftieth section of the Practice Act relating to the striking out of sham answers applies to any but affirmative defenses, query? (*Gostoris v. Taaffe*, 18 Cal. 385.)

285. When plaintiff moves on affidavit to strike out a defense as "sham," the affidavit of defendant that his defense is bona fide will defeat the motion. (*Gostoris v. Taaffe*, 18 Cal. 385.)

286. Plaintiff sued on a note made by defendants to his order, the complaint not being verified, but setting out the note. Defendants plead payment. Plaintiff, on affidavits that the plea was false and plead in bad faith, moved to strike out the answer and for judgment. Granted. Held, that the action of the court was right; that, under the fiftieth section of the Practice Act, "sham" answers and defenses are such as are good in form but false in fact, and pleaded in bad faith; and that such answers, when consisting of affirmative defenses, should be stricken out. (*Gostoris v. Taaffe*, 18 Cal. 385.) Cited 32 Cal. 574; 57 Cal. 291; 14 Col. 69; 4 Or. 95.

Denial in language of complaint is evasive. See ante, 286.

Denial of conjunctive allegations as a whole. See ante, IX, 6.

Sham allegations. See Venue, 98.

Sham answer in action on note. See Bills and Notes, 392.

Striking out sham answer. See ante, VII, 12; Replevin, 73.

Answer, when sham and may be stricken out. See Bills and Notes, 397.

Evasive answer. See Streets, 642, et seq.

F frivolous answer, what is. See Judgments, 168.

Denial in good faith. See Supplementary Proceedings, 23, et seq.

11. Denial Where Complaint Verified; Denial on Information and Belief.

287. The omission of the words "when it is verified," in the act of 1860 amending the sixty-fifth section of the Practice Act, is a mere clerical mispision. The amendment by the act of 1860 to this section, and also to section 46, was not designed to change the char-

acter of answers, or to abolish any distinction between those verified and those not verified. (*Skirm v. Farrand*, 18 Cal. 314.)

288. There are but two forms in which defendant can controvert the allegations of a verified complaint. (1) Positively, when the facts are within his personal knowledge, and (2) upon information and belief, when they are not. (*Curtis v. Richards*, 9 Cal. 33.) Cited 9 Cal. 473; 10 Cal. 232; 13 Cal. 371; 25 Cal. 196; 100 Cal. 488.

289. An answer is fatally defective if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief, the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice, and cannot have any legal effect. (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.) Cited 100 Cal. 489; 6 Col. 308.

Waiver of verification does not dispense with specific denial. See ante, 163.

290. An answer to a verified complaint, which undertakes to deny material allegations, should contain a specific denial to each allegation controverted. (*Fish v. Redington*, 31 Cal. 185.)

291. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and whenever the defendant fails to make such denial, he admits the averment. (*Blankman v. Vallejo*, 15 Cal. 638, cited 23 Cal. 168, 31 Cal. 194, 38 Cal. 290; *Doll v. Good*, 38 Cal. 287, cited 70 Cal. 583, 6 Mont. 9, 7 Cal. 578.)

292. A general denial in a verified answer is inadmissible, and may be stricken out on motion of the plaintiff. (*People v. Hagar*, 52 Cal. 171.)

293. If the complaint is sworn to, a general denial in the answer admits all its material allegations. (*Pico v. Colimas*, 32 Cal. 578.)

294. General and sweeping denial, though the answer is sworn to, is insufficient, where the complaint is verified. (*Dewey v. Bowman*, 8 Cal. 145.) Cited 8 Cal. 280.

295. Where a complaint is verified, an answer denying "generally and specifically each and every material allegation in the complaint, the same as if such allegation were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. (*Hensley v. Tartar*, 14 Cal. 508.) Cited 31 Cal. 195; 4 Or. 290.

296. A general denial of the averments of a verified complaint with the qualifications of "except as hereinafter admitted" is insufficient to put in issue any of its allegations. (*Levinson v. Schwartz*, 22 Cal. 229.)

297. When complaint is verified, answer which denies its allegations in conjunctive is insufficient. (*Leroux v. Murdock*, 51 Cal. 641.)

Conjunctive allegations in sworn complaint, denial of as a whole. See ante, IX, 6.

298. The Civil Practice Act does not require the answer to a verified complaint in an action in a justices' court to controvert specifically the material allegations of such complaint. It is sufficient if the answer deny the material allegations, either generally or specifically. (*Minturn v. Burr*, 20 Cal. 48.)

Denial of allegations of sworn bill literally. See ante, 275.

299. An answer that denies a material averment of a complaint "upon information and belief" is a sufficient denial to raise an issue thereon. (*Jones v. Petaluma*, 36 Cal. 230, cited 38 Cal. 163; *Roussin v. Stewart*, 33 Cal. 208, cited 36 Cal. 234, 38 Cal. 163.)

300. Where the pleadings are verified, and the answer, in response to a material allegation of the complaint, denies the same upon information and belief, the denial is insufficient. (*Nelson v. Murray*, 23 Cal. 338.) Cited 69 Cal. 87; 5 Wash. 663.

301. A specific allegation of a contract, in a verified complaint, is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same; and no evidence of the contract would be necessary. (*Ord v. Steamer Uncle Sam*, 13 Cal. 369.)

302. In a verified answer, a denial "upon" information and belief is sufficient. (*Kirstein v. Madden*, 38 Cal. 158.)

303. An allegation in an answer by an administrator, that the defendant "averts on information and belief that no such deed or deeds were ever executed," is a sufficient denial of an averment in the complaint that defendant's intestate executed and delivered the particular deeds referred to. (*Thompson v. Lynch*, 29 Cal. 189.) Cited 80 Cal. 322.

304. Denials in an answer that the defendant "has no knowledge or information sufficient to enable him to form a belief as to the truth of or to answer the allegation in said complaint contained," repeating the allegation, and "therefore he denies the said allegation, and the whole thereof," although imperfect, and not in conformity with the statute, will not be held fatally defective upon appeal, where it appears that the plaintiff treated them as creating an issue, and made no objection thereto upon the trial, and the court also so considered them in deciding the cause and granting a nonsuit. (*People v. Swift*, 96 Cal. 165.)

305. Where a material fact stated in a verified complaint is denied upon information and belief, the answer should state how it happened that the defendant is without knowledge as to the fact averred. (*Brown v. Scott*, 25 Cal. 189.) Cited 32 Cal. 607; 43 Cal. 397; 63 Cal. 314; 74 Cal. 300.

306. An answer placing a denial of an averment of the complaint on the ground of want of information sufficient to enable the defendant to answer the same, without also averring that they have no belief on the subject suffi-

cient to enable such answer, is not sufficient to raise an issue. (*Naftzger v. Gregg*, 99 Cal. 83.)

307. The motion in this case to strike out the answers, because denying on information and belief, and for judgment on the complaint, held, to be properly overruled. (*Comerford v. Dupuy*, 17 Cal. 308.)

308. In an action by an assignee of an account, an answer alleging that defendant has no information or belief sufficient to enable him to answer the allegations of a particular paragraph of the complaint, which contains the averment of the assignment, and for that reason denying all and singular the allegations contained in such paragraph, is sufficient to raise an issue as to the fact of the assignment. (*Read v. Buffum*, 79 Cal. 77.) Cited 100 Cal. 487.

309. To a complaint sworn to, on a promissory note payable in a sum certain, "in monthly pro rata installments, out of the first net proceeds from sale of water," and an allegation that defendants turned off the water from the ditch, the proceeds of the sales of which water were to be applied to the payment of the note, and thereby diminished the quantity, etc., the defendant answered by admitting the making of the note, but denied, "to the best of his knowledge, information, and belief, all and singular the other allegations in said complaint." Held, that such answer did not amount to a specific denial of the allegations of the complaint. (*Stewart v. Street*, 10 Cal. 372.)

310. Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz., "And the said defendants deny, for want of information to enable them to admit, the sale and transfer of said Georgia ditch to them, plaintiffs, as alleged," etc. (*Humphreys v. McCall*, 9 Cal. 59.) Cited 9 Cal. 473; 10 Cal. 232; 13 Cal. 371; 32 Cal. 607; 43 Cal. 397; 63 Cal. 314; 88 Cal. 150; 6 Col. 308.

311. The allegation of the death of plaintiff's ancestor, in a verified complaint, is not sufficiently controverted by the averment in the answer, "that defendant has not sufficient knowledge to form a belief, and therefore neither admits nor denies." (*Anderson v. Parker*, 6 Cal. 197.)

312. Defendant can know what is his belief, and can therefore state it. This belief may be founded on the statement of others, not competent witnesses, and not under oath, etc. Yet, if the defendant has formed a belief from this source, he must state it. He cannot be the judge as to whether his information is legal testimony. (*Humphreys v. McCall*, 9 Cal. 59.)

313. In no case can the allegation of a verified complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. (*Curtis v. Richards*, 9 Cal. 83.) Cited 74 Cal. 300.

314. Where the facts alleged in the complaint are presumably within the knowledge of the defendant, he must answer them posi-

tively; and a denial upon information and belief will be treated as evasive. This rule is as applicable to corporations and their officers as to natural persons. (*Loveland v. Garner*, 74 Cal. 298.)

Cited 88 Cal. 150; 100 Cal. 75, 489.

315. Where facts are alleged in a verified complaint which are presumptively within the personal knowledge of the defendant, he is not permitted to deny them upon information and belief, but must answer positively; but this rule does not apply to the denial of the sufficiency of a recorded claim of lien. (*Hagman v. Williams*, 88 Cal. 146.)

316. A defendant is not at liberty to answer any allegation for want of information or belief upon the subject sufficient to enable him to answer it, when he may be presumed to know, or when he is aware, before answering, that he has the means of ascertaining whether or not such allegation is true; and such an answer is improper, where it appears that the defendant knew, before answering, that he could certainly ascertain whether or not plaintiff had recorded his claim of lien, as alleged in the complaint, by examining a public record in the county in which the lots upon which the lien is claimed were situated. (*Mulcahy v. Buckley*, 100 Cal. 484.)

317. If the allegations of a verified complaint are presumptively within the knowledge of the defendant, a denial of the same in the answer, according to his best knowledge, information, and belief, is evasive of the issue tendered. (*Brown v. Scott*, 25 Cal. 189.) Cited 31 Cal. 195; 32 Cal. 458; 4 Or. 290; 1 Wash. 419.

318. When the material facts alleged are presumptively within the knowledge of the defendant, he must traverse them, if he undertakes to do so, or must state how it is that he is without knowledge of such facts. (*Vasault v. Austin*, 32 Cal. 597.)

Cited 33 Cal. 211; 36 Cal. 234; 38 Cal. 163; 40 Cal. 75; 43 Cal. 397; 68 Cal. 265; 1 Idaho, N. S., 756.

319. When the facts alleged in a verified complaint are presumptively within the knowledge of the defendant, the code requires his denial to be specific, not general. The object of the provision is to call the attention of the defendant, and to confine each denial to one allegation at a time and not permit him to deny all at once. (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 458.)

320. A denial upon information and belief, by the assignee of an insolvent corporation, that certain appliances were attached to the realty, and were fixtures, is insufficient. Such assignee must be presumed to have been in the possession of the property, and to have known whether or not the appliances named were so attached, and the denial should be positive in form. (*Gribble v. Columbus Brewing Co.*, 100 Cal. 67.)

321. Where the alleged fact is, from its nature, presumptively within the personal knowledge of the defendant, he cannot be permitted to answer on information and belief, but must answer in the form positive. And where, from the nature of the fact alleged, the knowledge, if any, is presum-

tively based on information, he is not bound to deny positively, but only "according to his information and belief"; but in such case he must answer according to both his information and belief. The word "belief," as used in the statute, is to be taken in its ordinary sense, and means the actual conclusion of the defendant, drawn from information. (*Humphreys v. McCall*, 9 Cal. 59.)

322. The answer that the defendant, a municipal corporation, has "no knowledge or information" in respect to the allegations of a count in a verified complaint, "and therefore denies the same," is insufficient. (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.)

Cited 13 Cal. 372; 17 Cal. 127; 25 Cal. 196; 68 Cal. 265; 100 Cal. 489.

323. The statute imposes upon the defendant if a natural person, and if a corporation upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in a verified complaint, to enable them to answer in the proper form. (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.)

Cited 74 Cal. 300.

324. The rule which requires a defendant to answer positively as to the facts alleged in a verified complaint, which are presumptively within his own knowledge, applies to municipal corporations. The statute makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.)

Cited 11 Cal. 258; distinguished 20 Cal. 108.

Information and belief, denials on. See *Injunctions*, 375, et seq; *Mandamus*, 228.

Information and belief, denial for want of. See *Mechanics' Liens*, 344.

Defendant denying his ownership on information and belief. See *Streets*, 641.

Answer in trespass on information and belief. See *Trespass*, 37.

Information and belief, denial on, when evasive. See *Mechanics' Liens*, 345.

Denial on information and belief in action on judgment. See *Judgments*, 817.

12. Material and Substantial Allegations Only Need be Denied.

325. Defendant in his answer is required to deny only material allegations of the complaint. (*Racouillat v. Rene*, 32 Cal. 450.)

Cited 1 Idaho, N. S., 552; 7 Nev. 172.

326. The only allegations essential to a complaint are those required in stating the cause of action. Allegations inserted for the purpose of intercepting and cutting off an anticipated defense are superfluous and immaterial and do not require an answer. (*Cannfield v. Tobias*, 21 Cal. 349.)

Cited 97 Cal. 346; 18 Nev. 117.

327. Immaterial averments in a pleading need not be answered, and if it be done, both the complaint and answer, so far as they relate thereto, will be disregarded when the sufficiency of the pleadings and issues are brought in question. (*Jones v. Petaluma*, 36 Cal. 280.)

Material allegations only need be denied. See ante, VIII, 4.

Irrelevant allegations need not be controverted. See *Ejectment*, 183.

13. Denials of Conclusions of Law.

328. If the answer merely denies the conclusions of law resulting from the facts averred in the complaint, it is insufficient to raise an issue, and the facts are deemed admitted. (*Nelson v. Murray*, 23 Cal. 338.)

Cited 5 Wash. 663.

329. The denial of a conclusion of law raises no issue. (*Turner v. White*, 73 Cal. 299.)

Conclusion of law, denial is denial of, when. See *Mechanics' Liens*, 348, et seq.

Averments of legal conclusions need not be traversed. See *Mortgages*, 393, et seq.

Answer denying legal conclusions only does not raise issue. See *Sales*, 236.

Conclusion of law, denial that one is bound by judgment is denial of. See *Judgments*, 816.

14. Denials of Matters of Evidence.

330. Allegations of matters of evidence in a pleading are not issuable facts. If the answer puts in issue the ultimate facts resulting from the evidence, it is a sufficient denial. (*Moore v. Murdoch*, 26 Cal. 514.)

Cited 33 Cal. 96, 128; 63 Cal. 427; 4 Or. 94.

Averments of evidence are not admitted by failure to deny. See ante, 53, 54.

Ultimate fact, denial of is sufficient. See *Marriage and Divorce*, 216.

15. Want of Capacity to Sue Must be Specially Pleading.

331. The want of capacity in plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient. (*California Steam etc. v. Wright*, 8 Cal. 585.)

Cited 99 Cal. 605.

General issue does not put in issue the plaintiff's title to sue. See post, 334.

16. General Denial, What Puts in Issue, and Effect of.

332. The forty-sixth section of the Practice Act, which enacts that the answer of defendant shall contain, in respect to each allegation of the complaint controverted by the defendant, a general or special denial thereof, etc., provides for the use, in pleading, of the general issue at common law, without confining parties to the particular form of language belonging to such pleas respectively, but allowing a general denial in plain language to be equivalent, in its effect, to any general issue necessary to meet the subject matter of the action. (*McLarren v. Spalding*, 2 Cal. 510.)

333. An answer which denies, generally, all the allegations of the complaint is equivalent to the general issue at common law, and ought not to be struck out as sham or frivolous. (*Brooks v. Chilton*, 6 Cal. 640; *Ellissen v. Halleck*, 6 Cal. 386.)

334. Under the system of practice in this state, a general denial is equivalent to the general issue at common law, and such a plea does not put in issue the plaintiff's title to sue (*White v. Moses*, 11 Cal. 68.)

335. A denial, whether general or special, only puts in issue allegations of complaint. The difference between a general and special denial in this respect is only in the extent to which the allegations are traversed. (Coles v. Soulsby, 21 Cal. 47.)

336. If answer does not traverse material allegations of complaint, and the new matter contained in it does not state facts sufficient to constitute a defense, and the pleadings are not verified, a closing denial, stating that "the defendants deny each and every allegation set forth in plaintiff's complaint not consistent with the foregoing answer," fails to raise any issue. (Richardson v. Smith, 29 Cal. 529.)

Cited 9 Or. 489.

337. Defendant has right to put plaintiff to proof of his demand by a general denial. (Fay v. Cobb, 51 Cal. 313.)

338. The legal effect of general denials, as in this case, is not changed by expressions showing that they were intended to be specific. (Hensley v. Tartar, 14 Cal. 508.)

339. When a general denial to an unverified complaint is qualified by an exception of "such allegations as are hereinafter admitted, stated, or qualified," it will not control the effect of an affirmative allegation of the answer which, in legal effect, admits the cause of action. (People v. Otto, 77 Cal. 45.)

Want of capacity to sue must be specially pleaded. See post, IX, 15.

New matter must be specially pleaded. See post, IX, 23.

General denial, sufficiency. See Justices of the Peace, 71.

General denial, what puts in issue. See Executors and Administrators, 293; Mechanics' Liens, 346.

General denial, effect of. See Taxation, 640.

General denial, effect of in action on note. See Bills and Notes, 384.

General denial in foreclosure, what puts in issue. See Mortgages, 624.

General issue, deed absolute cannot be attacked as mortgage under. See Mortgages, 118, 119.

General denial in forcible entry. See Forcible Entry and Unlawful Detainer, 183, 184.

General denial, replication, when not necessary. See Malicious Prosecution, 59.

Evidence admissible under general denial. See Evidence, IX, 8.

17. Other Denials, Sufficiency to Raise Issue; Traverse in Affirmative Words.

340. Where the answer contains no new matter, and the plaintiff claims that all the denials are bad, he may test their sufficiency by a motion for judgment upon the pleadings. (Gay v. Winter, 34 Cal. 153.)

341. Qualified and copulative denials relating to contract alleged in the complaint to enforce a lien held insufficient to raise a substantial issue. (Mulcahy v. Buckley, 100 Cal. 484.)

342. Denial of any indebtedness, without denial of any of the facts from which that indebtedness follows as a conclusion of law,

raises no issue. (Curtis v. Richards, 9 Cal. 33.)

Cited 2 Idaho, 1169.

343. Where complaint averred contract between plaintiff and board of supervisors on behalf of the county, and the answer admitted a contract between the plaintiff and another on one side, and the county on the other, and averred that this was the only contract made by the county in relation to the matter, and denied that any other was made by the board of supervisors, held, that this denial was sufficient to put the plaintiff on proof of the contract. (Murphy v. Napa County, 20 Cal. 497.)

Cited 81 Cal. 404.

344. Where complaint avers that plaintiff did certain work in consideration of promise by defendant, an answer denying that plaintiff did the work, but not claiming that it was done upon any other consideration than the promise, raises no issue, except as to the performance of the work, and requires no proof from plaintiff as to the consideration upon which it was performed. (Mathewson v. Fitch, 22 Cal. 86.)

345. It is not necessary that a traverse should be in negative words. An averment in the answer of the contrary of what is alleged in the complaint is equivalent to a denial. Even where the averment is not of the direct contrary of the allegation, but is inconsistent with its truth, it may, under certain circumstances, be held to raise an issue. So held where plaintiff took no proceeding in the court below to test the sufficiency of the answer. (Perkins v. Brock, 80 Cal. 320.)

346. An issue may be taken upon a material allegation of the complaint by an affirmative allegation in the answer inconsistent with it; and a finding of affirmative facts which are inconsistent with an averment which the answer denies is a sufficient finding that the averment is not true. (Churchill v. Baumann, 95 Cal. 541.)

347. If the plaintiff, in his complaint, alleges that he is the owner of and entitled to the possession of an undivided one-half of certain personal property, an allegation in the answer that the defendant is the owner, coupled with an admission that he is in possession, puts in issue the title of the plaintiff. (Miller v. Brigham, 50 Cal. 615.)

Cited 78 Cal. 544; 80 Cal. 322; 95 Cal. 545.

348. If an answer, in response to an allegation of the complaint, instead of denying it in express terms, contains the averment that the defendant did not commit the act charged, or that the fact alleged to exist does not exist, these averments of the answer traverse the matters alleged, and are good denials of the same. (Hill v. Smith, 27 Cal. 475.)

Denial of indebtedness is insufficient. See Bills and Notes, 386.

Insufficient denials, directing verdict. See Instructions, 90, et seq.

18. Specific Denial is Confined to Specific Allegation.

349. If the complaint contains averments of the facts constituting a derangement of

title in a certain manner, and the answer contains a counter averment that the title was derived in a different manner, this counter averment is a denial, if it is alleged that the facts are not otherwise than averred in the counter statement. (*Siter v. Jewett*, 33 Cal. 92.)

350. Specific denial to each allegation of complaint is a separate denial, applicable only to the particular allegation controverted. Per *Burnett, J.* (*San Francisco Gas Co. v. San Francisco*, 9 Cal. 453.)

351. Each denial of an answer must be regarded as applying to the specific allegation it purports to answer, and not as forming a part of an answer to some other specific and entirely independent allegation. (*Racouillat v. Rene*, 32 Cal. 450.)

19. Admissions by Failure to Deny; Denial of Contract Attached to Pleading.

352. Jury should be instructed that fact is admitted in pleadings in a case where a fact is alleged in the complaint and not denied in the answer. (*Tevis v. Hicks*, 41 Cal. 23.)

353. Every material allegation of the complaint not specifically controverted is to be taken as true upon the trial. (*Fish v. Redington*, 31 Cal. 185.)

354. The failure to deny a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader. (*Burke v. Table Mountain Water Co.*, 12 Cal. 403.)

355. Specific denial of one or more allegations is held to be an admission of all others, well pleaded, under our practice and that of the common law. (*De Ro v. Cordes*, 4 Cal. 117.)

356. Allegation in complaint, not material to statement of plaintiff's cause of action, is not admitted by a failure on the part of the defendant to deny it in his answer. (*Canfield v. Tobias*, 21 Cal. 349.)

357. If answer merely denies what is non-essential in the averments of a complaint, it is an admission of all that is essential to a recovery. (*Leffingwell v. Griffing*, 31 Cal. 231.)

358. When complaint alleges value of all the property destroyed, for which suit is brought, in gross—for some items of which no recovery can be had—an answer, which contains no denial of the averment of value, will not be held as admitting the value of the property for which a recovery may be had. (*Nunan v. San Francisco*, 38 Cal. 689.)

359. Proceedings, which are void by reason of the infirmity of the statute under which they are had, are not cured by an averment in a complaint that they were duly and legally had, and a failure to deny the averment in the answer is not an admission that the proceedings were valid or legal. (*People v. Hastings*, 29 Cal. 449.)

Allegations anticipating defenses need not be denied. See ante VIII, 4; IX, 12.

Defective denials, admissions by. See ante, 117.

Evidence, averments of are not admitted by failure to deny. See ante, 53, 54.

Nonresidence, allegation of, whether ad-

mitted by failure to deny. See *Swamp and Overflowed Lands*, 131.

Admission by failure to deny. See *Contracts*, V, 3, a; *Ejectment*, 207; *Findings*, 207; *Mortgages*, 98, 98.

Facts are admitted by failure to deny. See *Findings*, 160, 161.

Immaterial allegations not admitted by failure to deny. See ante, 188.

Papers and contracts, how made part of; attaching contract to pleading. See ante, VII, 9.

360. A copy of the note sued on being attached to, and made part of, the complaint, the answer, not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. (*Horn v. Volcano Water Co.*, 13 Cal. 62.) Cited 10 Col. 510.

361. The admission of the genuineness and due execution of a contract, a copy of which is annexed to an answer, by a failure to file an affidavit denying it, is an admission that the contract is what it purports on its face to be, and that the matters recited in it are true, and that it was executed and delivered by the parties who signed it, and in the capacity in which they appear to have acted. (*Sloan v. Diggins*, 49 Cal. 38.) Cited 12 Mont. 429.

362. If the defendant justifies an alleged trespass on the plaintiff's land, under a contract made with a superintendent of streets to grade a public street, and annexes a copy of the contract to his answer, and the plaintiff fails to file an affidavit denying the contract, its genuineness and due execution are admitted, and it is error to exclude it as evidence, when offered without proof of its execution and genuineness. (*Sloan v. Diggins*, 49 Cal. 38.) Cited 10 Col. 510.

Admission of instrument set out in complaint by not denying under oath. See *Bonds*, 135.

Admission of execution of note annexed to complaint by failure to deny. See *Bills and Notes*, 381.

Admissions of genuineness of note by failure to deny. See *Bills and Notes*, 407, 408.

Failure to deny written instrument under oath. See *Release*, 9, et seq.

20. Separate Defenses, How Stated.

363. An objection to an answer, on the ground that separate defenses are not separately stated, cannot be taken by demurrer. The defect can only be reached by a motion to strike out, or by some other appropriate proceeding. (*Hagely v. Hagely*, 68 Cal. 348.)

Reference from one defense to separate defense. See *Mortgages*, 625.

21. Inconsistent Defenses.

364. Inconsistent defenses may be set up. (*Billings v. Drew*, 52 Cal. 565.) Cited 67 Cal. 334; 3 Wyo. 137.

365. Though two defenses, separately pleaded under section 49 of the Practice Act, may be inconsistent, the plaintiff cannot dis-

regard them, or either of them, on the trial. (*Buhne v. Corbett*, 43 Cal. 264.)
Cited 3 Col. 449.

366. If the answer contains several defenses stated separately, an admission made in one answer, for the purpose of pleading a separate defense, does not destroy the effect of a denial of the matter thus admitted in another answer. (*Siter v. Jewett*, 33 Cal. 92.)
Cited 34 Cal. 47.

367. Whether rule that sworn answer must be consistent does not apply to pleadings not verified, query? (*Hensley v. Tartar*, 14 Cal. 508).

368. A separate plea or defense should not contain matters repugnant or inconsistent in themselves; but a defense regarded as an entirety is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded; and there is no distinction in this respect between verified and unverified pleadings. (*Buhne v. Corbett*, 43 Cal. 264.)

369. Several defenses, inconsistent with each other, may, under proper circumstances, be set up in a verified answer. (*Bell v. Brown*, 22 Cal. 671.)
Cited 30 Cal. 200; 43 Cal. 269; 3 Col. 449; 7 Nev. 81; 2 S. Dak. 140; 1 Utah, 222; 3 Wyo. 137.

370. A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next. (*Hensley v. Tartar*, 14 Cal. 508.)
Cited 1 Utah, 225.

371. In an action to recover a mining claim the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim they had abandoned and forfeited it before defendants' entry. At the trial, on motion of plaintiffs, the court ordered defendants to elect on which of the above defenses they would rely, and defendants, having, after excepting to the order, elected to rely upon their denial, were precluded from introducing proof of the abandonment and forfeiture. Held, that the action of the court was error; that defendants had the right to set up both defenses in their answer and support both by proof. (*Bell v. Brown*, 22 Cal. 671.)
Cited 2 Utah, 210; distinguished 52 Cal. 268.

372. The inconsistent defenses which are allowed to be pleaded in a verified answer are not such as require in their statement a direct contradiction of any fact elsewhere directly averred. They are those in which the inconsistency arises rather by implication of law, being in the nature of pleas of confession and avoidance as contradistinguished from denials, where the party impliedly or hypothetically admits, for the purpose of that particular defense, a fact which he, notwithstanding, insists does not in truth exist. (*Bell v. Brown*, 22 Cal. 671.)

373. If a fact, which is directly averred in one part of a verified pleading, is in another part directly denied, whether it be in the

statement of several causes of action in a complaint or of several defenses in an answer, the party verifying it is guilty of perjury, and on the trial that averment which bears most strongly against the pleader will be taken as true. (*Bell v. Brown*, 22 Cal. 671.)

374. If inconsistent defenses are set up in an answer, the defect must be reached by motion to strike out or by demurrer; and if no objection be taken to the answer on this ground, defendant may on the trial rely on any of these defenses. (*Uridias v. Morrell* (No. 2), 25 Cal. 31, cited 43 Cal. 269, 3 Col. 449, 1 Utah, 222; *Klink v. Cohen*, 13 Cal. 623, cited 25 Cal. 37, 43 Cal. 269, 3 Col. 449, 1 Utah, 222.)

Points of counsel should be consistent. See post, XX, 6.

22. *Equitable Defenses as Defenses in Actions at Law.*

375. It will sometimes be necessary to determine whether matters set up in defense are of legal or equitable character, for the purpose of arriving at the rights and attitude of the parties, and the principles upon which the relief is to be determined. (*Carpentier v. Oakland*, 30 Cal. 439.)

376. Whether an answer states a purely legal or an equitable defense must be determined by the answer itself, and not from the findings of the court. (*Bodley v. Ferguson*, 30 Cal. 511.)

377. The defendant may set up an equitable defense in an action at law, but if he relies on an equitable right of action as a defense, he must plead the same as fully as if he were bringing an action in equity. (*Carpentier v. Oakland*, 30 Cal. 439.)
Cited 36 Cal. 55; 88 Cal. 182.

378. An equitable cause of action, in order to be available as a defense, must be one that has not been barred by the statute of limitations. (*Carpentier v. Oakland*, 30 Cal. 439.)
Cited 65 Cal. 325.

379. The party relying upon an equitable defense must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits in equity; and his answer, being in the nature of a bill in equity, must contain all the essential averments of such a bill. (*Swasey v. Adair*, 88 Cal. 179.)

380. In setting up an equitable defense in an action at law, the defendant becomes an actor, and the defense interposed a pleading in equity, the sufficiency of which—in matters of substance, though not in point of mere form—is to be determined by the application of the rules of pleading observed in courts of equity, when relief is sought there in cases of like character. (*Bruck v. Tucker*, 42 Cal. 346.)

Cited 47 Cal. 147; 57 Cal. 411; 67 Cal. 450, 451; 88 Cal. 182, 325; 9 Mont. 275; 6 Or. 41; 2 Utah, 195; distinguished 70 Cal. 366.

381. Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. (*Lorraine v. Long*, 6 Cal. 452.)

Cited 30 Cal. 311; 48 Cal. 392; 73 Cal. 365; 6 Or. 187.

Order of trial where equitable defenses to legal action. See post, XX, 2.

23. New Matter.

382. New matter is, where defendant seeks to introduce into the case a defense not disclosed by the pleadings—something relied on by him but not put in issue by the plaintiff. (Bridger v. Paige, 13 Cal. 640.) Cited 14 Cal. 415.

383. New matter is that which the defendant must affirmatively establish. (Glazer v. Clift, 10 Cal. 303.) Cited 21 Cal. 50; 30 Cal. 472.

384. Whatever admits that a cause of action, as stated in the complaint, once existed, but at the same time avoids it—that is, shows that it has ceased to exist—is new matter. (Coles v. Soulsby, 21 Cal. 47.) Cited 30 Cal. 472; 68 Cal. 86; 2 Mont. 566; 18 Nev. 118.

385. New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. (Piercy v. Sabin, 10 Cal. 22.) Cited 94 Cal. 172.

386. Any matter which does not discharge or avoid a cause of action theretofore existing, but the purpose of which is to show that the alleged cause of action never did exist, and that material allegations of the complaint are not true, is not new matter such as is required to be specially pleaded. (Churchill v. Baumann, 95 Cal. 541.)

387. A defense that concedes that plaintiff once had a good cause of action, but insists that it no longer exists, involves new matter. (Piercy v. Sabin, 10 Cal. 22.)

388. Where the allegations of an answer, although stated in an affirmative form, are in effect only a denial of the allegations of the complaint, they do not constitute new matter within the meaning of our Practice Act. (Goddard v. Fulton, 21 Cal. 430.) Cited 87 Cal. 14; 7 Col. 93; 5 Mont. 100.

389. Where a negative allegation is necessary in stating the cause of action, although it must, of course, precede an averment of the fact negated, it nevertheless constitutes the basis of the issue joined by the subsequent averment, and the latter operates as a traverse and not as an averment of new matter. (Frisch v. Caler, 21 Cal. 71.) Cited 81 Cal. 404.

390. If the answer, either directly or by way of necessary implication, admits the truth of all the essential allegations of the complaint which show a cause of action, but sets forth facts from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, those facts are new matter; but if the facts averred in the answer only show that some essential allegation of the complaint is untrue, then they are not new matter, but only a traverse. (Goddard v. Fulton, 21 Cal. 430.)

391. The code makes no distinction between different classes of new matter. All new matter of defense must be stated in the answer. (Piercy v. Sabin, 10 Cal. 22.)

392. New matter must be specially pleaded. (Coles v. Soulsby, 21 Cal. 47.) Cited 30 Cal. 472; 68 Cal. 86; 2 Mont. 566; 18 Nev. 118.

393. Matters in avoidance must be specially pleaded. They cannot be used as defenses under an answer which is a simple denial of the allegations of the bill. (Gaskill v. Moore, 4 Cal. 233.)

394. Where new matter exists, it must be stated in the answer. (Piercy v. Sabin, 10 Cal. 22.) Cited 10 Cal. 304; 14 Cal. 452; 21 Cal. 50; 30 Cal. 472.

395. Matter in abatement, or which was such at common law, as the motion in this case, must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary. (Tooms v. Randall, 3 Cal. 438.) Cited 6 Cal. 68; 80 Cal. 70.

396. Where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer. (Terry v. Sickles, 13 Cal. 427.) Cited 75 Cal. 568; 20 Or. 338.

397. The general denial only puts in issue the allegations of the complaint. New matter must be specially pleaded. (Glazer v. Clift, 10 Cal. 303.) Cited 21 Cal. 50; 30 Cal. 472.

398. In an action brought to recover the contract price agreed to be paid for work and materials, the defendant will not be permitted to insist at the trial that the work was done in an unworkmanlike manner, unless he has set up such defense in his answer. (Kendall v. Vallejo, 1 Cal. 371.) Cited 10 Cal. 30.

399. Where a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by the defendants by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or, confessing them, should state, distinctly and positively, new matter sufficient to avoid them. (Ladd v. Stevenson, 1 Cal. 18.) Cited 10 Cal. 30.

400. A party does not waive effect of denial contained in one portion of his answer by setting up, in the appropriate manner, new or affirmative matter. (Billings v. Drew, 52 Cal. 565.)

401. Allegations of affirmative matter in answer, not supported by proof, will not entitle the defendant to relief, and will be disregarded by the court. (Rogers v. Shannon, 52 Cal. 99.)

New matter, duty to plead. See Ejectment, 203, 204.

New matter must be specially pleaded. See Ejectment, 203.

New matter, what is. See Executions, 388; Judgments, 164.

New matter, what is not. See Ejectment 195; Malicious Prosecution, 39; Sales, 242, et seq.; Watercourses, 152.

New matter in ejectment, what is not. See Ejectment, 195.

New matter in replevin. See Replevin, 74, et seq.

Replication to new matter contained in answer. See ante, VIII, 12.

New matter, setting up in answer. See Attorney and Client, 126.

X. Demurrer.

1. Nature and Office of; What is; Statement of Facts in.

402. Demurrer is answer within meaning of section 150 of the Practice Act. (Oliphant v. Whitney, 34 Cal. 25.)

403. An allegation in an answer that the debt sued for, if due at all, is due to the plaintiff and another, as partners, cannot be treated as a demurrer. (Andrews v. Mokelumne Hill Co., 7 Cal. 330.)
Cited 1 Mont. 55.

404. It is not the office of a demurrer to set out facts. All the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of those facts. (Brennan v. Ford, 46 Cal. 7.)
Cited 13 Or. 340.

405. A statement of facts in a demurrer is not admissible. The only office of a demurrer is to raise issues of law upon the facts stated in the pleading demurred to. (Cook v. De La Guerra, 24 Cal. 237.)

Demurrer goes to capacity of plaintiff, and not to sufficiency of facts, when. See Swamp and Overflowed Lands, 233.

Demurrer, effect of. See Mandamus, 229.

Demurrer to opposition to insolvent's discharge. See Bankruptcy and Insolvency, 291, 292.

2. Demurring and Answering at Same Time.

406. The defendant may demur and answer at the same time to the entire complaint, and also to each cause of action stated therein. (People v. McClellan, 31 Cal. 101.)

407. An issue of law and fact should not be mixed in an answer. A demurrer should be filed as a separate pleading. (Brooks v. Douglass, 32 Cal. 208.)

408. If the defendant files his answer at the same time he does his demurrer, the court, after overruling the demurrer, has no right to strike out an answer which raises a defense because the defendant fails to pay the plaintiff twenty dollars, required by a rule of court to be paid, for the privilege of answering when a demurrer is overruled. (People v. McClellan, 31 Cal. 101.)

409. Where there is both a demurrer and an answer to the same complaint, raising both an issue of law and fact, the issue of law should first be disposed of. (Brooks v. Douglass, 32 Cal. 208.)
Cited 78 Cal. 125.

3. Service of; Striking Out.

410. It is not necessary, under the statute, to serve an answer or demurrer upon the op-

posite attorney unless he lives in the same county in which the action is pending. (Oliphant v. Whitney, 34 Cal. 25.)

411. A demurrer cannot be stricken out for want of proof of service, if filed in time, and the only other possible grounds of striking out such a demurrer is the insertion of irrelevant and redundant matter in it as a pleading, under section 453 of the Code of Civil Procedure, which cannot apply when it states only one or more of the grounds enumerated in section 430 of that code. (Davis v. Honey Lake Water Co., 98 Cal. 415.)

412. Demurrer cannot be stricken out on motion as sham and irrelevant defense. A demurrer can be disposed of in no other way than by the regular mode. (Larco v. Casaneuva, 30 Cal. 560.)

413. Where the summons is served on the defendant in another county than that in which the action is brought, a demurrer filed within thirty days after the service of the summons cannot be properly stricken from the files, whether it has been served or not, and an order striking such demurrer from the files and entering judgment by default will be reversed upon appeal from such judgment. (Davis v. Honey Lake Water Co., 98 Cal. 415.)

414. An order striking out a demurrer is deemed excepted to. (Davis v. Honey Lake Water Co., 98 Cal. 415.)

415. Demurrer stricken out constitutes part of judgment-roll as a pleading, and can be looked to to ascertain when it was filed upon appeal from a judgment rendered by default. (Davis v. Honey Lake Water Co., 98 Cal. 415.)

Demurrer, acceptance of as waiver of default. See Defaults, 6.

4. Form of; Statement of Grounds; General or Special Demurrer.

416. A demurrer to the complaint for any reason except an objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of action, must distinctly specify the grounds upon which any of the objections to the complaint are taken. (Kent v. Snyder, 30 Cal. 666.)

Reasons why facts insufficient need not be stated. See post, 445.

417. Objections which go to sufficiency of statement of facts contained in complaint, but not to the sufficiency of the facts themselves, cannot be entertained unless presented by special demurrer. (Himmelman v. Spanagel, 39 Cal. 401.)
Cited 68 Cal. 59.

418. Where a complaint states all the facts essential to a recovery, but states them imperfectly, a demurrer, to be effective, must be special, and directed against the particular defects complained of. (Tehama County v. Bryan, 68 Cal. 57.)
Cited 84 Cal. 200.

419. Upon a general demurrer to a complaint, where the facts necessary to constitute a cause of action are shown by the complaint to exist, although inaccurately or am-

biguously stated, or appearing by necessary implication, the demurrer will be overruled. (*Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311.)

420. When demurrer is general to complaint, courts are not bound to notice defects which are mere matters of form. (*Phelps v. Owens*, 11 Cal. 22.) Cited 82 Cal. 505.

421. Defects of form of averment or uncertainty cannot be urged upon general demurrer. (*Ward v. Clay*, 82 Cal. 502.)

Ambiguity or uncertainty must be taken advantage of by special demurrer. See post, X, 6, h.

Ambiguity or uncertainty, demurrer for must state facts. See post, X, 6, h.

Contradictory objection that allegations are, must be taken by special demurrer. See post, X, 6, c.

Defective statement of facts must be reached by special demurrer. See post, 436.

Failure to state cause of action may be taken by general demurrer. See post, 436.

Objection that complaint anticipates defense cannot be taken advantage of by general demurrer. See ante, VII, 4.

Waiver by failure to demur, where complaint defective in form but not in substance. See post, X, 7.

Demurrer because complaint does not state cause of action is sufficiently explicit. See Jurisdiction, 42.

Quo warranto, general demurrer will not lie when. See Quo Warranto, 12.

General demurrer, sufficiency of facts. See Ordinances, 131.

Defects must be taken advantage of by special demurrer. See Judgments, 488.

5. Joint Demurrer.

422. A joint demurrer by all of the defendants to an action is properly overruled if the complaint is good as against either of them. (*Acevado v. Orr*, 100 Cal. 293.)

Joint demurrer because of misjoinder of parties and causes, when properly overruled. See Injunctions, 416.

6. Grounds of Demurrer.

a. Statutory Grounds Only Allowed.

423. There are six causes for which a demurrer may be interposed, under section 40 of the code, and unless a ground of demurrer be included under one or more of such causes, it cannot be sustained. (*Hentsch v. Porter*, 10 Cal. 555.)

b. Failure to Serve Copy of Complaint.

424. Failure to serve copy of complaint with the summons is not a ground for demurrer. (*Ghiradelli v. Greene*, 56 Cal. 629.) Cited 84 Cal. 29.

c. Multifariousness; Redundancy; Contradictory Allegations.

425. Where the parties joined as plaintiffs are all interested in the principal question raised in the bill, and the issues tendered are simple, and a multiplicity of suits may be avoided, a demurrer for multifariousness will

not be sustained. (*People ex rel. Pierce v. Morrill*, 28 Cal. 336.)

426. That a complaint alleges facts which are redundant is not a cause for demurrer. The proper remedy in such a case is a motion to strike out. (*Henke v. Eureka Endowment Assn.*, 100 Cal. 429.)

427. The objection that the averments of a complaint are contradictory must be taken by special demurrer. (*Heeser v. Miller*, 77 Cal. 192.)

Cited 84 Cal. 234.

428. An objection to a complaint that a specific allegation contained therein is contradicted by an exhibit to which reference is made cannot be taken advantage of by general demurrer. (*Blasingame v. Home Ins. Co. of New York*, 75 Cal. 633.)

Cited 77 Cal. 193; 80 Cal. 321; 84 Cal. 234; 96 Cal. 606.

d. Omission of Christian Name; Mere Matters of Form.

429. It is no ground of demurrer to a complaint that the Christian name of one of the plaintiffs does not appear. (*Nelson v. Highland*, 13 Cal. 74.)

Cited 92 Cal. 227; 2 Mont. 614.

430. Objections to a declaration, when they arise from matters of form, are not the subject of a demurrer. (*Otero v. Bullard*, 3 Cal. 188.)

e. Want of Capacity to Sue.

431. A demurrer for want of capacity of the plaintiff to sue only lies where the complaint shows the want of capacity upon its face, and it is not a ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. (*Wilhoit v. Cunningham*, 87 Cal. 453.)

432. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff had the legal capacity to sue. The omission can only be taken advantage of by answer. (*Swamp etc. District No. 110 v. Feck*, 60 Cal. 403.)

Cited 74 Cal. 155; 80 Cal. 260; 87 Cal. 459, 460.

433. Capacity of plaintiff to sue cannot be tested on a demurrer, on the ground that the complaint does not state sufficient facts to constitute a cause of action. (*Mora v. Le Roy*, 58 Cal. 8.)

Cited 74 Cal. 155.

f. Want of Averment of Special Damages.

434. In an action for the breach of a contract, the want of any averment of special damage cannot be reached by demurrer. Such averment is only necessary where the right of action itself depends upon the special injury received. For the breach of contract an action lies, though no actual damages be sustained. (*McCarty v. Beach*, 10 Cal. 461.)

g. Failure to State Facts Sufficient to Constitute Cause of Action or Defense.

435. If every fact essential to claim or defense be not stated, the adverse party may demur; and if any fact not essential to the

claim or defense—in other words, any except issuable facts—be stated, the party may move to strike out the unessential parts. (*Green v. Palmer*, 15 Cal. 411.)

436. If complaint fails to state facts essential to cause of action, the defendant may take advantage of the defect by a general demurrer. If, however, the complaint avers all the essential facts, but states them defectively or improperly, the defect can only be reached by a special demurrer, particularly designating the specific point at which it is aimed. (*Harnish v. Bramer*, 71 Cal. 155.) Cited 84 Cal. 200.

437. A complaint which states the facts of the case in ordinary and concise language is not demurrable because such statement shows that the plaintiff is entitled to recover upon two different legal grounds. (*Mills v. Barney*, 22 Cal. 240.)

438. Defect which will defeat plaintiff's present right to recover, in whole or in part, is a good ground of demurrer. (*Hentsch v. Porter*, 10 Cal. 555.)

439. The sixth ground of demurrer, as specified in section 40 of the Practice Act, "that the complaint does not state facts sufficient to constitute a cause of action," is confined to those cases in which no cause of action at all, as against the defendants, arises from the complaint. (*Summers v. Farish*, 10 Cal. 347.)

440. A complaint is not demurrable on the score of a want of facts, if upon the facts stated the plaintiff is entitled to any relief, either at law or in equity. (*Grain v. Aldrich*, 38 Cal. 514.) Cited 2 Mont. 309.

441. A complaint which states a good cause of action for the recovery of money is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action, because there is also an ineffectual effort to state in the complaint a cause of action for the foreclosure of a mechanic's lien to secure the same money. (*Cox v. Western Pac. R. Co.*, 47 Cal. 87.)

442. If a complaint states facts which entitle the plaintiff to relief, either legal or equitable, it is not demurrable on the ground that it does not state facts sufficient to constitute a cause of action. (*White v. Lyons*, 42 Cal. 279, cited 64 Cal. 279, 86 Cal. 528, 96 Cal. 230, 12 Col. 566, 13 Col. 197, 581, 2 Mont. 309; *McPherson v. Weston*, 64 Cal. 275, cited 96 Cal. 230.)

443. Though a complaint purporting to be a bill in equity is insufficient as such, yet if the facts alleged are cognizable in a court of law, the proper relief will be administered; and a demurrer for want of facts sufficient to constitute a cause of action will not lie. (*White v. Lyons*, 42 Cal. 279.) Cited 96 Cal. 230.

444. Answer setting up no sufficient defense to action, and containing denials of conclusions of law and immaterial denials, is bad on demurrer. (*Wheeler v. West*, 78 Cal. 95.)

445. A demurrer to the complaint on the ground that it does not state facts sufficient

to constitute a cause of action is sufficient, without a specification of the reasons why it does not state such facts, unless the defense relied on is one which, to be made available, must be specially pleaded. (*Kent v. Snyder*, 30 Cal. 666.)

Cited 46 Cal. 12; 13 Col. 295.

Where complaint merely states evidence. See ante, VII, 4.

Defective statement of facts, objection, how taken. See ante, X, 4.

Sustaining demurrer where plaintiff entitled to nominal damages. See *Damages*, 83.

Demurrer, complaint praying exemplary damages, failure to allege facts. See *Nuisances*, 72.

h. Ambiguity or Uncertainty; Miscellaneous Grounds of.

446. Objection to pleading that it is uncertain should be taken by demurrer. (*Harney v. McLeran*, 66 Cal. 34.)

447. Demurrer to unintelligible complaint is properly sustained. (*Tibbets v. Riverside Land etc. Co.*, 61 Cal. 160.)

448. Pleading on part of defendant not showing what portions of it are intended as legal defense to a complaint in ejectment, and what portions are intended as a cross-complaint, will be held bad on demurrer for ambiguity. (*O'Connor v. Frasher*, 53 Cal. 435.) Cited 56 Cal. 501.

449. If enough appears to render pleading demurred to easy of comprehension and free from reasonable doubt, a demurrer, on the ground of ambiguity, should be overruled. (*Salmon v. Wilson*, 41 Cal. 595.) Cited 68 Cal. 494; 82 Cal. 213.

450. When the matter in respect to which a complaint is objected to as ambiguous is peculiarly within the knowledge of the defendant, such ambiguity is not a ground of demurrer of which the defendant can avail himself. Per *Beatty, C. J.* (*Doe v. Sanger*, 78 Cal. 150.)

451. Upon a demurrer to a pleading for uncertainty in a particular specified, a general allegation, though it would not have been sufficient standing alone, may nevertheless assist to make the complaint certain in the particular mentioned. (*Hutchinson v. McNally*, 85 Cal. 619.)

452. Ambiguity and uncertainty are separate grounds of demurrer, and where such separate grounds are conjoined, the pleading must be defective on each ground, or the demurrer must be overruled. (*Wilhoit v. Cunningham*, 87 Cal. 453.)

453. Demurrer on ground of ambiguity and uncertainty in conjunctive cannot be sustained if the complaint is either ambiguous or uncertain, but not both. (*White v. Allatt*, 87 Cal. 245.)

454. A special demurrer to a complaint, assigning as a ground that it is ambiguous, unintelligible, and uncertain, is properly overruled if the complaint is not subject to each of the objections assigned. (*Spargur v. Heard*, 90 Cal. 221.)

455. A demurrer to a complaint, on the ground that it is ambiguous, unintelligible, and uncertain, must specifically state in what the ambiguity or uncertainty consists, or it will be disregarded. (*Yolo County v. Sacramento*, 36 Cal. 193; *Blanc v. Klumpke*, 29 Cal. 156, cited 36 Cal. 196, 68 Cal. 279, 96 Cal. 605, 2 Idaho, 293; *Lorenzana v. Camarillo*, 45 Cal. 125.)

456. A defect in a complaint for uncertainty must be taken advantage of by special demurrer. It is not reached by a general demurrer. (*Reynolds v. Hosmer*, 45 Cal. 616.) Cited 82 Cal. 505.

457. A demurrer to a pleading on the ground of ambiguity must be special, and point out the particular matter objected to. A general demurrer on that ground should be disregarded. (*Demartin v. Albert*, 68 Cal. 277.) Cited 96 Cal. 605.

458. An objection to a complaint on the ground of ambiguity must be taken advantage of by a special demurrer; otherwise, the defect is waived. (*Colton v. Onderdonk*, 69 Cal. 155.)

459. If there are any valid objections to a complaint on the ground of ambiguity or uncertainty, such objections can only be taken by special demurrer, and cannot be urged upon appeal from a judgment by default. (*Kirsch v. Derby*, 96 Cal. 602.)

460. Under a general demurrer that a complaint does not state facts sufficient to constitute a cause of action, an objection cannot be taken that it is merely ambiguous. (*Slattery v. Hall*, 43 Cal. 191.) Cited 82 Cal. 505; 2 Idaho, 293.

461. Where a demurrer to a complaint upon the ground of uncertainty, setting forth the particulars thereof, is improperly overruled, and judgment is thereafter rendered, upon trial of the cause, in favor of the plaintiff, the judgment entered upon the uncertain complaint must be reversed. (*Mallory v. Thomas*, 98 Cal. 644.)

Demurrer for ambiguity. See *Trespass*, 35. Insufficient description, defect must be taken by special demurrer. See *Trover*, 25.

Demurrer for uncertainty. See *Assumpsit*, 32, 33, 47, 48; *Eminent Domain*, 95, et seq.

Uncertainty must be raised by demurrer. See *Marriage and Divorce*, 215.

Demurrer for uncertainty in action against county. See *Counties*, 130.

Demurrer, uncertainty, objection, when to be taken. See *Appeals*, 2309.

Complaint anticipating defense is demurrable. See ante, VII, 4.

Division of complaint into counts is not ground of. See ante, VIII, 6.

Failure to state separate defenses separately cannot be taken advantage of by demurrer. See ante, IX, 20.

Demurrer for want of jurisdiction. See *Jurisdiction*, 42, et seq.

i. Question as to Kind of Relief Cannot be Raised on.

462. If complaint shows that plaintiff has a cause of action, and that he is entitled to some relief, the question as to what kind or

how much relief shall be granted to him cannot be made on demurrer. (*Poett v. Stearns*, 28 Cal. 226.)

7. Waiver by Failure to Demur.

463. When complaint is defective in form, but not in substance, such defect can only be reached by demurrer, on the ground that the complaint is unintelligible or uncertain. (*Merritt v. Glidden*, 39 Cal. 559.) Cited 48 Cal. 365.

464. Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objections to it should be taken by demurrer. (*Greenfield v. Steamer Gunnell*, 6 Cal. 67.)

465. When a complaint is defective in manner rather than in matter, if no objection is taken by demurrer, it will be held sufficient to support a judgment. (*Russell v. Mixer*, 42 Cal. 475.)

466. If material fact is only stated inferentially in a complaint, and the pleading is not demurred to specially for this reason, it is good after judgment. (*Hill v. Haskin*, 61 Cal. 175.)

Cited 3 Mont. 452.

467. When declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer in the court below. It is too late to urge such defect after verdict. (*Happe v. Stout*, 2 Cal. 460.)

468. If complaint improperly unites two causes of action, or is ambiguous and uncertain, the defect must be taken advantage of by demurrer, or it is waived. (*Lawrence v. Montgomery*, 37 Cal. 183.)

Ambiguity is waived by failure to demur. See ante, 458.

Waiver of defect in complaint by failure to demur. See *Marriage and Divorce*, 47.

Waiver by failure to demur. See *Bills and Notes*, 383; *Partition*, 45.

Waiver of right to answer by demurring. See *Forcible Entry and Unlawful Detainer*, 188.

Demurrer, ground of must be taken below. See *Appeals*, 2307, et seq.

Demurrer, special ground of must be taken below. See *Appeals*, 2303, et seq.

8. Demurrer to Part of Cause of Action; Demurrer to Prayer.

469. Demurrer must be directed to whole of pleading or to a particular and separate count or statement of a cause of action or defense. (*Locke v. Peters*, 65 Cal. 161.)

470. Demurrer does not lie to part of defense. In order to determine the sufficiency of a defense it must be taken as a whole. (*Ferrier v. Ferrier*, 64 Cal. 23.)

471. A demurrer cannot be interposed to part of a cause of action or defense. If the part demurred to is irrelevant or immaterial, a motion to strike out may be made, but a demurrer must go to the whole cause of action or defense. (*Reed v. Drais*, 67 Cal. 491.)

Complaint stating cause of action in several counts, demurrer to. See ante, VIII, 6.

Prayer to complaint is not demurrable. See ante, VIII, 9.

9. Demurrer to Whole Complaint Where Part Good.

472. Demurrer addressed to whole of complaint should be overruled if some portion of the complaint states a cause of action. (Fleming v. Albeck, 67 Cal. 226, cited 96 Cal. 230; Weaver v. Conger, 10 Cal. 233; People ex rel. Pierce v. Morrill, 26 Cal. 336, cited 38 Cal. 234; McCann v. Pennie, 100 Cal. 547.)

473. A general demurrer to a whole complaint cannot be sustained if the complaint states facts, though imperfectly, showing that the plaintiff is entitled to relief, either legal or equitable. (Hulsman v. Todd, 96 Cal. 228.)

474. A demurrer upon the general ground that the complaint does not state facts sufficient to constitute a cause of action is not sustainable, if the complaint states a cause of action in favor of any one of several plaintiffs. (O'Callaghan v. Bode, 84 Cal. 489.)

475. If complaint contain several counts, and defendant demur to whole complaint, the demurrer should be overruled if there is one good count in the complaint, although the other counts may be bad. (Stoddard v. Treadwell, 26 Cal. 294, cited 66 Cal. 653; Whiting v. Heslep, 4 Cal. 327, cited 2 Utah, 392; Griffiths v. Henderson, 49 Cal. 566; Cassidy v. Cassidy, 63 Cal. 352, cited 96 Cal. 230; Pfister v. Wade, 69 Cal. 133.)

476. When a complaint contains several counts, one of which sets up a former judgment as estopping the defendants, a general demurrer does not raise the question of law whether the judgment did estop the defendants. (Spanagel v. Reay, 47 Cal. 608.)

477. A general demurrer to a whole complaint which contains two counts or two causes of action is properly sustained where neither of the counts states a cause of action; and it is not necessary that the demurrer in such case should refer to either of the counts separately. (Churchill v. Pacific Improvement Co., 96 Cal. 490.)

Demurrer to whole complaint where part is sufficient. See Partnership, 350.

10. What is Admitted by Demurrer.

478. Demurrer admits facts as alleged in the complaint. (Tuolumne Water Co. v. Chapman, 8 Cal. 392.)

479. Demurrer admits truth of all allegations which are well pleaded, however improbable the facts alleged may be. (Woodroof v. Howes, 88 Cal. 184.)

480. Demurrer only admits truth of facts that are well pleaded; it does not admit matter of law or legal conclusions. (Johnson v. Kirby, 65 Cal. 482, 486.)
Cited 82 Cal. 319.

481. Demurrer admits truth of such facts only as are issuable and well pleaded. (Branham v. Mayor and Common Council of San Jose, 24 Cal. 585.)

482. All allegations of fact not inconsistent with other allegations in the same count must be taken as true upon demurrer. (Glide v. Dwyer, 83 Cal. 477.)

483. Demurrer to complaint containing

allegations of law does not admit its truth. (Branham v. Mayor and Common Council of San Jose, 24 Cal. 585.)
Cited 82 Cal. 319, 320.

484. A demurrer to an answer admits not only the facts alleged therein, but also, for the purpose of determining the sufficiency of the complaint, that the facts alleged in the complaint which are denied in the answer form no part of the plaintiff's cause of action. (Sheward v. Citizens' Water Co., 90 Cal. 635.)

485. A demurrer to answer to petition for writ of mandate is an admission of the truth of the matters averred in the answer. (Middleton v. Low, 30 Cal. 596.)

11. Submission of; Duty to Rule on, and Waiver of Ruling.

486. The submission of a demurrer without argument is not a waiver of any objection raised thereby. (Richards v. Travelers' Ins. Co., 80 Cal. 505.)
Cited 2 Idaho, 1207.

487. Party to whose pleading demurrer is interposed is not injured by failure of court to pass on the demurrer. (McCarthy v. Yale, 39 Cal. 585.)
Cited 78 Cal. 125; 94 Cal. 41.

488. A demurrer to the answer will be deemed to be waived when the court proceeds to try the case without a ruling on the demurrer, and without plaintiffs calling for any ruling, or calling the attention of the court to it in any way. (Silcox v. Lang, 78 Cal. 118.)

489. The failure of the court to pass upon a demurrer to an answer is not an error of which the defendant can complain, where he does not attend the trial nor object to a trial at the time, and the plaintiff insists upon trying the issues of fact. (Fincher v. Malcolmson, 96 Cal. 88.)

490. Where a demurrer is interposed to an answer, and the cause is tried by the court without first disposing of the demurrer, and no objection is made at the time of the trial, it is not such an irregularity as entitles the plaintiff to a new trial. (Calderwood v. Tevis, 23 Cal. 335.)

Demurrer, it is plaintiff's duty to urge hearing of. See Dismissal, 25.

Order sustaining demurrer is not a judgment. See Justices of the Peace, 75.

12. Error in Ruling, When Immaterial; Ruling Pending Motion for Change of Venue.

491. The sustaining of a special demurrer for uncertainty to the first count of a complaint, consisting of the common count for money had and received, the other count, upon which the case was in fact tried, consisting of a claim for overdrafts of defendant's accounts with the plaintiff bank, if erroneous, cannot be prejudicial error, where it appears from the evidence that there could be no recovery upon the first count, and that both counts were intended to represent the same cause of action. (Consolidated Nat. Bank v. Pacific Coast S. S. Co., 95 Cal. 1.)

492. If the second count in a complaint is in part a copy of the first, but the additional

allegations it contains do not present any new or additional ground of relief, the second count is redundant, and the judgment will not be reversed because a demurrer to such second count was sustained, for no injury was sustained thereby. (*Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.)

493. Where a demurrer to a separate defense in an answer setting up a defect of the parties plaintiff is erroneously overruled, the error is without prejudice to the plaintiffs if the defendants subsequently abandon the defense. (*Burroughs v. De Couts*, 70 Cal. 361.)

494. If the answer contains a special defense which consists of an averment of facts which, if admissible in evidence, can be proved under the denials contained in the answer, an order of the court overruling a demurrer to the special defense, if erroneously made, constitutes an immaterial error. (*Brown v. Kentfield*, 50 Cal. 129.)

495. Where the court erroneously overruled plaintiff's demurrer to certain new matter contained in the answer, under which, however, the defendant, at the trial, introduced no proof, held, that the plaintiff's case was not prejudiced by such erroneous decision, and that it furnishes no ground for a reversal, on appeal, of a judgment rendered for the defendant. (*Campbell v. Bear River etc. Min. Co.*, 35 Cal. 679.)
Cited 90 Cal. 94.

496. That a good special defense, held to be bad on demurrer, might have been proved under general issue will not be considered as a correction of the erroneous ruling, when it appears from the record that material evidence in support of such defense was excluded upon objection made and sustained at the trial. (*Green v. Campbell*, 52 Cal. 586.)

497. Where a defendant in an action demurred to the complaint, and improperly moved for a change of venue, the fact that the court overruled the demurrer before overruling the motion for a change of venue is not prejudicial error, if both the demurrer and the motion were properly overruled. (*Pennie v. Visser*, 94 Cal. 323.)

13. Notice of Overruling.

498. Written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party at the time of the ruling, and the time to amend or answer runs in such case from the time when the ruling is made. (*Wall v. Heald*, 95 Cal. 364.)

499. Upon the overruling of the demurrer to the complaint the defendant's attorney was present in court, and asked for and obtained leave to file an answer within five days. Held, that written notice was waived and a judgment by default was rightly entered after the expiration of the time. (*Barron v. Deleval*, 58 Cal. 95.)

Cited 69 Cal. 562; 89 Cal. 41; 95 Cal. 367; 99 Cal. 176; 6 Utah, 142; distinguished 66 Cal. 472.

500. Under rule 16 of the superior court of the city and county of San Francisco, when a demurrer to the complaint has been overruled

for want of an appearance, notice of the ruling of the court must be given to the demurring party before the entry of a judgment. (*Callahan v. Hickey*, 63 Cal. 437.)

501. If the defendant, against whom a judgment by default has been taken for a failure to answer within ten days after his demurrer to the complaint has been overruled, desires to avail himself of an omission on the part of the plaintiff to give him notice of the overruling of the demurrer, he should move the trial court to set aside the default and judgment on that ground, and, if the motion is denied, appeal from the order denying it. (*Bailey v. Sloan*, 65 Cal. 387.)

Notice of order overruling demurrer, time, when begins to run. See Defaults, 45.

Failure to give notice of overruling of demurrer not ground for setting aside default, when. See Defaults, 204.

Demurrer, notice of overruling of. See Judgments, 672.

14. Judgment on; Exception to Ruling; Review of.

Judgment on demurrer. See Judgments, VII.

Judgment rendered before demurrer disposed of. See Judgments, XII, 11.

Judgment on demurrer, setting aside. See Judgments, XIV, 2, d.

Stipulation for overruling of demurrer, estoppel from. See Stipulations, 42.

502. When party stands by pleading, to which demurrer has been sustained, no exception to the decision is required. (*Smith v. Lawrence*, 38 Cal. 24.)
Cited 7 Mont. 352; 8 Mont. 222; 17 Nev. 269; 1 Utah, 334.

Appealability of rulings on demurrers. See Appeals, II, 17.

Demurrer overruled by consent not reviewable. See Appeals, 1941, 1942.

Demurrer, judgment on, time to appeal from. See Appeals, 414.

Demurrer, overruling, review of order on appeal by plaintiff. See Appeals, 2007.

Demurrer, ruling sustained if proper on any ground. See Appeals, 1866.

Appeal, review of order dismissing demurrer. See Appeals, XI, 13, b.

Review, rulings and orders on demurrers, how presented for. See Appeals, VII, 4.

Appeal, immaterial errors affecting demurrers. See Appeals, XI, 12, c.

Appeal, presumptions as to demurrers. See Appeals, XI, 24, e.

Demurrer, presumption of disposition of. See Appeals, 2781.

Demurrer, order overruling, presumption in favor of. See Appeals, 2780.

Demurrers, objection to first taken on appeals. See Appeals, XI, 14, d.

15. Right to Amend.

503. If demurrer to complaint is sustained, plaintiff is entitled to leave to amend complaint, unless the complaint is so defective that it cannot be made good by any amendment. (*Lord v. Hopkins*, 30 Cal. 76.)

504. When final judgment on demurrer to complaint sustaining demurrer was reversed,

the plaintiff had the right to amend, on application to the court below. (*Phelan v. Supervisors of San Francisco*, 9 Cal. 15.) Distinguished 27 Cal. 295.

505. The privilege of amending a complaint after the trial of the issue of law, raised by demurrer, is in the discretion of the trial court, and where the demurrer is sustained without leave to amend, and nothing appears in the record to show an abuse of discretion, or that the plaintiff applied to the trial court for leave to amend, or took an exception to a refusal of the court to grant such leave, it is too late to raise the objection for the first time on appeal that the court failed to grant it. (*Buckley v. Howe*, 86 Cal. 597.)

506. When a demurrer to the complaint is overruled, and there is no answer on file, it is within the discretion of the court to grant leave to answer or to order a final judgment in the case. (*Barron v. Deleval*, 58 Cal. 95.) Cited 71 Cal. 492.

507. The defense relied on in the answer in this case being invalid, it was not error to refuse permission to amend after judgment sustaining a demurrer to the answer. Besides, the allowance of the amendment was matter of discretion, for the abuse of which only could this court interfere. (*Gillan v. Hutchinson*, 16 Cal. 153.) Cited 12 Cal. 222.

508. It is not error in order sustaining demurrer to omit to say anything about leave to amend, if the party whose pleading was demurred to did not ask for such leave or for any order on the subject. (*Smith v. Taylor*, 82 Cal. 533.)

Time to amend, from what time runs. See ante, X, 13.

Time to answer where demurrer overruled. See ante, IX, 1.

Case is pending during time allowed for amendment. See post, 541.

Allowing answer on overruling of demurrer. See Appeals, 2161.

16. Filing of Answer as Waiver of Ruling on Demurrer.

509. To test the ruling on the demurrer one should go to trial on the pleadings where the judgment on demurrer left him. (*Gale v. Tuolumne Water Co.*, 14 Cal. 25.) Cited 98 Cal. 283.

510. Where a demurrer to the complaint is put in, and overruled, and the defendant then answers, the answer is a waiver of the demurrer. (*De Boom v. Priestly*, 1 Cal. 206, cited 26 Cal. 20, 71 Cal. 190, 82 Cal. 257, 84 Cal. 218, 1 Idaho, N. S., 551, 2 Mont. 414, 16 Nev. 275; *Pierce v. Minturn*, 1 Cal. 470, cited 71 Cal. 190, 1 Idaho, N. S., 551, 2 Mont. 414, 16 Nev. 275, 3 Utah, 486; *Brooks v. Minturn*, 1 Cal. 481, cited 71 Cal. 190, 84 Cal. 218, 2 Mont. 414; *Madden v. Occidental etc. S. S. Co.*, 86 Cal. 445.)

511. The amendment of a complaint after the sustaining of a general demurrer thereto is a waiver of any error in the sustaining of the demurrer. (*Ganceart v. Henry*, 98 Cal. 281.)

512. An error in overruling a demurrer to a

complaint is cured if the plaintiff subsequently amend his complaint in the particular to which the demurrer was directed. (*Walsh v. McKeen*, 75 Cal. 519.)

513. Where a demurrer is sustained, and plaintiff amends by making two counts instead of one, he cannot, after trial, complain of error in sustaining the demurrer. (*Gale v. Tuolumne Water Co.*, 14 Cal. 25.) Cited 98 Cal. 283; 2 Mont. 474; 3 Mont. 144; 6 Mont. 287.

514. The defendant filed a cross-complaint, praying for a rescission, which was demurred to by the plaintiff, and the demurrer sustained, but before the sustaining of the demurrer, the plaintiff filed an answer to the cross-complaint. Held, the demurrer was waived. (*Booth v. Chapman*, 59 Cal. 149.)

515. When separate defenses are set up in answer, and demurrer is sustained to one or more of them, an amended answer subsequently filed operates as a waiver of error as to such defenses as are pleaded anew, but not as to defenses to which the demurrer was sustained, and which are not again pleaded. (*Hagely v. Hagely*, 68 Cal. 348.) Cited 71 Cal. 542.

516. Objection that two causes of action are improperly united in a complaint, when properly taken by demurrer, is not waived by subsequently answering the complaint and going to trial upon the merits. (*Thelin v. Stewart*, 100 Cal. 372.)

517. Demurrer is not waived by filing of answer upon leave given by the court after the demurrer is overruled. (*Curtiss v. Bachman*, 84 Cal. 216.)

Waiver of error in striking out by filing amended complaint. See ante, 143.

17. Trial After Ruling on, Without Issue Joined.

518. It is error to proceed to try cause as if issues were joined by the pleadings after the decision of the court sustaining a demurrer to an answer. (*Carman v. Boss*, 64 Cal. 249.)

18. Power of Defendant After Demurrer to Answer Sustained.

519. After a demurrer is sustained to an answer, the defendant is practically out of the case, and his objections to the subsequent proceedings cannot be considered. (*Ramsey v. Flournoy*, 58 Cal. 260.)

XI. Amendments.

1. Should be Liberally Allowed; Discretion as to.

520. Amendments are allowed by statutes in furtherance of justice, and are within the discretion of the court. (*Cooke v. Spears*, 2 Cal. 409.) Cited 30 Cal. 437.

521. Great latitude is given to the courts by our statute, in amending and altering pleadings. (*Polack v. Hunt*, 2 Cal. 193.)

522. Courts should be liberal in allowing amendments to pleadings, to the end that cases may be fully and fairly presented upon their merits. Motions to amend are not, however, to be granted as matter of course,

but only when good cause is shown therefor. (Hayden v. Hayden, 46 Cal. 332.)
Cited 2 Col. App. 241.

523. Amendments should be liberally allowed by inferior courts in advancement of justice, and to secure a fair and speedy trial on the merits; and an arbitrary refusal to allow them under proper circumstances would be ground of interference by the superior court. (Smith v. Yreka Water Co., 14 Cal. 201.)

Cited 30 Cal. 78.

524. Great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as facilitate the production of all the facts bearing upon the questions involved in the action. (Burns v. Scooffy, 98 Cal. 271.)

525. Amendments should be allowed with great liberality in all stages of the proceedings, unless the opposite party would thereby lose an opportunity to fairly present his whole case. (Kirstein v. Madden, 38 Cal. 158.)

Cited 60 Cal. 251, 395; 12 Nev. 203.

526. The court below has power to grant amendments whenever, at any stage of the trial, they are necessary to the purposes of justice; and this power should be liberally exercised to secure a fair and speedy trial on the merits. (Lestrade v. Barth, 17 Cal. 285.)
Cited 70 Cal. 378; 98 Cal. 278; 12 Nev. 203.

527. Amendments to pleadings should be allowed with great liberality at any time before trial, injurious delays being avoided, and the amendment being essential to a fair trial on the merits. (McMillan v. Dana, 18 Cal. 339.)

528. Amendments of pleadings are in discretion of court below. (Stearns v. Martin, 4 Cal. 227.)

529. The allowance of amendments is in the discretion of the trial court. This discretion should not be exercised in favor of an unconscionable demand. (Daley v. Russ, 86 Cal. 114.)

530. An application to amend a pleading is addressed to the sound discretion of the court, and unless it clearly appears that the rights of the adverse party have been prejudiced by the amendment, he will not be heard to complain of it. (Cheney v. O'Brien, 69 Cal. 200; Emeric v. Alvarado, 90 Cal. 444.)

531. While the power of the court in granting amendments to pleadings should be freely and liberally exercised, in order that all the substantial merits of a cause may be reached and determined without unnecessary delay, and in one suit, yet when the court has exercised that power by granting or refusing an amendment to a pleading, such ruling is only subject to review by this court when it is apparent that an abuse of discretion has occurred. (Wixon v. Devine, 91 Cal. 477.)

532. If discretion as to amendments be abused, or illegally exercised, an appellate court will interfere. (Cooke v. Spears, 2 Cal. 409.)

533. Refusal to allow amendment is presumed to be right, unless the character of

the proposed amendment is shown in the records. (Jessup v. King, 4 Cal. 331.)

Amendment withdrawing objectionable part of answer. See Slander, 23.

Referees cannot allow parties to alter pleadings. See Reference, 32.

Amendment, superior court cannot permit, when. See Appeals, 3199.

Amendment of petition for condemnation, court has power to allow. See Eminent Domain, 100.

Amendment of clerical error in order to show cause. See Bankruptcy and Insolvency, 164.

Amendment of answer by garnishee. See Attachments, 291.

Amendment of complaint in replevin. See Replevin, 59.

Amendment by pleading novation. See Novation, 10.

Petition for sale, amendment of. See Estates of Deceased Persons, VII, 4, e, D.

Amendment, refusal to allow, when cured, See Appeals, 2047.

2. Amendments as of Course.

534. Under section 472 of the Code of Civil Procedure, a defendant, after filing a demurrer to the complaint, and before the trial of the issues of law thereon, has a right as of course to file an amended demurrer. (Hedges v. Dam, 72 Cal. 520.)

535. It is error for court to refuse plaintiff leave to amend his complaint before decision on the demurrer, if the defendant demurs to the complaint. (Lord v. Hopkins, 30 Cal. 76.)

536. Plaintiff may amend without leave of court, at any time before issuing summons, where there has been no appearance of the defendant. (Allen v. Marshall, 34 Cal. 165.)

Right to amend after demurrer sustained. See ante, XI, 15.

3. Power and Discretion of Justice to Allow.

537. Justice of the peace has right to allow complaint to be amended in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. The greatest liberality and indulgence should be extended in all such applications. (Linhart v. Buiff, 11 Cal. 280.)

538. Amendments should be readily allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in justices' courts. (Butler v. King, 10 Cal. 342.)

4. Imposition of Terms as a Condition.

539. It is not an abuse of discretion for the trial court to refuse, except upon the terms of payment of a sum of money to plaintiff, to allow the defendants, in an action to foreclose a mortgage, leave to file an amendment to their amended answer, setting up an offer of rescission of the contract, which they claimed was without consideration and tainted with fraud, where it appears that the cause had been on the calendar for two years, and that

the amount fixed by the court was to reimburse the actual expenditures of the plaintiff in coming a considerable distance to the place of trial with counsel, which would be of no avail if the amendment was allowed, because of the necessity of a continuance. (*Culverhouse v. Crossan*, 94 Cal. 544.)

540. The plaintiff obtained an *ex parte* order for leave to amend his complaint, and afterwards, upon motion of the defendant to vacate the order, the court modified the same by requiring of the plaintiff, as a condition, that he should file an undertaking for costs. Held, that the court, under section 473 of the Code of Civil Procedure, had the power to impose terms as a condition of the amendment, and that the order was therefore within its jurisdiction. (*Clune v. Sullivan*, 56 Cal. 249.)

Cited 81 Cal. 550.

5. Time of.

541. Where demurrer to complaint has been sustained with leave to amend, and the time for amendment has not expired, the case is still pending and undisposed of. (*Ex parte Barry*, 85 Cal. 603.)

542. Where there is unreasonable delay in presenting an amendment to a pleading, the court may properly refuse to allow it; and where there is no intimation of excuse for delay in presenting amendments long before allowed, until after the case is declared substantially closed, it is not an abuse of discretion to refuse to allow them thereafter when presented. (*Emeric v. Alvarado*, 90 Cal. 444.)

543. In an action upon a promissory note—the case having been at issue for nearly two years upon the plea of payment—the defendant (upon affidavits) moved for leave to file an amended answer, alleging want of consideration. Held, that the lower court properly exercised its discretion in refusing to allow this amendment. (*Page v. Williams*, 54 Cal. 562.)

544. The refusal of leave to file an amended answer is not error, when the motion therefor is made on the eve of the trial, and the jury is in attendance; and especially is this so when the case is afterwards tried as if all the matters set forth in the amended answer were pleaded. (*Shadburne v. Daly*, 76 Cal. 355.)

545. Amendment of pleading should be allowed at any stage of the trial when it is necessary for the purposes of justice, and whenever it is not done, it is error. (*Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 388.) Cited 98 Cal. 276.

546. It is not error for a court to allow pleadings to be amended so as to supply a defect or omission even after the commencement of a trial. (*Gavitt v. Doub*, 23 Cal. 78.) Cited 12 Cal. 223.

547. It is within the discretion of the trial court to permit the pleadings to be amended during the trial, when necessary for the purposes of justice. (*Walsh v. McKeen*, 75 Cal. 519.)

548. If the defendant does not know that too many persons are joined as plaintiffs until the same appears in evidence, he should

then apply for leave to amend his answer. (*Gillam v. Sigman*, 29 Cal. 637.)

549. In an action to foreclose a street assessment, the court may, on the trial, permit the complaint to be amended by omitting the names of certain defendants who are shown by the evidence to have no interest in the property against which the lien is sought to be foreclosed. (*Doane v. Houghton*, 75 Cal. 360.)

550. It is not an abuse of the discretion of the court to permit an answer to be amended after the jury is impaneled, where it does not appear that the plaintiff was taken by surprise, or suffered any injury therefrom. (*Beronio v. Southern Pac. R. R. Co.*, 86 Cal. 416.)

Trial, amendment at, to permit evidence or to conform to proofs. See post, XI, 15.

551. Permitting the defendant, by an amended answer, to plead the statute of limitations, and to deny certain averments as to taxes and assessments paid, after the evidence was closed, is not erroneous, where consideration of the statute of limitations did not enter into the judgment, and it appears that there was no abuse of discretion in regard to the amendment as to the taxes. (*Hibernia Savings and Loan Society v. Jones*, 89 Cal. 507.)

552. A court may allow a formal amendment to a complaint after the trial and during the argument. (*Hall v. Rice*, 64 Cal. 443.)

553. The action of the trial court in allowing an amended cross-complaint, setting up fraud in the procurement of the deeds of settlement, to be filed after the case had been submitted for decision, and in refusing to strike out the testimony of the defendant tending to show the fraud pleaded in the amended cross-complaint for the first time, is not an abuse of discretion, where the testimony was all in, and the amendment was made to conform to the proofs; and the fact that the plaintiff did not, in giving her testimony, deny the defendant's charges of fraud, because not based upon any issue in the case, did not render the action of the court prejudicially erroneous, in the absence of a request by the plaintiff to have the case reopened for the purpose of giving such testimony. (*Jackson v. Jackson*, 94 Cal. 446.)

554. Where an amended complaint is offered after the case is tried, and presented with the proposed findings and plaintiff's brief without any formal motion, and is conditioned to be allowed to be filed if the court should think that the complaint needed amendment, the failure of the court to cause the amended complaint to be filed is not a failure of its legal duty, or prejudicial error. (*Gillespie v. Wright*, 93 Cal. 169.)

555. A motion to amend a complaint does not come too late because made after the plaintiff has closed his testimony and the defendant has moved for a nonsuit. A motion to amend is always in time when it immediately follows an objection to the complaint or answer. (*Valencia v. Couch*, 32 Cal. 339.)

556. After the motion for a nonsuit, the

court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant, but if this is not done, the plaintiff cannot recover. (*Farmer v. Cram*, 7 Cal. 135.)

557. Where the original answer presents no defense, and judgment is rendered on the pleadings on motion of the plaintiff, it is an abuse of its discretion for the court to refuse leave to the defendant to file a sufficient amended answer. (*Felch v. Beaudry*, 40 Cal. 439.)

Amendment, allowance of where motion made for judgment on the pleadings. See *Vendor and Vendee*, XI, 6.

Amendments should be liberally allowed at all stages of the proceedings. See *ante*, 525, et seq.

Verdict, amendment after. See *post*, XI, 16.

Close of trial, amendment at. See *post*, XI, 11.

Amendment of prayer after verdict. See *ante*, VIII, 9; *post*, XI, 13.

Motion to file amended answer, time to make. See *Judgments*, 189.

Amendment of complaint on transfer of cause. See *Taxation*, 639.

Amendment on coming in of referee's report. See *Replevin*, 144.

Amendment after default by inserting true name. See *Names*, 5.

Appeal, power to amend pleadings pending. See *Appeals*, VIII, 3.

Amendment of answer during second trial, discretion as to. See *Bills and Notes*, 404.

Mistake in remedy, remanding cause with leave to amend. See *Appeals*, 3146.

6. Altering or Enlarging Description.

558. In an action of ejectment to recover a quarter section of land described as being in "range 19 east," an amendment to the complaint, describing the land as "range 20 east," is not the substitution of a new cause of action, and may properly be allowed. (*Heilbron v. Heinlen*, 72 Cal. 376.)

559. The allowance of an amendment to the complaint, in an action to determine an adverse claim to real property, by enlarging the description of the premises claimed by the plaintiff, cannot be objected to as prejudicial, if defendant disclaims as to all of the premises described in the amended complaint. (*Bulwer Consolidated Min. Co. v. Standard C. Min. Co.*, 83 Cal. 613.)

7. Matter Already Known, Substantially Alleged, or Provable under Original Pleadings.

560. Fact that new matter set up by way of amendment was known to the defendant at the time of filing his original answer is no reason why the amendment should not be permitted. (*Sharon v. Sharon*, 77 Cal. 102, cited 98 Cal. 276; *Pierson v. McCahill*, 22 Cal. 127, cited 98 Cal. 276; *Farmers' Nat. Gold Bank v. Stover*, 60 Cal. 388, cited 77 Cal. 105, 98 Cal. 276.)

Knowledge of new matter. See *post*, 593.

561. There is no error in refusing to allow an answer to be amended, when the amendment is unnecessary, and the defendant can introduce all his evidence under the original

answer. (*Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416.)

562. The refusal to allow a defendant to file an amended answer setting up matters which could be proved under the averments of the original answer is not erroneous. (*Edgar v. Stevenson*, 70 Cal. 286.)

563. An application for permission to file an amended answer is addressed to the discretion of the trial court; and where the amendment states no defense that could not be made under the original answer, it is not error for the court to permit the answer to be so amended. (*Dorn v. Baker*, 96 Cal. 206.)

564. It is not an abuse of discretion for the trial court to refuse to allow an amended answer to be filed, when the matters set out therein are not substantially different from those already pleaded in the answer on file. (*Heilbron v. Kings River etc. Canal Co.*, 76 Cal. 11.)

565. Pending the trial of an action, the court has power, upon such terms as may be just, to permit a second amended complaint to be filed, which embodies substantially the same allegations as the original complaint. (*Riverside Land etc. Co. v. Jensen*, 73 Cal. 550.)

8. Changing Nature or Cause of Action; Changing Parties.

566. It is error to allow a plaintiff to amend his complaint, changing the proceeding from an action *ex delicto* to one *ex contractu*. (*Hackett v. Bank of California*, 57 Cal. 335.) Cited 78 Cal. 96.

567. The plaintiff sued in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After a trial and verdict, which was set aside by the court, he amended his complaint, to make it in form an action of trespass for mesne profits. Held, this was erroneous, and should not have been permitted. (*Ramirez v. Murray*, 5 Cal. 222.) Cited 57 Cal. 336; 78 Cal. 96, 97; 6 Col. 150.

568. Amendment of a complaint in assumpsit for rent so as to change it into trespass for mesne profits would virtually change an action *ex contractu* into an action *ex delicto*. (*Ramirez v. Murray*, 5 Cal. 222.)

569. Where complaint in assumpsit is amended so as to change it into trespass for mesne profits, if the new complaint is to be treated as an amendment to the old one, and to continue the original action, then two causes of action incompatible in their nature are joined. (*Ramirez v. Murray*, 5 Cal. 222.)

570. A complaint in an action by a contractor to enforce a mechanic's lien, in which the special contract between the contractor and owner of the building is stated, can be changed by amendment into an action on the contract, which may be counted on specially, or the common counts in assumpsit may be used, in accordance with the general rules applicable to such counts. (*Castagnino v. Balletta*, 82 Cal. 250.)

571. A complaint in an action for breach of contract, which as originally framed, seeks to recover the contract price of services per-

formed by the plaintiff in pursuance of the contract, together with profits which he would have made, on the ground that he had been technically "prevented" from completing the contract by the defendant, may be amended so as to aver a claim for the value of the services actually done as upon a quantum meruit. Such an amendment is not the substitution of a new cause of action, so as to continue the running of the statute of limitation until its filing. (*Cox v. McLaughlin*, 76 Cal. 60.)

Cited 79 Cal. 277.

572. If the complaint avers the ownership of land in the bed of and near the banks of a stream, and work done thereon to dig a canal and build a dam to use the waters of the stream, and is framed for a judgment to recover possession of the property from one who is averred to have ousted plaintiff, if the plaintiff asks it, he should be allowed to amend his complaint by inserting therein averments of his prior appropriation of the water and a diversion by defendant, with prayer for an injunction. (*Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 673.)

573. In an action by an assignee of an insolvent firm to recover the value of certain sheep, alleged in one count of the complaint to have been sold to the defendant by the firm in violation of section 55 of the Insolvent Act, it is not error for the court to permit the complaint to be amended by adding a count charging the sale of the sheep to have been void because made by only one of the partners, without authority from the other partner. (*Carrie v. Cloverdale Banking etc. Co.*, 90 Cal. 84.)

574. Where the original complaint is upon two promissory notes, and alleges an assignment of the notes by indorsement and delivery, and also states facts from which an equitable assignment and subrogation would result in the absence of a legal assignment, and the amended complaint contains the same allegations, with the exception of the legal assignment by indorsement, no new cause of action is stated. (*Redington v. Cornwell*, 90 Cal. 49.)

575. The action was brought to quiet title to certain land. The original complaint alleged that the plaintiff's devisor was the owner of the land, and conveyed the same by a deed absolute in form to one Gridley in 1866; that the deed was intended as a mortgage to secure an indebtedness, which had subsequently been fully paid; that Gridley promised to reconvey the property, but died without having done so. It was further alleged that the deed constituted a cloud on the title of the plaintiff. The widow and children of Gridley were made parties defendant. The plaintiff subsequently filed an amended complaint, making the administratrix of the estate of Gridley also a defendant; and further alleging that the plaintiff's devisor remained in the actual, open, notorious, uninterrupted, and exclusive possession of the land, claiming the same as his own, and adversely to every other right, from the time of the execution of the deed until his death in 1883. The prayer was for a decree establish-

ing the ownership of the plaintiff to the land, and that the defendants had no right or title therein; that the deed be declared a mortgage and canceled of record, and that the title of the plaintiff be quieted. Held, on demurrer and motion to strike out, that the amended complaint did not materially change the nature of the action, and that several causes of action were not improperly joined. (*Louvall v. Gridley*, 70 Cal. 507.)

576. Where the first amended complaint in an action to recover a deposit upon a rescinded contract of sale made the owners of the land and their agents defendants, and alleged that the "defendant is an association of two or more persons doing business" under a common name, and in a second amended complaint only the agents of the owners were alleged to be an association doing business under the common name, and the owners are named separately as codefendants, the agents and owners of the land being charged in both complaints with having received from the plaintiff, and to his use, the money sued for, and with a refusal to pay it to the plaintiff upon demand, the second amended complaint does not state an essentially different cause of action against the owners of the land from that alleged in the first amended complaint, for the purpose of the statute of limitations. (*Bogart v. Crosby*, 91 Cal. 278.)

577. An amendment changing the nature of the action cannot be objected to by way of answer setting up such change as a defense, and such answer may be stricken out as irrelevant. A defendant cannot answer a complaint by allegation that it has been improperly filed. The question must be raised, if opportunity is offered, by objection to the filing of the amendment, or by motion to strike the amended pleading from the files. (*Wheeler v. West*, 78 Cal. 95.)

578. Objection that the amendment stated a different cause of action from that declared on in the original complaint cannot be urged for the first time in a collateral suit on a bond given for release of the attachment. (*Hammond v. Starr*, 79 Cal. 556.)

Amendment of prayer from legal to equitable relief. See post, XI, 13.

Facts occurring pendent lite changing liabilities. See post, XI, 9.

Form of action, amending changing. See ante, 29.

Amendment of complaint stating new cause of action, relation of. See post, XI, 21.

Amendment does not change issues, when. See *Mines and Mining*, 444.

Amendment changing parties. See Parties, VIII.

Amendment bringing in new parties. See Husband and Wife, 504, et seq.

Amendment joining additional stockholder as plaintiff. See Corporations, 608.

Amendment of complaint changing parties, effect of. See Watercourses, XIV, 2, p. B.

Time to apply for amendment, changing parties. See ante, 548, 549.

9. Title Acquired or Facts Occurring Pending Action.

579. A defendant in ejectment can only set up a title acquired pending the action by

amending his answer and averring the fact that the title was acquired since the commencement of the action. (*Reily v. Lancaster*, 39 Cal. 354.)
Cited 2 Utah, 186.

580. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, and has not pleaded such title in a supplemental answer, and for that reason his evidence of such title is excluded by the court, it is not an abuse of the discretion of the court to deny his application, made during the trial, to be allowed to amend his answer so as to obviate the objection. (*McMinn v. O'Connor*, 27 Cal. 238.)

Cited 31 Cal. 336; 39 Cal. 356.

581. Facts which occur subsequent to filing of original complaint, and which change the liabilities of the defendants, and in consequence the character of the judgment which is sought, cannot be incorporated into the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. (*Van Maren v. Johnson*, 15 Cal. 308.)

Cited 27 Cal. 247; 30 Cal. 474.

582. Discovery of fraud after suit brought would entitle plaintiff so to shape his action as to include it. (*Truebody v. Jacobson*, 2 Cal. 269.)

Transfer of interest pending action. See Parties, IX.

Supplemental pleadings. See Supplemental Pleadings.

10. Setting up Statute of Limitations.

583. Defendant will not be permitted to amend his answer so as to introduce the plea of the statute of limitations unless it be in furtherance of justice. (*Cooke v. Spears*, 2 Cal. 409.)

Cited 1 Idaho, N. S., 258.

Right to answer amendment by setting up statute of limitations. See post, 635.

Amendment, pleading statute of limitations after close of evidence. See ante, 551.

Amendment of complaint, effect on statute of limitations. See post, XI, 21; Statute of Limitations, X, 1.

11. Setting up Pendency of Another Action or Prior Judgment.

584. Permitting the defendant at the close of the trial to amend his answer by setting up the pendency of another action involving the same cause of action, held, not an abuse of discretion, under the circumstances of the case. (*Coubrough v. Adams*, 70 Cal. 374.)

585. The action was ejectment, and the defendant, after pleading to the merits, asked leave to amend his answer so as to set up a judgment of the county court in bar of the action. The court refused to allow the amendment. Held, that the judgment would not have been a bar, and that the amendment was properly disallowed. (*Kirsch v. Smith*, 64 Cal. 13.)

Cited 69 Cal. 615; 71 Cal. 437.

12. Ambiguous Complaint, Amendment of.

586. Amendment should be allowed to a complaint at the request of the plaintiff, so

as to make it express the cause of action originally intended but ambiguously expressed, if the intention is manifest on the face of the complaint. (*Nevada County etc. Canal Co. v. Kidd*, 28 Cal. 673.)

13. Amendment of Prayer.

587. The court should not allow the prayer for relief to be amended after verdict so as to ask for further relief, unless the facts averred and issues joined justify it, and all those issues to which the further relief demanded relate have been fully litigated and fairly determined, and the additional relief has been asked in proper time. (*Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.)

588. Where a complaint praying for legal relief states a cause of action entitling the plaintiff to equitable relief, the court may, on the trial, permit the prayer to be amended so as to ask for the appropriate equitable relief. (*Walsh v. McKen*, 75 Cal. 519.)

Amendment to prayer, refusal, presumption in favor of. See Appeals, 2777.

14. Inconsistent with Original; Evasive, Immaterial, or Redundant Matter.

589. Where amended answer is complete in itself, and is inconsistent with original answer, the two cannot stand together. (*Kuhland v. Sedgwick*, 17 Cal. 123.)

590. When a party admits in his answer, under oath, a material allegation of the complaint, and the case is tried, and a judgment rendered, and a new trial afterwards granted by the supreme court, on the return of the cause to the court below the defendant should not be allowed to amend his answer by changing the admission into a denial. (*Spanagel v. Reay*, 47 Cal. 608.)

Cited 85 Cal. 92; 2 Idaho, 352.

591. In an action against the appellants and other defendants to foreclose a street assessment lien upon a lot in San Francisco alleged to be the property of defendants, the appellants—having, in their original answer, admitted ownership of the premises in dispute—moved for leave to file an amendment, in which, by way of separate defense, they denied ownership, and the motion was denied. Held, the refusal to allow the filing of the amendment, under the circumstances in which the application was made, was not an abuse of discretion with which this court will interfere. (*Harney v. Corcoran*, 60 Cal. 314.)

Cited 66 Cal. 36.

592. After trial of a foreclosure suit, in which one of two joint payees of the mortgage note was charged as an indorser, and had filed an answer admitting the indorsement and waiver of demand, notice, and protest, and pleading that his copayee was the real party in interest, and that the action was barred by limitation, and after reversal of a judgment in favor of the indorser, it is not error for the court before retrial to permit the indorser to amend his answer by averring that, at the time of the indorsement and waiver, it was agreed between himself and his copayee, who joined in the indorsement of the note to a firm of which the copayee was a member, that such copayee would ad-

murrer. Under the latter section, as it stood prior to the amendment of March 9, 1880, service of the amendment upon the defendants was not required unless ordered by the court. (*McGary v. Pedorena*, 58 Cal. 91.)

620. Where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon the parties, including the defaulting defendant. (*Thompson v. Johnson*, 60 Cal. 292.)
Cited 82 Cal. 419; 86 Cal. 399; 88 Cal. 168.

621. An amended complaint must be served on all the adverse parties who are to be bound by the judgment, whether it materially affects them or not. (*Elder v. Spinks*, 53 Cal. 293.)
Cited 58 Cal. 93.

622. Section 432 of the Code of Civil Procedure, requiring an amended complaint to be served on the defendants affected thereby, has reference to amendments made after the parties have been brought into court, and does not require a mode of service of summons differing from other cases. (*Dowling v. Comerford*, 99 Cal. 204.)

623. Where a complaint is amended (under section 474 of the Code of Civil Procedure) by inserting the true name of a defendant sued by a fictitious name, service of a copy of the amended complaint on such defendant is not required, nor is he entitled to ten days in which to answer. Section 472 of the Code of Civil Procedure has no application to such a case. (*Brock v. Martinovich*, 55 Cal. 516.)

624. Where complaint has been amended prior to order for publication, the amended, and not the original, complaint should be deposited in the post-office. (*Mudge v. Steinhart*, 78 Cal. 34.)

625. The service of an amended complaint upon the attorney for a defendant, prior to his appearance as such, is void as a service on the defendant. (*Powers v. Braly*, 75 Cal. 237.)

626. The service of an amended complaint upon a person who is brought in thereby for the first time as a defendant, without a service of the summons upon him, is void. (*Powers v. Braly*, 75 Cal. 237.)

Service of amended pleading. See post, 634.

19. Manner of Making; Filing of; Waiver of Objection to.

627. If, at the close of a trial, the court asks the plaintiff if he desires to amend his complaint to make it conform to the proofs, and he declines to amend, and the court announces that, if it becomes necessary, it will, of its own motion, amend the complaint to make it conform to the case made, and the suit is decided against the plaintiff and no amendment is made, the plaintiff cannot afterwards be allowed to treat the complaint as amended. (*Carpentier v. Brenham*, 50 Cal. 549.)
Cited 19 Nev. 68.

628. Mere order permitting amendment of complaint is of no effect unless and until

complied with. (*Kimball v. Gearhart*, 12 Cal. 27.)
Cited 9 Cal. 284.

629. If the court, during the trial, grants leave to file an amendment to the complaint, and it is filed before the argument is concluded, and there is nothing in the record to show the other party was not present and consenting, the amendment will not be disregarded in the supreme court. (*Reynolds v. Hosmer*, 45 Cal. 616.)

630. Where the plaintiff was permitted at the trial to amend the statement of his second cause of action by adding that the money claimed in that count was the identical money claimed in the first count, the fact that the amendment was not actually made and filed until after the verdict and entry of judgment is error without prejudice, such amendment being immaterial, and it appearing that the case was tried with reference to it. (*Stark v. Wellman*, 96 Cal. 400.)
Cited 98 Cal. 646.

631. The facts that the clerk's minutes show that leave was given to file an amended complaint, and that amendments only to the complaint were filed, do not furnish ground for wholly disregarding the amendments in the supreme court. (*Reynolds v. Hosmer*, 45 Cal. 616.)

632. The amendment of a complaint by striking out of the caption the name of certain of the defendants who were not proper parties, without filing an amended complaint, while not commendable as a method of amending, is without prejudice to other defendants who are properly parties. (*Doane v. Houghton*, 75 Cal. 360.)

633. After the cause had been at issue more than two years, the defendant, without obtaining leave of the court and without notice to the plaintiff, filed an amended answer, a copy of which was served upon the plaintiff's attorneys, who made no protest or objection until after the trial had commenced, two weeks subsequent to the service and filing of the amended answer, when they moved to have it stricken from the files. The court granted the motion, and the defendant thereupon asked leave to refile the amended answer on a proper showing, which the court refused. Held, that the action of the court was an abuse of discretion. (*Lower Kings River Water Ditch Co. v. Kings River etc. Canal Co.*, 67 Cal. 577.)

Amendment, service, objection when to be taken. See Appeals, 2324.

Amendment, presumption as to filing and serving. See Appeals, 2775.

20. Answer to Amendment.

634. The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of default against him on the original pleading. The amendment of a pleading in matter of substance opens the default on the original pleading, and the amended pleading must be served upon a defaulting defendant. (*Reinhart v. Lugo*, 86 Cal. 395.)

635. The action as originally brought was

tiff's intestate, where the defendant denied the partnership, and set up as one of his defenses that the alleged agreement had been superseded and annulled by a subsequent written agreement between plaintiff, defendant, and a third party, and upon the trial, after having proved the execution of the subsequent agreement, sought to show by oral testimony that it had been executed upon the consideration and agreement that the first agreement should be canceled, and all claims of plaintiff's intestate against the defendant waived thereunder, but an objection was made to the testimony, upon the ground that it was incompetent, and not responsive to any of the issues raised by the pleadings, which objection was sustained, it is error for the court to refuse to allow the defendant to amend his answer so as to obviate the objection that the evidence was not within the issues. (*Guidery v. Green*, 95 Cal. 630.)

608. The court should allow the defendant to make amendments to his answer, to enable him to prove facts which will constitute a defense to plaintiff's demand; and if, by reason of such amendments, the court is satisfied that the plaintiff is taken by surprise, and requires further time to prepare to meet the defense, it can continue the case, and impose such terms as will compensate plaintiff for the expense and delay caused thereby. (*Guidery v. Green*, 95 Cal. 630.)

609. A ruling of the trial court disallowing a proposed amendment to the answer, so as to plead a particular prior right sought to be proved outside of the issues, is sufficiently supported, where it appears that the taking of evidence at the trial had almost concluded at the time of the proposed amendment; that eight years before the same attorneys in a former suit between some of the same parties, involving some of the same rights, pleaded similar facts as a defense; that defendant could not have been misled by supposing the evidence admissible under the answer as framed; that the proposed amendment would contradict an admission of the answer; and that the matter of the proposed evidence would contradict principles of law settled by decisions in the same case upon former appeals, and would be too weak to support the proposed amendment. (*Wixon v. Devine*, 91 Cal. 477.)

610. When the petition is amended at the trial to conform to the evidence, and it appears that the evidence already taken is applicable to the amended petition, the court may properly refuse to try the case *de novo*, and to have introduced anew the evidence already before the court. (*Modesto Irrigation District v. Tregoe*, 88 Cal. 334.)

611. It is within the discretion of the trial court to allow an intervenor to amend his complaint at the trial to conform to the proofs, and it is not error to allow such amendment. (*Ward v. Waterman*, 85 Cal. 488.)

612. Pending a motion for a nonsuit, it is within the discretion of the court to permit the plaintiff to amend his complaint so as to conform to the evidence. (*Kamm v. Bank of California*, 74 Cal. 191.)

613. If evidence is objected to because the defense under which it is offered is defectively pleaded, the court should allow the pleading to be amended. (*Carpentier v. Small*, 35 Cal. 346.)

Cited 37 Cal. 165; 14 Nev. 146.

614. If the plaintiff sues upon one only or upon two of the causes of action mentioned in the Forcible Entry and Detainer Act, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the court, on its own motion, or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony. (*Valencia v. Couch*, 32 Cal. 340.)

615. The complaint in suit to quiet title by the holder of the equitable title against the holder of the legal might have been amended at the trial so as to conform to the proofs and findings; and the proofs showing a clear cause of action in favor of plaintiff for the enforcement of a trust, leave to amend the pleadings and retry the case accordingly will be granted upon reversal of the judgment. (*Bryan v. Tormey*, 84 Cal. 126.)

Amendment to conform to proofs. See *Mechanics' Liens*, 343.

Amendment to conform to proof after submission of cause. See *ante*, 553.

16. Amendment of Complaint to Correspond to Judgment.

616. Under our Practice Act a complaint cannot be amended in this court so as to make it correspond with the verdict. The district court in a proper case, before judgment, may direct the complaint to be so amended. (*Hooper v. Wells, Fargo & Co.*, 27 Cal. 11.)

Cited 60 Cal. 396; 98 Cal. 276; distinguished 28 Cal. 631.

17. Compelling Amendment.

617. A witness having testified to the effect that he and his company claimed to own a part of the land in controversy, the defendant's attorney moved that the plaintiff be required to amend its complaint, and to bring in the witness and his cotenants as parties; and the motion was denied. Held, the defendant had no right to insist upon the proposed amendment. (*Niagara etc. Min. Co. v. Bunker Hill Min. Co.*, 59 Cal. 612.)

18. Notice and Service of.

618. Where it does not appear from transcript that any proposed amendment was served or presented, or that the notice of motion pointed out the precise amendment which the plaintiff would ask leave to make, it cannot be held that it is an abuse of discretion for the court to refuse to allow an amendment to the complaint. (*Martin v. Thompson*, 62 Cal. 619.)

619. In order to give effect to both of sections 432 and 472 of the Code of Civil Procedure, it must be held that the former applies to amendments made before answer filed, and before the trial of an issue of law upon a demurrer; and that the latter applies to amendments made after answer filed, or after the trial of an issue of law upon a de-

651. An amended complaint takes the place of the original, and when it is filed the original ceases to perform any further functions as a pleading. (*Barber v. Reynolds*, 33 Cal. 497, cited 54 Cal. 193, 57 Cal. 411, 63 Cal. 308, 64 Cal. 13, 69 Cal. 138, 100 Cal. 454, 1 Idaho, N. S., 436, 9 Mont. 261, 10 Mont. 132, 8 Nev. 60; *La Société Française etc. v. Weidmann*, 97 Cal. 507.)

652. Original complaint is not superseded by amended complaint for all purposes, but the original complaint may be considered as a part of the record of the case for the purpose of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment upon the hearing of a demurrer raising those questions. (*Redington v. Cornwell*, 90 Cal. 49.)

653. An amended complaint only supercedes the pleadings founded upon the original complaint, and does not affect a cross-complaint or the issues joined thereon, nor does the cross-complaint fall with the fall of plaintiff's complaint, when a demurrer is sustained thereto, and there is a failure or refusal to amend. (*Mott v. Mott*, 82 Cal. 413.)

Amended complaint takes place of original. See *Summons*, 23.

Amended complaint does not state new cause of action, when. See *Slander*, 21.

Evidence of allegations in original answer. See *Slander*, 23.

Original complaint as evidence. See *Interpleader*, 10.

Original pleading not admissible after amendment. See *Evidence*, 214, et seq.

23. Motion for, When to be Passed on; Refusal or Allowance, When Immaterial; Review of.

654. All questions relating to the sufficiency of the pleadings should be passed upon when presented, and before proceeding further with the trial. Accordingly, where the court below, upon the application of the contestant of a will—made at the close of the testimony—to amend his petition, reserved its ruling, but stated that, in case the will was set aside, it would allow the amendment, and otherwise not, held, that this was an irregularity; but held also, as evidence had been admitted as to all the facts alleged in the amended petition, that the contestant was not injured, and that the ruling was not ground for reversal. (*Estate of Brooks*, 54 Cal. 471.)

655. It is not error if the court refuses to allow an immaterial amendment to a pleading. (*Carey v. Brown*, 62 Cal. 373.)

656. In an action of assumpsit, for goods sold and delivered, after a submission of the case upon the pleadings, defendants asked leave to amend their answer, which as it then stood raised no issue, by averring that the goods were purchased "on credit," and that the "term of credit" had not expired, which the court refused. Held, that the refusal was proper, as the averment proposed was only a conclusion of law, and therefore immaterial. (*Levinson v. Schwartz*, 22 Cal. 229.) Cited 69 Cal. 87.

657. Assignment of an account by indorsement of the word "assigned" being sufficient,

it is not error to permit the plaintiff, the assignee of the account, to amend on the trial by inserting the words, "for value received I hereby assign the within account," instead of the word "assigned," the additional words being mere surplusage. (*Ryan v. Maddux*, 6 Cal. 247.)

658. Erroneous refusal to allow amendment to answer becomes immaterial if the defendant was allowed to introduce all the evidence which he could have introduced under the proposed amendment, and such evidence shows no defense. (*Southern Pac. R. R. Co. v. Purcell*, 77 Cal. 69.) Cited 98 Cal. 276.

Allowing continuance on amendment. See *Continuance*, 14.

Appeal, review of order allowing amendments. See *Appeals*, XI, 13, d.

Review, orders allowing or refusing amendment, how presented for. See *Appeals*, VII, 2.

Appeal, amendment allowing on reversal or affirmation. See *Appeals*, XII, 8.

Amendments, objection to first taken on appeal. See *Appeals*, XI, 14, d.

Appeal, reversal to allow amendment. See *Appeals*, XII, 8.

Certiorari to review order allowing amendment. See *Certiorari*, III, 2, a.

XII. Transfer from One Department to Another.

659. While the different departments of the superior court of San Francisco constitute, theoretically, one court, still, practically, for the purpose of the trial of causes, they are as distinct as other superior courts; and to transfer a cause from one department to another, and try it on the same day, without notice, is an abrupt proceeding, from which, at least in a divorce case, it is proper to relieve the absent party. (*Cottrell v. Cottrell*, 83 Cal. 457.)

XIII. Discontinuance and Retraxit.

660. If the plaintiff, after the summons is served, and on the return day, without any other proceedings, directs the justice to enter a judgment of discontinuance, no trial is had or entered upon. (*Anderson v. Pennie*, 32 Cal. 265.)

661. Under our practice, the plaintiff in person cannot make a renunciation of his suit in court, but such renunciation must be made by his attorney of record. (*Merritt v. Campbell*, 47 Cal. 542.)

662. A judgment of dismissal, rendered on the application of either party, with the written consent of the other, amounts to an open and voluntary renunciation of the plaintiff's suit, which amounts to a retraxit. (*Merritt v. Campbell*, 47 Cal. 542.)

XIV. Transfer of Interest Pending Action.

See *Parties*, IX.

663. If the plaintiff in ejectment parts with the title to the demanded premises, pending the action, the action may be continued in his name, unless the grantee applies to be substituted as plaintiff. (*Camarillo v. Fenlon*, 49 Cal. 202.)

664. Where the plaintiff transfers his interest in the subject matter of the action, it is the right of his successor in interest (under section 385 of the Code of Civil Procedure) to prosecute the case, either in the name of the original plaintiff, or by having himself substituted in the action by an order of the court; and the original plaintiff is divested of all power to control the action. Accordingly, where the plaintiff had transferred his interest to others, whose attorneys thenceforth took charge of the case, but without any change of the title of the action or of the attorney of record, a stipulation signed by the original plaintiff and his attorney for the dismissal of the action was a flagrant breach of good faith, and an order of dismissal entered upon such stipulation should have been promptly vacated on discovering the fraud. (*Walker v. Felt*, 54 Cal. 386.)

Order of substitution *nunc pro tunc*. See post, 701.

XV. Presumption Arising from Uniform Procedure.

665. Constant and uniform procedure continued by courts for long time is strongly persuasive that the practice is correct. (*Giant Powder Co. v. San Diego Flume Co.*, 78 Cal. 193.)

Long continued practice sustained. See Reference, 9.

Stare decisis, doctrine of, whether applies to questions of practice. See *Stare Decisis*.

XVI. Powers of Judges at Chambers.

666. Judge's chambers are not confined to place for usual transaction of judicial business not required to be done in open court, but chamber business may be done wherever the judge may be found within the proper jurisdiction of the court. (*In re Lux*, 100 Cal. 593.)

667. General rule is, that all judicial business must be transacted in court, and there must be some express warrant of the statute to authorize any of it to be transacted at chambers. (*Larco v. Casaneuava*, 30 Cal. 561.) Cited 34 Cal. 332; 35 Cal. 691; 6 Col. 530; 2 Dak. 340; 10 Or. 348.

668. If an order, which is required to be made by the court, is entitled and filed in the court, and bears the seal of the court, it will not be considered as an order of the judge at chambers, because the words "it appearing to me," are used in it, and the testatum clause says "in witness whereof, I have hereunto set my hand." (*Oaks v. Rodgers*, 48 Cal. 197.)

669. The judge may at chambers grant leave to renew the motion. (*Kenney v. Kelleher*, 63 Cal. 442.)

670. District judges have no jurisdiction at chambers to entertain motions to strike out pleadings or parts of pleadings. (*Larco v. Casaneuava*, 30 Cal. 561.)

671. In an application to condemn land for a public use, the district judge, at chambers, has no power to make an order authorizing the plaintiff to take possession of and use the property during the pendency of the proceed-

ings, nor has he power to make an order staying all actions against the plaintiff, on account of taking possession of such property. (*Loomis v. Andrews*, 49 Cal. 239.)

672. A judge at chambers has "no jurisdiction to make an order setting aside an execution issued on a judgment and perpetually staying the enforcement of the same." (*Bond v. Pacheco*, 30 Cal. 530.) Cited 34 Cal. 332; 35 Cal. 691.

673. If the district judge at chambers makes an order which he has no power to make, and afterwards sets the order aside, and then at chambers, by a subsequent order, reinstates the first order, the order reinstating is also without authority and void. (*Loomis v. Andrews*, 49 Cal. 239.)

674. A judge at chambers has no power to make an order directing the clerk of his court to enter in the minutes of the court, *nunc pro tunc*, an order alleged to have been made in open court. (*Hegeler v. Henckell*, 27 Cal. 491.)

675. By the statute concerning guardians (*Stats. 1850*, p. 272), as amended by the sixteenth section of the act of 1861, the power to discharge a guardian at chambers is conferred upon the probate judge, and as the act of the probate court. (*Warder v. Elkins*, 38 Cal. 439.)

676. This power includes and implies the power to perform at chambers any act preliminary to this ultimate act, and the same becomes the act of the probate court. (*Warder v. Elkins*, 38 Cal. 439.)

677. After a cause has been submitted in the court, it is not error to hear argument at chambers, and thereupon to decide the case. (*City of San Jose v. Shaw*, 45 Cal. 178.)

678. The constitution does not prohibit the legislature from conferring upon district judges the power to hear and determine actions and proceedings at chambers. (*Brewster v. Hartley*, 37 Cal. 15.)

Chamber orders, appealability of. See Appeals, II, 4.

Chambers, judgment in cause tried at, validity. See Judgments, XII, 18.

Chambers, issuance of writ at. See Certiorari, IV, 6.

Chambers, discharge in insolvency at. See Bankruptcy and Insolvency, X, 4.

Chambers, order for meeting of creditors may be made at. See Bankruptcy and Insolvency, 142.

Chambers, granting application for continuance at. See Continuance, III, 3.

Chambers, hearing writ of certiorari at chambers. See Certiorari, 161.

Chambers, granting injunction at, *ex parte*. See Injunctions, 292.

Power to appoint receiver at chambers. See Receivers, 6.

Power of judge at chambers over execution. See Executions, 70.

XVII. Motions.

679. A motion, within the meaning of the statute concerning fees, is an application for a rule or order by a party to an action or proceeding; and the motions, rules, or orders,

for the entry of which the clerk is entitled to collect fees, are such as are entered on the application of some party who is bound by law to pay for the service rendered. (*Bicknell v. Amador County*, 30 Cal. 237.)

680. A motion is an application for a rule or order made viva voce to a court or judge. Making out and filing a written application for such rule or order is not sufficient. The attention of the court must be called to it, and the court moved to grant it. (*People v. Ah Sam*, 41 Cal. 645.)
Cited 9 Mont. 403.

681. One who is not a party to a proceeding cannot make a motion therein. (*Estate of Aveline*, 53 Cal. 259.)

682. Motion may be made orally, though it is better practice to have it made in writing or entered in the minutes of the court. (*Herrlich v. McDonald*, 80 Cal. 472.)
Cited 83 Cal. 83.

683. Where a party in his notice of motion served on the adverse party asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented. (*People ex rel. Field v. Turner*, 1 Cal. 152.)

684. When the statute speaks of notice of a motion, it means written notice, or notice in open court, of which a minute is made by the clerk. (*Borland v. Thornton*, 12 Cal. 440.)
Cited 24 Cal. 365; 2 Nev. 40.

685. A party who appears and contests a motion in the court below cannot object, on appeal, that he had no notice of the motion. (*Reynolds v. Harris*, 14 Cal. 667.)
Cited 27 Cal. 138; 57 Cal. 542; 90 Cal. 220.

Motion and notice of motion, distinction. See Appeals, 1293.

Notice of motion. See post, XIX.

Ex parte motion substituting executor. See Parties, 114, et seq.

Notice of motions to discharge attachment. See Attachments, 224, 225.

686. In all motions before a judge during the progress of a trial, he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others. (*Southern California etc. Road Co. v. National Bank of San Bernardino*, 100 Cal. 316.)

687. In all ordinary motions, where the jurisdiction is not limited by statute, it is in the discretionary power of the court or judge hearing and denying a motion to grant leave for its renewal. (*Hitchcock v. McElrath*, 69 Cal. 634.)

688. Leave to renew a motion may be given after the original motion is denied. (*Kenney v. Kelleher*, 63 Cal. 442.)
Cited 69 Cal. 632.

689. Motion made in the usual course of practice which has once been denied may be renewed by leave of the court. (*Bowers v. Cherokee Bob*, 46 Cal. 279.)
Cited 54 Cal. 490; 63 Cal. 444.

690. In a case where a motion is made to vacate a judgment entered without findings, the court has jurisdiction, and it is within its

discretion to allow a motion to vacate the judgment to be renewed, although it had previously been denied. (*Mace v. O'Reilly*, 70 Cal. 231.)

Cited 98 Cal. 206.

Granting leave to renew at chambers. See ante, 669.

691. The doctrine of *res adjudicata*, in its strict sense, does not apply to motions for alias writs and to motions for orders requiring a sheriff to execute a writ. The court may, on a proper state of facts, allow a renewal of such a motion, once decided; but such leave will not be granted unless a new state of facts has arisen since the former hearing, or the facts were not then presented by reason of surprise or excusable neglect. (*Ford v. Doyle*, 44 Cal. 635.)

Cited 46 Cal. 285; 54 Cal. 490; 63 Cal. 444; 78 Cal. 472; 9 Mont. 403.

Renewal of motion to reinstate appeal. See Appeals, 1854.

Renewal of motion for nonsuit. See Nonsuit, IX.

Motion, renewal, presumptions as to. See Appeals, 2824.

Appeal, motion to dismiss, renewal of. See Appeals, IX, 3.

Renewing motion for change of venue. See Venue, II, 7, h.

Second motion for new trial. See New Trial, XI, 4.

Second notice of motion for new trial. See New Trial, V, 3, f.

Appeal, review of order allowing renewal of motion once denied. See Appeals, XI, 13, g.

Motions for change of venue. See Venue, II.

New trial of motion not permitted. See Appeals, 349.

Power to entertain at chambers. See ante, XVI.

Motion to substitute lost papers. See post, XIX.

XVIII. Orders.

692. An order is the judgment or conclusion of the court or judge upon any motion or proceeding, and includes cases where affirmative relief is granted or relief is denied. (*Gilman v. Contra Costa County*, 8 Cal. 52.)
Cited 98 Cal. 640; 1 Idaho, N. S., 428.

693. An order is a direction of a court or judge made or entered in writing, and not included in a judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. (*McGuire v. Drew*, 83 Cal. 225.)

Order dispensing with bond of municipal officer, when an order of "court." See Appeals, 719.

694. When county court has acquired jurisdiction, both of the parties and of the subject matter of the action, its orders thereafter, though they may be erroneous, are not void, unless they contravene some provision of the statute regulating appeals to the county

courts. (*People ex rel. Waldron v. Elkins*, 40 Cal. 642.)

695. While a court has power to set aside orders and judgments improvidently and unintentionally made, yet a given order or judgment will not be presumed on appeal to have been of that character. The fact must be affirmatively shown. And it seems that a recital that the order was made "under a misapprehension" is not a sufficient showing of the fact. (*Wunderlin v. Cadogan*, 75 Cal. 617.)

696. When a court makes an order, and it does not appear on the face of the record that the court did not have jurisdiction to make it, it will be presumed, in a collateral attack, that the parties were before the court, and that the proper proceedings were had to authorize the court to make the order. (*Clark v. Sawyer*, 48 Cal. 133.)
Cited 73 Cal. 398; 75 Cal. 304; 84 Cal. 498.

Order appointing guardian, collateral attack on. See *Guardian and Ward*, II, 5.

697. The entry of an order in a criminal case in vacation instead of term time, even if irregular, does not work any injustice. (*People v. Congleton*, 44 Cal. 92.)

698. The action of the court does not depend upon the entry of its orders by the clerk in the minutes, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, and filed with the clerk, it is as effective as if it had been entered of record by the clerk. (*Von Schmidt v. Widber*, 99 Cal. 511.)

Cited 100 Cal. 601.

Entry of order in vacation. See *Judgments*, 207.

Orders, statute requiring entry and signature is directory. See *Probate Courts*, 18.

699. A court has no power, after the adjournment of a term, to direct the clerk to enter in the minutes, *nunc pro tunc*, an order made at the adjourned term, where there is nothing in the record to show that such order was made. (*Hegeler v. Henckell*, 27 Cal. 491.)

Nunc pro tunc order. See *Appeals*, 714.

700. An order *nunc pro tunc* may be made to correct a mistake in failing to enter an order which was actually made, or which should have been made as a matter of course. (*Estate of Skerrett*, 80 Cal. 62.)

701. Where an order of the court was made in the action of foreclosure, substituting the successor in interest of the plaintiff as plaintiff in the action, but the order was not entered in the minutes by the clerk, the court has jurisdiction to have an order entered *nunc pro tunc*, making the substitution; and its action in making such order is conclusive against any collateral attack. (*Crim v. Kessing*, 89 Cal. 478.)

Nunc pro tunc entry of order appealed from. See *Appeals*, 1246.

Nunc pro tunc entry, when error. See *Appeals*, 1206.

702. An order obtained "by means of an artifice and trick practiced upon the court"

may be set aside by the court which made it. (Page v. Page, 77 Cal. 83.)

703. Court may, of its own motion, or upon the application of a party interested, during the continuance of the term in a criminal case, modify or set aside an erroneous order. (*Ex parte Hartman*, 44 Cal. 32.)

704. A motion to set aside an order, entered at a term of the court next preceding the passage of the act of April 2, 1866, amending the sixty-eighth section of the Practice Act, and within five months after the adjournment of said term, was made in due time. (*Bensley v. Ellis*, 39 Cal. 309.)

705. The rule that one affected by an order regularly entered, which is the subject of an appeal, must assail it by an appeal, and not by an application to set it aside, does not apply to an *ex parte* order obtained by an intruder who was not a party to the action. (*City of San Jose v. Fulton*, 45 Cal. 316.)

706. An order made without notice to the other party may be set aside without notice to the party who procured it. (*Coburn v. Pacific Lumber etc. Co.*, 46 Cal. 31.)

Statute authorizing relief from orders is not retrospective. See *Statutes*, VIII, 9.

Order to produce papers. See post, XX, 8.

Power to make at chambers. See ante, XVI.

Order of submission of cause. See post, XX, 13.

Ex parte order allowing alimony. See *Marriage and Divorce*, 187.

Ex parte order staying execution. See *Executions*, 73.

Ex parte order compelling sheriff to execute writ. See *Sheriffs*, 35.

Orders, later order in case, effect of. See *Judgments*, 694.

Orders improvidently made, setting aside. See *Judgments*, 616.

Order compensating appraisers, signing at residence. See *Executors and Administrators*, 120.

Order substituting trustee, vacating after six months. See *Trusts and Trustees*, 226.

Order of court, sale by guardian under. See *Guardian and Ward*, V, 6, c.

Order of court, power of guardian to sell without. See *Guardian and Ward*, V, 6, c.

Conditional order setting aside judgment, effect of. See *Judgments*, XIV, 5.

Incidental orders in condemnation proceedings. See *Eminent Domain*, IX, 7.

False order of supreme court, effect of. See *Supreme Court*.

Order to show cause. See *Bankruptcy and Insolvency*, VI, 7; *Contempt*, V, 3; *Scire Facias*.

Order to show cause on sale. See *Estates of Deceased Persons*, VII, 4, g.

Order to show cause on petition for sale. See *Guardian and Ward*, V, 6, c, C.

Order, unlawful, disobedience of. See *Contempt*, IV, 8.

Order, disobeying or obstructing. See *Contempt*, IV, 10.

Denying right to deposition for disobedience of order of court. See *Depositions*, XII.

Order for alimony, modification. See Marriage and Divorce, III, 6, g.

Orders made after judgment must be excepted to. See Appeals, 2462.

Orders in various proceedings, certiorari to review. See Certiorari, III, 2.

Orders, appealability of. See Appeals, II.

Orders, how presented for review. See Appeals, VII.

Appeal, review of order allowing associate counsel. See Appeals, XI, 13, f.

Orders, identification and authentication of. See Appeals, VI, 6, d.

Appealability of orders refusing to try cause. See Appeals, II, 16.

Time, order extending, review of by certiorari. See Certiorari, III, 2, a.

XIX. Lost Papers, How Supplied.

See Records.

707. The substitution of papers (or pleadings in a case) is always within the discretion of the court, and no notice of the motion to apply for it need be given when the notice can be of no use. (*Benedict v. Cozzens*, 4 Cal. 381.)

Distinguished and disapproved 27 Cal. 523.

708. If pleading in pending action is lost, its place can only be supplied by motion based upon affidavits showing what the lost pleading contained, and the service of personal notice upon the opposite party of the intention to move, which notice must be sufficiently explicit to advise him of what is intended, as well as to enable him to controvert the affidavits submitted. (*People v. Cazalis*, 27 Cal. 522.)

. XX. Trial, Questions Relating to.

1. What Constitutes Trial; When Complete.

709. A trial is the examination before a competent tribunal, according to the law of the land, of the facts or a question of law put in issue in a cause, for the purpose of determining such issue. (*Anderson v. Pennie*, 32 Cal. 265.)

710. The word "trial," as used in section 650 of the Code of Civil Procedure, means a trial of an issue of law as well as of an issue of fact, and under such section a bill of exceptions is allowable upon the trial of an issue of law. (*Redington v. Cornwell*, 90 Cal. 49.)

711. After issue of fact is joined, every step taken for purpose of determination of that issue, up to and including the verdict upon such issue, must be regarded as "arising during the course of the trial." (*People v. Turner*, 39 Cal. 370.)

712. Trial of cause by court is not concluded until decision is filed with the clerk. (*Connolly v. Ashworth*, 98 Cal. 205.)

713. The trial of an action is not completed until a decision has been given in writing and filed with the clerk which states the conclusions of law upon which the judgment is to rest. (*Broder v. Conklin*, 98 Cal. 360.)

714. Until a decision of the court has been entered in the minutes, or reduced to writing by the judge and signed by him and filed

with the clerk, a case has not been tried. (*Hastings v. Hastings*, 31 Cal. 95.)
Cited 64 Cal. 56; 98 Cal. 206, 362.

715. Where the trial judge filed his findings of fact and certain conclusions of law in an action tried before him, in which he found "that the plaintiffs herein are entitled to judgment," but qualified that conclusion by adding as a closing direction that "counsel will prepare an interlocutory judgment in favor of the plaintiffs, directing a reference to a commissioner to be appointed by the court to take an account between the parties," it sufficiently appears that at the time of the filing of such findings of fact and conclusions of law the trial of the action was not completed. (*Broder v. Conklin*, 98 Cal. 360.)

Trial, definition of. See Definitions, 14.

Trial, what constitutes. See New Trial, I. Impaneling jury is part of the trial. See Jury and Jurors, 71.

Condemnation proceedings, when complete. See Eminent Domain, IX, 10.

Action is pending during appeal. See Abatement, I, 5.

Effect of appeal. See Appeals, VIII.

2. Order of Trial, Where Both Legal and Equitable Issues.

Whole subject matter of action disposed of, when. See Assignments of Contracts, 69.

716. When case involving questions of law and of equity is brought before court for trial, without a jury, the more regular and orderly practice is, first, to dispose of the equitable branch of the case on rehearing. (*Martin v. Zellerbach*, 38 Cal. 300.)
Cited 68 Cal. 188; 88 Cal. 180, 181.

717. In such case, it should distinctly appear from the record that the issues on the equity side of the court were first tried and disposed of; or if the whole action and all the issues were tried and submitted together, that fact should appear on rehearing. (*Martin v. Zellerbach*, 38 Cal. 300.)

718. It is not every defense of equitable nature which may be interposed to an action at law which must be tried by the court before proceeding to a trial of the issues of law, but only such a defense as is properly an equitable right of action existing in behalf of the defendant which he might have asserted in an independent suit brought by him against the plaintiff for the purpose of enforcing such right, but which he can rely upon as a defense in an action involving the same subject matter brought against him by the plaintiff. (*Swasey v. Adair*, 88 Cal. 179.)

719. A second count of the answer, setting forth separately an alleged conspiracy and deceit practiced upon the defendant by the plaintiff and others in relation to the property in controversy, and claiming damages therefor, presents no equitable defense which the court is justified in trying separately before trial of the other issues. (*Swasey v. Adair*, 88 Cal. 179.)

Order of trial where equitable defense. See Appeals, 2411; Ejectment, XI, 5, c.

On union of legal and equitable remedies or defenses. See Jury and Jurors, I, 1.

Joinder of issues of law and fact, presumption as to order of trial. See Appeals, 2852.
Issues on cross-complaint are disposed of first. See Cross-complaint, 41.

Contestants of will are plaintiffs. See Wills, X, 9, b.

Trial of issues on contest of probate of will. See Wills, X, 9, e.

Order of trial, objection to first raised on appeal. See Appeals, XI, 14, l.

3. *Separate Trials; Trying Separate Causes Together.*

720. In an action for recovery of land, brought against many defendants holding separate portions thereof, and having no common interest, and who rely upon different sources of title, it is the duty of the court, on the motion of defendants, to order separate trials. It is likewise the duty of court, without any motion therefor, to order separate trials, whenever, to the satisfaction of the court, it appears that the parcels of land in controversy are separate and distinct, and the several classes of defendants rely on different sources of title. (Judson v. Malloy, 40 Cal. 299.)
Cited 2 Mont. 584.

721. The defendants in open court waived a separate trial, but afterward, before the jury was sworn, moved for a separate trial. Held, that it was in the discretion of the court to refuse the application. (People v. Alviso, 55 Cal. 230.)

722. When two separate causes involving the same questions and set for the same day are tried simultaneously, the witnesses being separately sworn in each cause, but not separately examined, the cases are in effect tried separately; and such course is within the discretion of the court, though one of the parties fails to appear, if no injury results to such party. The attendance of counsel for the absent defendant during the progress of such trial, who failed to demand a jury trial in the second cause, and to obtain a continuance for that purpose, owing to the trial having been commenced, shows no injury to the absent defendant, in the absence of a showing that a proper application for a jury trial and continuance of that cause would not have been granted. (McGuire v. Drew, 83 Cal. 225.)

Consolidation. See Consolidation.

Severance of challenges where defendants tried together. See Jury and Jurors, VII, 2.
Separate trials, right to. See Criminal Law, XVIII, 4.

Trial as to one defendant, waiver of right to object to. See Continuance, 82.

4. *Setting Cause for Trial; Notice of.*

723. Parties will not be forced to trial without reasonable opportunity to prepare therefor, and the court would abuse its discretion in refusing a continuance or in refusing to set aside a judgment taken because of hasty action in setting a case for trial at an unreasonably early day, whereby a party has been unable to be present or to prepare for trial. (Dusy v. Prudom, 95 Cal. 646.)

724. Parties to an action and their attor-

neys, whether residents or nonresidents of the county where the action is pending, must watch its progress, and are charged with notice of the fact that it has been set for trial. The parties are bound to know the rules of the trial court, and if the rules fix a day for setting causes for trial, they are presumed to know the fact, and if the rules do not they must govern themselves accordingly, and learn from the proceedings of the court when the case is to be heard. (Dusy v. Prudom, 95 Cal. 646.)

725. A party to a cause must, either personally or by his attorneys, whether they reside in the county where the case is to be tried or elsewhere, watch its progress, and cannot object that a proceeding is taken against him in his absence, unless it is taken through his mistake, inadvertence, surprise, or excusable neglect. (Eltzroth v. Ryan, 91 Cal. 584.)
Cited 95 Cal. 648.

726. In the absence of a rule of court requiring notice by the moving party of the setting of a cause for trial, no notice is necessary. (Eltzroth v. Ryan, 91 Cal. 584.)

727. Section 1013 of the Code of Civil Procedure, respecting the time in which the other party may act where notice is served by mail, has no application where notice that a cause has been set for trial has been given by mail; and the party so notified cannot claim the time given by that section after the mailing of such notice before a legal trial can be had. (Eltzroth v. Ryan, 91 Cal. 584.)

728. The agreements between the parties that a case should be set for trial and be tried on a particular day are not only agreements between the parties, but between them and the court, which the latter is bound to enforce, not only for the benefit of the party interested in their performance, but for the protection of its own honor and dignity. (Meagher v. Gagliardo, 35 Cal. 802.)

729. The position of a cause on the calendar will not be changed to a different day from that on which it is set by the clerk, whether upon stipulation or motion, except for good cause shown. (Wetmore v. San Francisco, 43 Cal. 37.)

Transfer of cause and trial without notice. See ante, XII.

Notice of hearing. See Arbitration and Award, V, 1.

Trial, notice of. See Justices of the Peace, V, 3.

Trial before service. See Intervention, 40.
Postponing hearing. See Venue, II, 7, g.

Failure to appear at trial, new trial for. See New Trial, IV, 7.

5. *Attorney as Witness; Argument of Counsel; Opening Statement; Right to Open and Close.*

730. There is no rule of law which prohibits an attorney of record, who is a witness in a case, from summing it up before the court or jury. If a rule of the court prohibits such attorney from arguing a case without permission of the court, the court may give such permission. (Branson v. Caruthers, 49 Cal. 375.)

731. It was error in the court to decide that

the defendants held the affirmative, and therefore to give them the opening and conclusion of the cause. The plaintiff always, in contemplation of law, has the affirmative, and has the right to open and conclude. (*Benham v. Rowe*, 2 Cal. 387.)

Right to open and close. See Criminal Law, XVIII, 17.

732. The court may properly refuse to permit counsel in his opening address to argue the law to the jury. (*People v. Carty*, 77 Cal. 213.)

733. The court may properly direct counsel for the defendant in his opening statement to cease reflecting on the action of the court in refusing a continuance; and may properly refuse to allow him therein to refer to other cases or to read law in illustration of his argument; and may require him to confine himself to a statement of the facts, the effect thereof, and his conclusions therefrom, without any argument upon the evidence introduced by the prosecution. (*People v. Goldeneson*, 76 Cal. 328.)

Opening statement. See Criminal Law, XVIII, 6.

Discretion of court as to who to open argument. See Criminal Law, 2057.

Opening statement, nonsuit on. See Nonsuit, IV, 1.

734. In his closing argument to the jury the district attorney was permitted by the court, notwithstanding the objection and exception of defendant, to aver, and argue from, the existence of facts as to which no evidence had been offered or introduced. Held, for counsel to state facts not proven or sought to be proven is, in effect, to place unsworn evidence before the jury, and when improper evidence is admitted without objection on one side, this will not authorize improper evidence on the other. It is error sufficient to reverse a judgment for counsel, against objection, to state facts pertinent to the issue and not in evidence, or to assume, *arguendo*, such facts to be in the case when they are not. (*People v. Mitchell*, 62 Cal. 411.) Cited 78 Cal. 329.

735. Where the district attorney, in making his closing argument to the jury in a criminal prosecution, made a statement respecting certain evidence, which was disputed by the attorney for the defendant, who thereupon asked the court to direct the stenographer to read the testimony in that regard, the action of the court in denying the request, and stating that the jury had heard the witness, and that it was their province to determine what he testified to, is not error, if the court afterward told the jury that they were the exclusive judges of what the witness had testified to, but if any of them were in doubt as to the testimony, he would have the reporter read it to them. (*People v. Faulke*, 96 Cal. 17.)

736. As a general rule, the practice of allowing counsel in either a civil or criminal action to read law to the jury is objectionable, and ought not to be tolerated. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases or extracts from text-books,

subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court. (*People v. Anderson*, 44 Cal. 65.) Cited 67 Cal. 224; 69 Cal. 238; 72 Cal. 249; 76 Cal. 350; 7 Mont. 59.

737. It is not error to permit the district attorney to read, during his argument before the jury, portions of an opinion of the supreme court, but such a practice is not commendable. (*People v. Forsythe*, 65 Cal. 101.)

738. The refusal of the court to allow counsel to read law-books, or to make an argument on the law of the case, or to state what he claimed to be the law, to the jury, is not error. (*Sullivan v. Royer*, 72 Cal. 248.)

739. It is within the discretion of the court to permit counsel to read to the jury and comment upon instructions which have been previously settled by the court. (*Boreham v. Byrne*, 83 Cal. 23.)

740. Upon the trial of an information for murder, the district attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "*Browne's Medical Jurisprudence of Insanity*." No testimony had been introduced to show that this was a recognized work or standard authority, or that it was a scientific work. The defense objected to said book, or any part thereof, or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work, or a standard of recognized authority, and that it was incompetent. The court overruled the objections, and defense excepted; and the district attorney did read from the book various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of the case. Held, the court erred in permitting the district attorney to read the extracts referred to. (*People v. Wheeler*, 60 Cal. 581.)

Cited 62 Cal. 412; 67 Cal. 14; 76 Cal. 348.

741. Counsel have a right, in arguing the case to the jury, to read the whole pleadings, including exhibits attached thereto, and cannot be restrained by the court from discussing the case in all its bearings, so long as they do not go outside of it and attempt to bring in other matters. (*Knight v. Russ*, 77 Cal. 410.)

742. The mere fact that the plaintiff's counsel read, in his address to the jury, a portion of an answer which had been stricken out, is not error of itself. (*Morgan v. Hugg*, 5 Cal. 409.)

743. The defendant could have asked the court to rule out the answer as testimony, and charge the jury to disregard it. (*Morgan v. Hugg*, 5 Cal. 409.)

Submission without argument is not waiver of objection. See ante, X, 11.

Hearing argument at chambers. See ante, XVI.

Arguments of counsel. See Criminal Law, XVIII, 17, XXI, 31, 1.

Appeal, arguments on. See Appeals, XI, 2.

Argument, unauthorized statement, presumptions as to. See Appeals, 2859.

Point admitted cannot be urged. See Bankruptcy and Insolvency, 294.

Erroneous statement of testimony by counsel, new trial for. See New Trial, IV, 9.

Argument of counsel, objection to first raised on appeal. See Appeals, XI, 14, n.

Argument of motion for new trial and what may be read on. See New Trial, IX, 5.

Argument, limiting. See Criminal Law, 877.

Appeal, review of order limiting argument. See Appeals, XI, 13, f.

6. Presentment or Points; Points of Counsel Should be Consistent.

744. If counsel, when case is tried by court without jury, desire to present for consideration certain points of law as applicable to the facts established, or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with a statement that counsel makes the following points, or contends as follows. (Touchard v. Crow, 20 Cal. 150.)

745. In an action to try the right to a mining claim, counsel cannot claim that there was a bill of sale to the opposite party, for the purpose of excluding evidence of a verbal sale, and at the same time insist that the bill of sale is void. (Patterson v. Keystone Mining Co., 30 Cal. 360.)

Inconsistent positions in replevin. See Replevin, VIII.

Inconsistent defenses. See ante, IX, 21.

Inconsistent positions. See Mandamus, 229.

Recovery cannot be had on theory inconsistent with pleading. See Variance, 16.

7. Ruling, Adherence to; Erroneous Ruling, Effect of, Where Several Parties.

746. If the court makes a ruling during the progress of a trial, the party in whose favor the ruling is is entitled to have the case decided according to the ruling, provided that, if the ruling had been against him, he might have been able to remove the objection made by the other party. (Carpentier v. Small, 35 Cal. 346.)

747. The responsibility of an erroneous order of decision, made on motion, or at the request of one of many defendants, will attach alike to all the defendants, unless it appears that the order or decision was clearly restricted, or would necessarily apply only to particular defendants or parcels of property. (Judson v. Malloy, 40 Cal. 299.)

Rulings, presumptions as to. See Presumptions, 29.

8. Notice to Produce Papers at Trial; Compelling Production.

748. Sufficiency of notice to the adverse party, to produce on trial a certain paper in his possession, is a question of discretion in the court trying the case. (Burke v. Table Mountain Co., 12 Cal. 403.)

749. Literal accuracy cannot be expected in the description given in the notice of a paper

in the possession of the adverse party. Such description as will apprise a man of ordinary intelligence of the document desired is sufficient. (Burke v. Table Mountain Water Co., 12 Cal. 403.)

750. Where it is impossible to produce paper between the time of giving the notice and the trial, that fact should be made to appear. (Burke v. Table Mountain Water Co., 12 Cal. 403.)

751. In an action against a railway company for damages for injuries received by the plaintiff because of the negligence of the defendant, it is proper for the court to compel the defendant's counsel to deliver to plaintiff's counsel a bundle of papers or package containing certain written statements of employees of the defendant in relation to the facts surrounding the occurrence which caused the plaintiff's injury, where it appears that the bundle was in the courtroom, in the possession of the defendant's counsel, and that plaintiff's counsel had been allowed to examine it, and desired to use it as a foundation to impeach the testimony of one of the defendant's employees, who was a witness for the defendant, and who had made one of the statements which was at variance with his testimony. (Freel v. Market Street Cable Ry. Co., 97 Cal. 40.)

9. Misconduct or Irregularity of Judge or Attorney; Irregularities During Trial.

752. It is irregular for one of the justices composing the court of sessions, on a criminal trial, to retire before the termination of the trial, and another justice, not present during the previous stages of it, to come in and participate in the proceedings. The members of the court who act as such when the case is developed should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular not here decided, but the practice is dangerous and disapproved of. (People v. Eckert, 16 Cal. 110.)

Cited 28 Cal. 475.

Change of judges during trial. See Criminal Law, XVIII, 13.

Hearing of motion by different judges. See New Trial, IX, 1.

Change of findings by different judge. See Findings, 48.

753. Temporary absence of the judge from the courtroom during a portion of the trial cannot be assigned as error, though it may have been an irregularity; but no objection thereto can be considered, if the motion for new trial is not made on the ground of irregularity, and no objection to the temporary absence of the judge was urged at the time. (O'Callaghan v. Bode, 84 Cal. 489.)

754. Where the record shows that the defendant's counsel consumed time unnecessarily in the repetition of questions, a censure for such consumption of time by the trial court is not prejudicial error, though the language of censure employed by the court is more harsh than can be commended. (People v. Baker, 100 Cal. 188.)

Prejudicial conduct of judge. See Criminal Law, XXI, 31, k.

Prejudicial conduct of judge in commenting on witness. See Evidence, 619.

Remarks of judges as to witnesses, what improper. See Witnesses, VII, 11.

Remarks of judge, what improper. See Negligence, 157.

Remarks of court in rulings on evidence. See Evidence, 618.

Remarks of court, objection first raised on appeal. See Appeals, XI, 14, n.

Appeal, review of actions of judge. See Appeals, XI, 13, f.

755. Trial court should always be alert to prevent attorney from obtaining advantages in jury trials by the practice of methods not countenanced by the ethics of the profession. (Marshall v. Taylor, 98 Cal. 55.)

Improper influencing of jury, new trial for. See New Trial, IV, 6, b.

Violation of right of fair trial, new trial for. See New Trial, IV, 6, b.

Completion of trial after expiration of term. See Judges, 23.

Trial cannot be had in vacation. See Judgments, 81.

Swearing and then withdrawing child is not an irregularity warranting new trial. See Witnesses, 28.

Reinstructing jury in absence of counsel. See Instructions, 244, et seq.

Excluding parties from courtroom. See Witnesses, X.

Appeal, review of conduct of trial. See Appeals, XI, 13, f.

10. View by Jury.

756. If, on the trial of an issue in ejectment, as to whether the demanded premises were swamp or dry land on the 28th of September, 1850, the jurors are sent by the court to view the premises in controversy, they cannot take into consideration the result of the examination in determining the character of the land as swamp or dry, but must render their verdict on the testimony of witnesses given on the stand, and use the inspection of the land only as a means of enabling them to understand and apply the evidence. (Wright v. Carpenter, 49 Cal. 607.)

Cited 71 Cal. 251, 252; 19 Nev. 228.

View by jury. See Criminal Law, XVIII, 12; Elections, 83; Jury and Jurors, XII.

View of premises by judge in condemnation proceedings. See Eminent Domain, 192.

Inspection of objects introduced in evidence. See Jury and Jurors, XII.

Taking documents or instructions into jury-room. See Jury and Jurors, XIII, 3.

11. Agreed Statements.

757. Parties cannot, by agreeing upon a statement of facts, invoke the aid of a court for the decision of what, to them, or either of them, is merely a moot question of law; and courts should not render judgments which cannot be enforced by any process known to the law. (Johnson v. Malloy, 74 Cal. 430.)

758. Where a case is submitted under an agreed statement of facts, the consideration of the court is restricted to the facts admitted, and its judgment cannot be based upon any other facts which it may suppose one of the

parties can establish. (Green v. Fresno County, 95 Cal. 329.)

759. Where the parties to a controversy made an agreed case under the three hundred and seventy-seventh section of the Practice Act, which is submitted for decision to the district court, the consideration of the court is restricted to the facts admitted in the case. (Crandall v. Amador County, 20 Cal. 72.) Cited 95 Cal. 334.

760. Where the plaintiff claimed that defendant was indebted to him, and, under the section above referred to, a case was made and submitted, stating the facts agreed upon between the parties, upon which the district court decided that plaintiff's demand was not established without proof of other and additional facts, held, that it was error for the court, instead of rendering judgment for the defendant, to make an order based upon the supposition that plaintiff might establish such other facts. (Crandall v. Amador County, 20 Cal. 72.)

761. In view of a stipulation, that certain questions only were involved, other questions could not be considered. (Scott v. Dyer, 54 Cal. 430.)

762. If case is submitted upon stipulated facts, without reserving question of competency, relevancy, or admissibility of evidence to prove such facts, the question cannot be raised that such facts are not properly before the court. (Brewster v. Hartley, 37 Cal. 15.)

763. If parties agree upon facts, subject to all legal objections, and the agreed statement of facts is admitted in evidence without objection, neither party can raise the point in the supreme court that some of the admitted facts were not admissible in evidence under the pleadings. (Hess v. Bolinger, 48 Cal. 349.)

764. If the defendant in ejectment sets up in his answer that the plaintiff obtained a patent for the land as a pre-emptor, and that the defendant was entitled to pre-empt it, and that the plaintiff holds the legal title in trust, but does not aver the facts showing his right to pre-empt, and the parties agree on a statement of facts which entitle the defendant to a judgment, the judgment in his favor will not be reversed because the answer was defective in not stating such facts. (Hess v. Bolinger, 48 Cal. 349.)

765. If the attorneys stipulate as to what are the facts in the case, and that the stipulation shall form a part of the judgment-roll, the facts therein admitted stand in place of a finding of facts by the court, and constitute a part of the judgment-roll, and no specification of the errors relied on on appeal need be made in the transcript, nor is a statement necessary. (Brewster v. Hartley, 37 Cal. 15.)

Agreed case. See Certiorari, IV, 3.

Agreed case, reviewing facts on appeal. See Appeals, 1433.

Agreed case is part of judgment-roll. See Appeals, 1107.

Agreed facts, no finding on is necessary. See Findings, 148.

Appeal, agreed cases how presented. See Appeals, VII, 20.

12. Hearing Case on the Pleadings.

766. Where cause is heard on bill and answer the allegations of the latter are to be taken as true. (*Belt v. Davis*, 1 Cal. 134.)

767. Where a chancery suit is heard on bill and answer, all the allegations in the answer, whether upon knowledge or upon information and belief, are to be taken as true. If the complainant wishes to dispute any of the allegations in the answer, he must file a replication, and thus enable the defendant to establish them by proof, if he can. (*Von Schmidt v. Huntington*, 1 Cal. 55.) Cited 1 Cal. 142.

768. Where a bill was filed to set aside and vacate a judgment, on the ground that it was obtained through fraud, venality, and corruption, and these charges were all sufficiently denied in the answer, and the cause was heard on the pleadings, held, that the effect of the denial in the answer was the same as if the charges in the bill had been disproved by testimony. (*Belt v. Davis*, 1 Cal. 134.)

Submission of application for prohibition on pleadings. See Prohibition, II, 2.

Submission of land contest on the pleadings. See Public Lands, XVII, 8.

Judgment on pleadings. See Ejectment, XVII, 2; Judgments, VI.

Judgment, estoppel from where case submitted on pleadings. See Judgments, X, 9, 1.

13. Special Issues; Submission of Case.

769. The submission to the jury of special issues is within the discretion of the court, and the refusal of the court to grant a request therefor is not the subject of an exception. (*Smith v. Occidental and Oriental Steamship Co.*, 99 Cal. 462.)

Special issues. See Equity, IV, 4; Marriage and Divorce, III, 4, 1.

Submitting special issues. See Verdict, X.

Special issues in probate. See Probate Courts, 22, et seq.

770. An order of court that, "upon the filing of the proofs and testimony as taken by the court commissioner, the case be submitted to the court and decided at chambers, and the decision and judgment be entered as of this term of court," is a submission in presenti. (*Ex parte Bennett*, 44 Cal. 84.)

771. If an erroneous order is made setting aside the submission of a motion and authorizing new evidence to be introduced, the party against whom the error is committed waives the same by availing himself of the permission to introduce new evidence. (*Keys v. Warner*, 45 Cal. 60.)

Amendments to conform to proofs after submission of cause. See ante, 553.

Submission of motion for new trial. See New Trial, IX, 5.

Submission of case on motion for nonsuit. See Nonsuit, VI, 4.

Submission of cause, nonsuit after. See Nonsuit, IV, 2.

14. Objections; Exception, What Is and Necessity of.

Objections on appeal. See Appeals.
Objections to jury, how interposed. See Jury and Jurors, IV, 5.

Objections to evidence. See Evidence, X, 6.

Demurrer to evidence. See Evidence, X, 6, b.

Juror, duty to object to. See Jury and Jurors, VII, 8.

Objection taken to juror after verdict. See Jury and Jurors, VII, 8.

Ruling on challenge, exception to. See Jury and Jurors, VII, 8.

Objections to witnesses when taken, and proof of. See Witnesses, V, 8, b.

Objections first raised on motion for new trial. See New Trial, 544.

772. An exception is an objection taken between the time of calling the action for trial and the rendition of the verdict or decision. (*Quivey v. Gambert*, 32 Cal. 804; *Will of Bowen*, 34 Cal. 682.)

773. An exception is a formal protest against the ruling of the court upon a question of law. (*People v. Torres*, 38 Cal. 141.) Cited 3 Mont. 439.

774. The word "decision," as used in sections 648 and 939 and in the first part of section 956 of the Code of Civil Procedure, where it is used as an alternative to the word "verdict," refers to the written findings of fact and law mentioned in section 633 of the same code; but as used in the phrase "any intermediate order or decision," employed in the latter part of section 956, the word "decision" does not refer to written findings, which are not required upon such orders; and an exception to an "intermediate order or decision" is not an "exception to the verdict or decision," in the sense of section 939. (*Clifford v. Allman*, 84 Cal. 528.)

775. The "decision" to be excepted to in section 956 of the Code of Civil Procedure applies to the finding of fact. (*Thompson v. Hancock*, 51 Cal. 110.)

776. No exception is required to a final judgment, but the exception to be taken to the decision of the court is an exception to the findings of fact, which ordinarily is based on the insufficiency of the evidence to sustain the findings. (*Thompson v. Hancock*, 51 Cal. 110.)

777. The decision of a court, when not rendered immediately after the close of the testimony, is, by operation of law, deemed to be excepted to on a motion for a new trial, or an appeal. No express exception to a final decision is necessary for the purposes of a motion for new trial, or review on appeal. (*Will of Bowen*, 34 Cal. 682.)

778. Exception must be taken upon fact or facts not denied. The point of law to the decision of which an exception lies does not arise until the facts are determined. (*Will of Bowen*, 34 Cal. 682.)

779. Order striking out demurrer is deemed excepted to. (*Davis v. Honey Lake Water Co.*, 98 Cal. 415.)

Ruling on demurrer, necessity of exception. See ante, X, 14.

Order refusing to strike out is not deemed excepted to. See ante, 144.

Bill of exceptions is allowable upon trial of issue of law. See ante, XX, 1.

Exceptions on trials before referees. See Reference, 34, et seq.

Exceptions, order granting or refusing nonsuit must be excepted to. See Appeals, XI, 14, k.

Exceptions to referee's report. See Reference, IX, 5.

Exceptions to rulings. See Evidence, X, 6, f.

Bills of exceptions. See Appeals, VI.

Bills of exception, authentication or identification of. See Appeals, VI, 6.

Exceptions, petition to prove. See Appeals, VI, 1, h, E.

15. Relief Authorized.

780. A judgment must follow the issues joined, and if a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the finding of the facts in relation to it by the court. (*McComb v. Reed*, 28 Cal. 281.)

781. Plaintiff can only recover for such causes of action as are stated in his complaint. (*Benedict v. Bray*, 2 Cal. 251.) Cited 14 Or. 356.

782. A plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other which may be developed by the proofs. (*Reed v. Norton*, 99 Cal. 617.)

783. Although the prayer of a bill be artificially framed, the court will, under the general prayer for relief, disregard mistakes, and grant such relief as will conform to the bill. (*Truebody v. Jacobson*, 2 Cal. 269.) Cited 77 Cal. 616; 1 Ariz. 387.

784. Where the defendant has answered, the court may, under the prayer for general relief in the complaint, grant any relief consistent with the facts alleged in the complaint; but under the general prayer, no relief can be granted in equity beyond that which is authorized by the facts stated in the pleadings. (*Cummings v. Cummings*, 75 Cal. 434.) Cited 76 Cal. 49.

785. Under a prayer for general relief, no relief can be granted in equity beyond that which is authorized by the facts stated in the bill. (*Carpentier v. Brenham*, 50 Cal. 549.) Cited 64 Cal. 281; 76 Cal. 442; 76 Cal. 49.

786. Where a defendant appears and answers, the court may, under section 137 of the Practice Act, grant any relief consistent with the case made and embraced within the issues, although not specifically prayed for. (*Gimmy v. Gimmy*, 22 Cal. 633.)

787. In an action to enjoin the sale of shares of stock by the defendants, claimed to be held in pledge, where an amended and supplemental complaint charged the defendants with fraud and conspiracy to sell the stocks for a fraudulent claim indebtedness, whereas in fact plaintiff owed defendants nothing whatever, and alleged that plaintiff was the owner of the stocks and defendants had an interest therein, and the answer took issue upon the averments of fraud, alleged unpaid loans to the plaintiff for which the stocks were pledged and judgments recovered thereon,

which were pleaded as estoppels, but asked for no affirmative relief, upon findings in favor of the defendants upon all the issues, a decree dissolving the injunction adjudging the indebtedness and the lien of the pledge therefor, and awarding affirmative relief to the defendants by directing the shares of stock to be sold under execution to satisfy the indebtedness, is authorized and not erroneous. (*Zellerbach v. Allenberg*, 99 Cal. 57.)

Any relief embraced in the issue may be granted. See ante, 23.

Prayer, judgment in excess of amount prayed for. See Judgments, XII, 4.

Judgment, pleadings must be sufficient to support. See Judgments, XII, 3.

Judgment must be based on pleadings. See Judgments, XII, 3.

Judgments must accord with admitted facts. See Judgments, XII, 7.

Judgment on facts not in issue. See Judgments, XII, 7.

Verdict must be within pleadings. See Verdict, II.

Assistance, writs of. See Assistance.

Joint sale on separate suits in partition. See Partition, VI, 9.

Appointment of commissioner to execute deed. See Specific Performance, 185.

Appeal, review of order allowing additional relief without amendment. See Appeals, XI, 13, d.

16. Re-examining Case After Rendition of Judgment.

788. After trial by court, when it has filed its findings and rendered judgment, it is irregular for it, upon motion of one of the parties, to re-examine the evidence and reverse its former action, or substitute different findings of facts. (*Prince v. Lynch*, 38 Cal. 528.) Cited 75 Cal. 618.

789. Only regular way for court to review its former action is on a motion for a new trial. (*Prince v. Lynch*, 38 Cal. 528.)

Setting aside submission, waiver of error. See ante, XX, 13.

Reopening case in equity. See Equity IV, 4.

Reopening case, costs on. See Costs, II, 1.

Reopening case for further evidence. See Evidence, X, 3.

PLEAS.

See Pleading and Practice, IX, 3.

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PLEDGES.

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II. What Constitutes; Distinction Between and Mortgage.

III. Delivery and Continuous Change of Possession; Validity Against Creditors.

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V. Pledge by One not Owner; Ratification of; After-acquired Title.

VI. Sale or Assignment by Pledgor; Rights and Liabilities of Purchaser or Assignee.

VII. Rights and Liabilities of Pledgrees.

1. *Title of; Warranty of Title by Pledgor.*
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3. *Right to Retain Possession; Rights Against Real Owner.*
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 - a. *Agreement for Sale; Fraud; Sale of Stock; Duty to Retain Identical Shares.*
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VIII. Payment and Tender; Refusal to Deliver; Action to Recover Property.

Bailments. See Bailments.
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 Property in pledge, title to. See Corporations, 173.
 Alteration of contract of. See Alteration of Instruments, 17.
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 Barring of debt, effect of on right to recover property. See Statute of Limitations, 376.
 Corporation, pledge by, effect on stockholder's liability. See Corporations, IV, 7, g.
 Claims against estate secured by pledge, presentation of. See Estates of Deceased Persons, VI, 7, a.

I. What Subject of.

1. A note secured by mortgage may become the subject of either a pledge or mortgage, but to make such pledge available to the pledgee, there must accompany the pledge a power to assign the note and mortgage in case of a sale of it, and to release the mortgage in case of a satisfaction of it. (Wright v. Ross, 36 Cal. 414.)
 Cited 92 Cal. 467.

Mortgage, pledge of. See Mortgages, 456, et seq.

Negotiable paper, pledge of. See Bills and Notes, XVII, 8.

Assignment of lease as collateral security. See Landlord and Tenant, 154.

II. What Constitutes; Distinction Between and Mortgage.

2. Where a lease is assigned as security for a note, it is a pledge, and not a mortgage. The "pledgee" does not take the legal title by the assignment, or by failure of the "pledgor" to pay the note, but he has the right to collect the rents, and apply them on the note, and is responsible for the surplus. (Dewey v. Bowman, 8 Cal. 145.)

Cited 8 Cal. 287; 14 Cal. 246; 27 Cal. 271; 34 Cal. 132; 35 Cal. 414; 37 Cal. 25; 73 Cal. 306; 3 Nev. 316.

3. The distinction between a pledge and chattel mortgage, while well defined in theory, is sometimes difficult of application to the transaction. (Wright v. Ross, 36 Cal. 414.)

Contract when a pledge and not a chattel mortgage. See post, 8.

4. When the payor of a note assigns to the payee, as collateral security for the payment of the note, a note and mortgage given by a third person to the payor, the payee holds this note and mortgage as a pledge, and an assignee of the payee, who receives the note and mortgage upon the same terms, also holds them as a pledge. (Ponce v. McElvy, 47 Cal. 154.)

Cited 85 Cal. 128.

5. Under section 2924 of the Civil Code, one having the possession of personal property as security for a debt due him holds the same as a pledge, whether the title thereto has passed to him or not. (Loughborough v. McNevin, 74 Cal. 250.)

6. S., a wagon-maker, and W., a blacksmith, entered into an arrangement for the building of wagons, by which S. was to do the woodwork, and W. the ironwork, and W. was also to furnish the materials for the woodwork, for which he was to have a lien as security on the interest of S. in the wagons. Held, that the contract constituted an hypothecation of the interest of S. in the wagons while they were being made, and that when the wagons came into the possession of W., he became a pledgee in possession thereof, and was entitled to retain such possession until paid. (Waldie v. Doll, 29 Cal. 555.)

Note secured by mortgage, how pledged. See ante, I.

Sale, transaction when is and not a pledge. See Mortgages, 931.

Instrument construed to be and not chattel mortgage when. See Mortgages, 933.

Finding as to pledge, when a conclusion of law. See Findings, 9.

Pledge is a mortgage within attachment law. See Attachments, 93.

III. Delivery and Continuous Change of Possession; Validity Against Creditors.

7. A delivery of possession of property pledged must be made to the pledgee, in order to consummate the pledgee's right. (Goldstein v. Hort, 30 Cal. 372.)
 Cited 59 Cal. 159.

8. Where a chose in action is assigned and delivered as collateral security for the payment of a debt due the assignee, the assignment and delivery to the assignee of the chose in action are necessary to give the latter full authority to readily control the security and make it available, but this does not necessarily constitute the transaction a chattel mortgage as distinguished from a pledge. Upon the facts in this case, the transaction was a pledge. (Gay v. Moss, 34 Cal. 125.)

9. As a general rule, the delivery back of the possession of the thing pledged, with the consent of the pledgee, terminates the bail-

ment and the lien; but if the pledgor recover possession of the pledged property wrongfully, without the consent of the pledgee, the pledge is still valid; and if it is delivered back to the pledgor in a new character, as a special bailee or agent, the pledgee will be entitled to the pledge, not only against the owner, but as against third persons. (*Palmtag v. Doutrick*, 59 Cal. 154.)
Cited 73 Cal. 529.

10. Where two parties own wagons in common, and one pledges his half to the other for advances, if the pledgee keeps the wagons on his premises, and marks them with his name, and exercises control over them, the mere fact that the pledgor is painting them does not show a surrender of possession by the bailee. (*Waldie v. Doll*, 29 Cal. 555.)

11. After personal property has been pledged, and the possession thereof delivered to a pledge-holder, the mere fact that the pledgor, either with or without the knowledge or consent of the pledgee, for a time assists the pledge-holder in taking charge of the property, does not necessarily render the holding of it as a pledge void as to creditors of the pledgor. In such a case there is a sufficient delivery and continuous change of possession to preserve the lien of the pledgee. (*Hilliker v. Kuhn*, 71 Cal. 214.)

12. An agreement to pledge personal property does not create a lien thereon in favor of the intended pledgee, either as against a creditor of the intended pledgor, or his assignee in bankruptcy or insolvency. (*Hitchcock v. Hassett*, 71 Cal. 331.)

13. As to whether the transfer of stock in this case was fraudulent as against creditors, stated. (*Smith v. '49 and '56 Quartz Co.*, 14 Cal. 242.)

Possession must accompany pledge. See post, 36.

Surrender of possession by pledgee to another. See post, 49.

IV. Conditions in.

14. When a contract of pledge is absolute upon its face, the party asserting a condition or limitation must show it. (*Hyatt v. Argenti*, 3 Cal. 151.)

15. Personal property may be pledged, mortgaged, hypothecated, or placed in trust, upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case. (*Hyatt v. Argenti*, 3 Cal. 151.)
Cited 8 Cal. 150.

V. Pledge by One not Owner; Ratification of; After-acquired Title.

16. The indorsement and delivery of certificates of stock to a person for safe keeping only, gives to the transferee the indicia of ownership, and a transfer of the stock by him to a third party as security for the payment of money loaned is valid, and vests in the pledgee a right to the stock as security for the loan. (*Ambrose v. Evans*, 66 Cal. 74.)
Cited 66 Cal. 403.

17. The owner of stock, who voluntarily de-

livers the indorsed certificates to a third person, allows him to assume the apparent ownership of the stock, and cannot recover the same from a bona fide pledgee of the apparent owner, without payment of the debt for which the pledge was made. (*Arnold v. Johnson*, 66 Cal. 402.)
Cited 81 Cal. 326.

18. A pledge of the property of his principal, made by a factor having its possession and control, as security for his individual debt, is good as against the principal, if the pledgee acted in the due course of business without notice of the actual ownership. (*Wisp v. Hazard*, 66 Cal. 459.)

19. Where goods are deposited in warehouse in name of agent, who is apparently the owner thereof, a pledge of the goods by such agent as security for a loan is valid as against the real owner, if the pledgee acted in good faith, and without notice that the pledgor was not the owner. (*Amann v. Lowell*, 66 Cal. 306.)

Master, when may pledge. See Shipping, 14.

Ship captain, pledge by, priority of. See Shipping, 15.

20. Goods were shipped by the plaintiff to the California Type Foundry Company with the following written instructions: "As I wrote you before, I want you to keep these consignment goods as such—as my property until sold." While the property was still in the warehouse of the railroad company the consignee pledged the goods to F. Bros., and the property was then placed in defendants' custody to be kept in store for F. Bros. Held, passing the question whether the mere possession of property, under written instructions showing that the possessor has no title, would be sufficient evidence of ownership to protect the pledgee who advances his money on the bare statement of the possessor that he is the owner, in this case the pledgor was not in the actual possession of the property at the time the loan was negotiated. F. Bros. must have seen (from the letter of instructions) that the plaintiff was the owner of the property, had they required some evidence of title in the proposed pledgor as they ought to have done. (*Chicago Taylor Printing Press Co. v. Lowell*, 60 Cal. 454.)

21. Where the property of one is pledged without his knowledge or consent to secure the debt of another, and upon being informed of the transaction the owner agrees that if the pledgee will forbear the debt for a time the property may remain in pledge to secure the debt, there is a valid pledge. (*Smith v. Mott*, 76 Cal. 171.)

22. The forbearance is a sufficient consideration for such an agreement, and a redelivery of possession is not necessary. (*Smith v. Mott*, 76 Cal. 171.)

23. Such an agreement is not within the statute of frauds. (*Smith v. Mott*, 76 Cal. 171.)

24. Where a party obtains money by the unauthorized pledge of another's property, it does not validate the pledge that some of the money was used to pay a debt of the person

who obtained the money to the owner of the property, the latter being ignorant of the use made of his property. (*Robinson v. Nevada Bank*, 81 Cal. 106.)

25. Nor does it validate the pledge that part of the money was used to pay notes of the person who obtained the money upon which the owner of the property was an accommodation indorser, the latter being in ignorance of the transaction. (*Robinson v. Nevada Bank*, 81 Cal. 106.)

26. One assuming to own personal property, and pledging it, is estopped from afterwards asserting that he did not own it when he pledged it; and a subsequent acquisition of title by the pledgor, as between the parties to the contract, inures to the benefit of the pledgee, without any new delivery or ratification of the pledge. (*Goldstein v. Hort*, 30 Cal. 372.)

27. One who receives personal property in pledge from another who does not own it, but who subsequently, and while the pledge continues, acquires the title to it, may recover possession of the same from one who becomes possessed of it without right. (*Goldstein v. Hort*, 30 Cal. 372.)

Ratification by owner of delivery by pledgee to another. See post, 49.

VI. Sale or Assignment by Pledgor; Rights and Liabilities of Purchaser or Assignee.

28. Where a pledgor, pending an action to enforce the pledge, assigns his interest in the property pledged, and any cause of action he might have against the pledgee for the conversion thereof, the assignee, under section 386 of the Code of Civil Procedure, may intervene for the purpose of enforcing the rights assigned to him. (*Loughborough v. McNevin*, 74 Cal. 250.)

29. When goods sold by a pledgor are in the possession of the pledgee, and are not paid for or delivered to the pledgor's vendee, the title does not pass to such vendee; and if the goods are sold fairly at auction by the pledgee for less than the price agreed upon between the pledgor and his vendee, the latter, if purchasing with notice of the pledge, is liable to an action, under section 3311 of the Civil Code, to recover the difference between the contract price, less the amount paid thereon, and the proceeds of sale realized by the pledgee. (*Habenicht v. Lissak*, 77 Cal. 139.)
Distinguished 3 Wash. 336.

30. An understanding that payment for goods sold by a pledgor is to be made to the pledgee, in order that the vendee may secure possession, does not operate as an equitable assignment of the pledgor's claim for purchase money to the pledgee, if there is no privity of contract between the pledgee and the vendee; and a subsequent assignee of the pledgor's right to the purchase money cannot be non-suited in an action against the vendee for breach of the contract of sale, upon the ground that the pledgee was a necessary party to the contract of sale, or that the cause of action was joint. (*Habenicht v. Lissak*, 77 Cal. 139.)

31. In an action by the assignee of a pledgor

against the pledgor's vendee for breach of a written contract of sale not referring to the pledge, evidence to show the transactions between the pledgor and pledgee is necessary in showing that the defendant knew the goods were pledged, and that he did not expect to receive them except upon payment to the pledgee, and such evidence does not vary the terms of the written contract of sale. (*Habenicht v. Lissak*, 77 Cal. 139.)

32. An averment in a complaint for breach of contract to buy goods held in pledge by a third person, that the defendant was indulged for over a year longer than his original agreement allowed him in which to pay for and receive the goods, is a sufficient averment that a reasonable time was given to comply with the contract before resale of the goods pledged by the pledgee. (*Habenicht v. Lissak*, 77 Cal. 139.)

33. R., being the owner of certain musical instruments, pledged them to F., and was afterwards employed to assist in the management, care, and renting of the same, and in the course of his employment rented a piano (part of the pledged property) to D., but instead of making the lease in the name of F., as he was directed, made it in his own name. F. notified D. that he was the owner, and D. agreed to hold the property for him, and at the end of the lease to return it to him. R. made a bill of sale of the property to P. to satisfy a debt, and at the same time assigned the lease made by him to D. P. taking with notice of F's claim. P. notified D. of the sale, and the latter accepted from the former a lease. In an action by P. against D., held, that F. had not lost his lien, and that D. was entitled to set up the title of F. as a defense to the action. (*Palmtag v. Doutrick*, 59 Cal. 154.)

Cited 82 Cal. 625.

Limitation of actions against transferee of pledgee. See Statute of Limitations, VI, 9.

VII. Rights and Liabilities of Pledgee.

1. Title of; Warranty of Title by Pledgor.

34. A pledge does not vest the title in the pledgee. He has only a special property in or lien on the chattel pledged, and if the pledge is not redeemed by the time limited, it retains the character of a pledge still. (*Heyland v. Badger*, 35 Cal. 404.)
Cited 54 Cal. 440.

35. In case of a pledge, the title remains in the pledgor after condition broken, with right to redeem at any time before a sale of the property; and if the property is sold by the pledgee in satisfaction of his demand, he cannot become the purchaser at his own sale. (*Wright v. Ross*, 36 Cal. 414.)

36. In a pledge, the title, after condition broken, does not pass to the pledgee, who has only a lien on the property; and in all cases the possession must accompany the pledge. (*Wright v. Ross*, 36 Cal. 414.)
Cited 91 Cal. 418.

37. Upon the pledge of shares of the capital stock of a corporation as security for a debt, the legal title thereto, as between the pledgor and pledgee, remains in the former.

(Cross v. Eureka Lake and Yuba Canal Co., 73 Cal. 302.)

Title of pledgee. See ante, 2.

38. The pledgor of personal property warrants the title of the property pledged. (Goldstein v. Hort, 30 Cal. 372.)

After-acquired title in pledgor. See ante, V.

2. Income from Pledged Property; Pledge of Contract to Pay Money.

39. Where the relation of pledgor and pledgee exists, if the debt is paid it is the duty of the pledgee to account for and pay over all the income, profits, and advantages derived from the bailment. (Hunsaker v. Sturgis, 29 Cal. 142.)

40. The action was brought by the pledgee of shares of the capital stock of a corporation against the latter, to recover certain dividends which had accrued upon the stock. The corporation paid the money into court, and had the pledgor, the original owner of the stock, and a person to whom it had been assigned, substituted as defendants. Upon the trial, it appearing that the debt to secure which the stock was pledged had been satisfied, judgment was rendered with the consent of the pledgor in favor of the assignee for the entire amount of the dividends. Held, that the plaintiff had no interest in the money and could not question the correctness of a judgment in so far as it awarded to the assignee the dividends which accrued prior to the assignment. (Cross v. Eureka Lake and Yuba Canal Co., 73 Cal. 302.)

Right of pledgee to collect rents. See ante, 2.

41. It may well be doubted whether the pledgee of a contract, for the payment to the pledgor of a much larger sum of money than the debt due to the pledgee from the pledgor, was not bound to collect the amount due on the contract and reimburse himself out of the proceeds. (Gay v. Moss, 34 Cal. 125.)

3. Right to Retain Possession; Rights Against Real Owner.

42. Pledgee of shares of capital stock of corporation has right to retain their possession until the debt to secure which they were pledged is satisfied. (Cross v. Eureka Lake and Yuba Canal Co., 73 Cal. 302.)

43. A broker who receives from a customer a certificate of stock indorsed in blank, which was delivered to the customer by the owner to enable him to pledge it as security for the purchase of other stock, and which is pledged for that purpose, cannot, after having purchased such other stock, and resold the same at an advance, retain the pledged stock as security for a previous debt of the pledgor existing at the date of the pledge, if it does not appear to have been pledged for such indebtedness, and if the broker thereafter sells it and appropriates the proceeds to pay such indebtedness, he is liable to the owner of the stock for a conversion thereof. (Niles v. Edwards, 90 Cal. 10.)

44. The fact that the broker was ignorant of who was the true owner of the stock at the date of the pledge is immaterial, the apparent ownership of the pledgor not having resulted

to his injury, and the broker not being a holder of the pledge in good faith and for value, as against the owner, after the moneys advanced on the stock were fully repaid. (Niles v. Edwards, 90 Cal. 10.)

Rights of pledgee on pledge by one not owner. See ante, V.

Right of pledgee to recover possession. See ante, 27.

Right of pledgee to retain possession. See ante, 6.

Pledgor taking pledged property from pledgee, when larceny. See Criminal Law, 2294.

Adverse possession by pledgee. See Adverse Possession, III, 4, b.

4. Action by for Conversion; Action Against Sheriff Seizing Goods; Property how Seized.

45. In an action by the pledgee against a stranger for the conversion of pledged property, the rule is, that plaintiff is entitled to recover its value; but if against the owner, or one acting in privity with him, then only for plaintiff's special interest therein as pledgee. (Treadwell v. Davis, 34 Cal. 601.) Cited 48 Cal. 115.

46. The pledgee, as against a stranger to the pledgor and wrongdoer, who has converted the pledge, may recover its full value; for he is answerable over to the pledgor for any surplus in his hands; and if he recovers in such action, and the wrongdoer satisfies the judgment, he thereby acquires a title to the pledge. (Thompson v. Toland, 48 Cal. 99.)

47. In an action by a pledgee against a sheriff for a conversion of goods pledged, the sheriff who has seized them under a lawful writ in his hands will be treated as in privity with the owner, the pledgor, provided he has pursued the law in making such seizure, and will be held only for plaintiff's special interest in the goods; but in any other event, he will be treated as a stranger, and held for their full value. (Treadwell v. Davis, 34 Cal. 601.)

48. A pledgee in an action brought by him to recover the property pledged, against a sheriff who had taken the same under an execution against the pledgor, cannot avail himself of a title acquired subsequent to the commencement of the action. (Barnhart v. Fulkerth, 73 Cal. 526.)

49. Plaintiff and Templeton were severally creditors of Thompson. Templeton, as security for his debt, held in pledge Thompson's goods, of greater value than the sum of both plaintiff's and Templeton's debts. By an arrangement between them, plaintiff guaranteed to Templeton the payment of his debt, and received from him an assignment and the possession of said goods, in pledge to secure the payment of the debts of both plaintiff and Templeton. Thompson, who was not a party to this arrangement between plaintiff and Templeton, afterwards expressed himself gratified at its consummation. Thereafter defendant, as sheriff of the city and county of San Francisco, levied upon and took said goods from plaintiff's possession, under a lawful writ of attachment against the property of Thompson, issued out in the suit of Martin v. Thompson, whereupon plaintiff brought this

action against defendant for said seizure, and to recover the full value of said goods. Held, (1) that Templeton lost his lien on the goods, as pledgee, by surrendering them to plaintiff and taking said guaranty for his debt; (2) that by said arrangement between Templeton and plaintiff, and the subsequent assent thereto by Thompson, plaintiff acquired, as pledgee, a valid lien on said goods to secure the payment of both said debts; and (3) that plaintiff is entitled to recover in this action, and his right of recovery is not limited to his interest only as pledgee of the goods, but extends to the whole value of the goods. (*Treadwell v. Davis*, 34 Cal. 601.)

Cited 59 Cal. 159; 77 Cal. 275; distinguished 82 Cal. 6.

Attachment of in hands of pledgor. See Attachments, 125.

Interest of pledgor, how attached. See Attachments, 134, et seq.

How levied on. See Executions, 120.

5. Independent Action on Debt.

50. Pledgee may maintain action for debt without first exhausting subject of the pledge where property is pledged to secure a debt. (*Ehrlich v. Ewald*, 66 Cal. 97.)

51. In the absence of a statute or stipulation to the contrary, the possession of the pledged property does not suspend the right of the pledgee to proceed personally against the pledgor for his debt without selling the pledge. (*Sonoma Valley Bank v. Hill*, 59 Cal. 107.) Cited 66 Cal. 98.

Right of action for deficiency after sale. See post, 63.

6. Sale.

a. Agreement for Sale; Fraud; Sale of Stock; Duty to Retain Identical Shares.

52. Party depositing securities for securing the payment of a debt, or advancements made thereon, may agree that they shall be sold at the option or pleasure of the creditor. (*Hyatt v. Argenti*, 3 Cal. 151.)

53. Where a party depositing securities for securing the payment of a debt, or advances made thereon, drew several drafts upon the defendant, who held the deposit, directing him to pay them "from the proceeds of the securities in his hands," this was held to give an authority to the plaintiff to sell the securities deposited to meet the drafts. (*Hyatt v. Argenti*, 3 Cal. 151.)

54. Where a party depositing securities for securing the payment of a debt, or advances made thereon, drew several drafts payable from the proceeds, and then drew order to be paid "when in funds, from the proceeds," such order makes the deduction conclusive that other sales of the securities had yet to be made by the defendant. (*Hyatt v. Argenti*, 3 Cal. 151.)

55. Action to recover a balance due. Answer alleging payment through sale by plaintiff of stock of defendant held as security, leaving a balance due, and cross-complaint. Rogers, the defendant, contended that Hayward, plaintiff, held a certain number of shares of stock as security, and that Hayward, without his knowledge, sold the stock; that after-

wards, and while he was ignorant of such sale, Hayward procured power from him to sell said stock, and then sold the same number of shares; that Hayward accounted to him for the sum realized on the sale of the stock last sold only, which was much less. On the other hand, the plaintiff contended that he constantly held the identical stock certificates up to the time when he admitted he sold them, or that if he did not have the identical stock certificates, that he did have other stock certificates during all of such time. Held, taking the defendant's version of the transaction as correct, and the fact that it is not charged in the cross-complaint that he, the defendant, was induced to do what he did by any representations of the plaintiff, the court did not err in sustaining objections to the introduction of evidence of what plaintiff said to the defendant in regard to those subjects. (*Hayward v. Rogers*, 62 Cal. 348.)

56. In such case the court did not err in allowing the witness Peart (business manager of the plaintiff) to be asked how much stock Hayward carried for Rogers between certain dates. Peart was better qualified to answer that question than any other witness, including Hayward himself. As to this question to the witness Peart, appellant's counsel seems to have assumed that the answer of the witness would contradict all the evidence to which the objections referred. But as the trial court could not have anticipated the answer of the witness, there was no error in overruling the objections to the question. No motion was made to strike out the answer; and according to the evidence there is no such contradiction. (*Hayward v. Rogers*, 62 Cal. 348.)

57. In such case the evidence as to the number of shares of stock that Hayward was carrying for persons other than Rogers, and as to the contents of the letter which Rogers wrote to Hayward, may not have been relevant to any issue in the case, but if there was error in overruling the objections to it, it was error without injury. (*Hayward v. Rogers*, 62 Cal. 348.)

58. Upon the main issue in the case, the court charged the jury as follows: "If you find that Hayward had sold the six hundred and ninety shares before the execution of the power, and had been able and willing to transfer an equivalent number of similar shares, then it was not material that these facts should be imparted to Rogers at the time he executed the power of attorney, and the power was a valid and binding one. It was not material to tell him that, for the reason that that was a thing that Hayward had a right to do anyway, and the law says that he was selling his own stock, and not Rogers' stock, provided he was all the time able to respond to Rogers, in case he should come and demand his stock. And if you find that Hayward had sold the identical shares, and that he was not at the time able to deliver to Rogers a similar number of shares, then the suppression of those facts operated as a fraud and destroyed the force and effect of the power of attorney." Held, this was a correct and sufficiently clear exposition of the law applicable to that issue, and it obviated the necessity of the court's

giving any other or further instructions upon it. Therefore, the refusal of the court to give the instructions asked on the points covered by the instruction given is not a sufficient ground for reversing the judgment. (*Hayward v. Rogers*, 62 Cal. 348.)

59. A. and G. each owned shares of stock in a mining company; A. delivered a number of his shares to G., to be held as collateral security for money advanced by G. to pay assessments upon the stock of A., and to be sold by G. whenever he could obtain not less than five hundred dollars per share; G. transferred certain of A.'s shares for less than the price named, in fulfillment by G. of a contract for a sale of his own stock, and, on settlement with A., G. transferred an equal number of his own shares to A., exchanging receipts with him in full of all demands. Subsequently A. sued G. for the amount of money received for the shares sold, alleging that the settlement had been procured by false representations on the part of G.; and G. defended by showing that he transferred the shares in fulfillment of a contract for the sale of his own stock, and that he at all times had and held for A.'s use an equal number of shares of equal value, and that he had so replaced them. Held, that G. did not become responsible for the proceeds of the sale of the shares. The technical breach of trust presents a case of *damnum absque injuria*. (*Atkins v. Gamble*, 42 Cal. 86.)

60. The owner of personal property which has been wrongfully converted is ordinarily entitled to recover his specific property, or its value, and cannot be compelled to accept other property of the same kind and equal value in lieu of that which was converted. (*Atkins v. Gamble*, 42 Cal. 86.)

61. Shares of stock in a corporation stand upon a different footing, because they are mere evidence of interest in the business of the corporation; and, if all the shares are of equal value, there can be no reason for preferring one share to another. (*Atkins v. Gamble*, 42 Cal. 86.) Cited 50 Cal. 414; 54 Cal. 341; 62 Cal. 372; 1 Utah, 275.

Stock, pledge of. See Corporations, IV, 5, e.

Redemption, return of identical property. See Corporations, 188.

b. Right to Sell on Default; Demand and Notice; Manner of Sale.

62. The common-law right of the pledgee to sell the pledge upon the default of the pledgor, and thereafter bring his action for any balance remaining unsatisfied, is wholly unaffected by chapter 1 of title 8 of the Practice Act. (*Mauge v. Heringhi*, 26 Cal. 579.) Cited 27 Cal. 271; 36 Cal. 429.

63. A pledgee of chattels has a right at common law, if the pledge is not redeemed within the stipulated time, to sell the property pledged at auction, by giving public notice of the time and place of sale, and if the sale does not satisfy the debt, he may recover the deficiency from the pledgor by an action at law. (*Mauge v. Heringhi*, 26 Cal. 579.)

64. Personal property pledged to secure a debt may be sold by the pledgee, after the

debt to secure which it was pledged has become due, if the sale be made at public auction and after reasonable notice of the time and place of sale be given to the pledgee. (*Wilson v. Brannan*, 27 Cal. 258.) Cited 36 Cal. 429.

65. A pledgee has no right to sell until after demand and notice; and if he sells without demand and notice to a party having full knowledge of his title, no absolute title passes, and the property remains in the hands of the purchaser as a pledge. (*Dewey v. Bowman*, 8 Cal. 145.)

66. The pledgee of a chose in action, pledged as security for the payment of a debt, is not authorized to sell the pledge without calling on the pledgor to redeem, and giving him reasonable notice of his intention to sell. (*Gay v. Moss*, 34 Cal. 125.)

67. Where, without calling on the pledgor to redeem, the pledgee sold the pledge—a chose in action—this was a conversion of the pledge, and the pledgee thereby became liable, in an action for the conversion, for the value of the pledge at the time of the conversion in excess of his demand secured by the pledge, with legal interest thereon from the time of the conversion. (*Gay v. Moss*, 34 Cal. 125.)

68. When one deposits securities for securing the payment of debts or advances made, and drew an order to be paid "when in funds, from the proceeds," a sale made under such authority is good without notice to the plaintiff of the time and place of sale or previous demand of payment. (*Hyatt v. Argenti*, 3 Cal. 151.)

69. Sale by pledgee of property pledged must be made by public auction, in the manner and upon notice to the public usual at the place of sale in respect to auction sales of similar property, and must be for the highest obtainable price. (*Bendel v. Crystal Ice Co.*, 82 Cal. 199.)

70. If a sale of mining stock, pledged as security for money, is made without notifying the pledgor to make his margin good, and without sufficient notice of time and place, still, if the pledgor knew of the time and place of sale, and made no objection, and after the sale approved of it, and promised to pay a balance claimed by the pledgee, he by these acts ratifies the sale. (*Child v. Hugg*, 41 Cal. 519.)

Sale by pledgee after action brought for recovery of stock. See post, 96.

Public auction, sale in board of brokers. See Auctions, 1.

c. Purchase by Pledgee.

Pledgee cannot purchase at his own sale. See ante, 35.

71. A pledgor may consent to or ratify a purchase at public auction by the pledgee of the property pledged. (*Hill v. Finigan*, 62 Cal. 426.) Cited 77 Cal. 274.

72. In its instructions the court below in effect told the jury that section 3010 of the Civil Code, which prohibits the pledgee from purchasing the property pledged, except by direct dealing with the pledgor, requires the

direct dealing to precede the sale, to be some thing which changes the form of the original contract, and be supported by a consideration. Held, in each particular the instruction is erroneous. In the first place, it entirely excludes the question of ratification; and in the second place, as the statute was intended for the protection of the pledgor, he may, at the time of the making of the pledge, or at any subsequent time, without changing the form of the original contract, and without consideration, consent that the pledgee may purchase at the sale. (*Hill v. Finigan*, 62 Cal. 426.)

73. Ratification by a pledgor of a purchase of the pledge by the pledgee at his own sale does not require a consideration or a new contract. If the pledgor, after the sale, treats with the pledgee for a repurchase, without objection to the sale and with full knowledge of his rights, it is a sufficient manifestation of his election to treat the sale as valid; and if a knowledge of the law by the pledgor is essential to a ratification, it will be presumed that he knew the law, when the contrary does not appear. An un rebutted presumption as to knowledge of the law has the same force as an admission of such knowledge. (*Hill v. Finigan*, 77 Cal. 287.)

74. When a pledgee purchases the pledge at a sale of which the pledgor has notice, the pledgor has a right of election to treat the sale as invalid, but loses that right by failing to exercise it within a reasonable time after knowledge of the fact. The right is lost by such unreasonable delay, as a rule of law, and not as an inference of fact, as to ratification of the sale by the pledgor. (*Hill v. Finigan*, 77 Cal. 287.)

75. A sufficient election by the pledgor to treat a purchase of the pledge by the pledgee at his own sale as valid cannot afterwards be retracted; nor can an election to disaffirm the sale be retracted or renewed at a later date for the purpose of increasing damages. (*Hill v. Finigan*, 77 Cal. 287.)

76. If the facts are undisputed, the judge may instruct the jury as to what delay of the pledgor, in avoiding a purchase of a pledge of stocks by the pledgee at his own sale, is unreasonable; but if the facts are disputed, it is proper to submit the question to the jury. An undisputed delay of two months after being informed of the facts, and until the stocks sold had risen to a very high price, would warrant an instruction to the jury, as matter of law, that the delay was unreasonable. (*Hill v. Finigan*, 77 Cal. 287.)

77. Instructions that the jury may find a ratification by the pledgor of the pledgee's purchase of the pledge at his own sale, from an unreasonable delay to object, after being informed of the purchase, or when the pledgor, with knowledge of his rights, has treated with the pledgee for a repurchase of part of the property, are correct, and do not charge the jury as to matters of fact. Ratification is here used as the equivalent of an election to treat the sale as valid; and the sufficiency and binding force of the election is matter of law. (*Hill v. Finigan*, 77 Cal. 287.)

78. The court below also instructed the jury as follows: "The object of the law is for the purpose of guarding against the greed and rapacity of money-lenders, and those who deal in securities of this character." And again: "There are many reasons why this law is a wholesome one, independent of the rapacity and greed of creditors." Held, in view of the circumstances of this case, these instructions were manifestly improper, as tending to prejudice the jury against the defendant. Per *Morrison, C. J.*, and *Ross* and *Myrick, J. J.* (*Hill v. Finigan*, 62 Cal. 426.)

Pledgee, right of to bid at sale. See *Mortgages*, 790.

d. Decree of Foreclosure and Sale.

79. Has a court of equity power to decree the foreclosure and sale of a negotiable instrument, in satisfaction of the debt for which it is held in pledge, under ordinary circumstances, query? (*Donohoe v. Gamble*, 38 Cal. 340.)

80. Under special circumstances, a court of equity has the power to decree the sale of such instruments so held. (*Donohoe v. Gamble*, 38 Cal. 340.)

81. Where the maker of the note or bill of exchange resides in a remote country, or in a different state, and it is not shown that he has any property subject to seizure and sale, within the jurisdiction of the forum, there is presented such special circumstances as to authorize the holder of the instruments given in pledge to resort to a court of equity for a foreclosure and sale. (*Donohoe v. Gamble*, 38 Cal. 340.)

Right of action for deficiency. See *ante*, 63.

7. Liability for Negligence; Loss of Goods.

82. A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence. (*St. Losky v. Davidson*, 6 Cal. 643.)

83. When the bailors agreed that the goods should be stored in a certain warehouse at their risk and expense, held, that their removal by an agent of the bailees, though without their knowledge, charged them for the safe keeping of the goods after their removal, and that they were responsible for any damage to said goods caused by their removal to an insecure or improper place of storage. (*St. Losky v. Davidson*, 6 Cal. 643.)

84. Where a piano was pledged as security for a note, and the pledgor consented that it should be stored with friends, who might use it as compensation for the storage, he cannot complain of negligence on the part of the pledgee in thus storing it, and permitting it to be used, though it may have been injured by negligent use on the part of those with whom it was stored, nor can he recover damages for such negligent use by way of counterclaim in an action upon the note after sale of the piano by the pledgee. (*Damon v. Waldeufel*, 99 Cal. 234.)

85. When the answer in an action for the

value of pledged property not returned upon demand and tender of the amount due pleads as new matter that the articles pledged were lost or stolen from the pledgee without fault or negligence, and there is no testimony upon the subject of such loss or stealing, it is proper for the court to find against the defendant upon the issue thus made. (*Vanderslice v. Matthews*, 79 Cal. 273.)

VIII. Payment and Tender; Refusal to Deliver; Action to Recover Property.

86. Where a contract of pledge does not fix the time for the payment of the debt secured thereby, a tender of the amount due thereon, with interest, made within a reasonable time after a previous demand for payment had been refused by the pledgor, is good, under section 1492 of the Civil Code, and extinguishes the lien of the pledgee. (*Loughborough v. McNevin*, 74 Cal. 250.)

87. The lien of a pledgee is extinguished when a tender of the amount due on the debt is made according to law and refused by the pledgee. Upon such tender being made and refused, the pledgor is entitled to the property pledged; and when, on or after such tender, a demand is made for the pledge, which is refused, the pledgee is guilty of conversion. (*Loughborough v. McNevin*, 74 Cal. 250.)

88. A tender of the indebtedness secured by the pledge is not vitiated by a condition imposed at the time of the tender that the property pledged should be delivered to the pledgor. (*Loughborough v. McNevin*, 74 Cal. 250.)

89. Upon the delivery of the property to the pledgee his lien thereon created by the bill of sale at once attached, and was not released by the conditional offer of payment. (*Myers v. Moulton*, 71 Cal. 498.)

90. In an action to recover the value of stocks converted by the defendant, in the sum of eighteen thousand dollars, where it appears that the stocks in controversy were pledged to the defendants as security for loans amounting to eight thousand dollars, and upon tender of the principal sum the other stocks were surrendered to the plaintiff, and the defendant refused to deliver the stocks in controversy upon demand therefor, because contending that they were security upon stock account as well as upon the loan account, the fact that the sum of thirty-seven dollars was due for interest upon the loan, which was overlooked by both parties at the time of the demand and refusal, will not preclude a recovery by plaintiff of the value of the stocks which defendants refused to deliver. The maxim, *De minimis non curat lex*, will apply under such circumstances. (*Kullman v. Greenebaum*, 92 Cal. 403.)

91. In an action to enforce a pledge, a plea of a previous tender of the indebtedness is good without bringing the money into court. (*Loughborough v. McNevin*, 74 Cal. 250.)

92. A pledgee is not justified in refusing to surrender the property pledged to the assignee of the pledgor, upon a tender by him of the amount secured thereby, by reason of the fact that subsequent to the assignment the prop-

erty had been attached as belonging to the original pledgor. (*Loughborough v. McNevin*, 74 Cal. 250.)

93. In the ordinary case of a pledge, the pledgee impliedly undertakes to deliver back the property to the pledgor, when the sum for which it is pledged is paid; but, on the other hand, the pledgor impliedly undertakes that the property pledged is his own, and may be safely returned to him; and if it turns out not to be so, may restore it to the lawful owner, or may, after demand by the true owner, set up his right as a defense. (*Palm-tag v. Doutrick*, 59 Cal. 154.)
Cited 61 Cal. 423; 65 Cal. 425; 93 Cal. 237.

94. The pledgee is liable to the pledgor for the depreciation in value of the property pledged after a tender of the amount due, and the refusal of the pledgee to deliver; and such liability may be enforced by the pledgor, either by an action of trover, or by a bill to redeem. (*Loughborough v. McNevin*, 74 Cal. 250.)

95. In an action for the value of articles pledged, which were not returned upon demand and tender of the amount due, the indebtedness secured by the pledge is properly set off against the value of the articles. (*Vanderslice v. Matthews*, 79 Cal. 273.)

96. While an action was pending for the recovery of shares of stock held as a pledge for the payment of a loan, the pledgee sold the shares in open market for a sum larger than the amount of the loan. Held, that the plaintiff could not recover the excess in such an action, as it constituted no part of his cause of action. (*Ambrose v. Evans*, 66 Cal. 74.)

97. A finding that articles were pledged which correspond in description to the articles described in the complaint, and alleged to have been pledged, is a sufficient identification of the articles, without averring in the finding that they were the same articles described in the complaint, there being nothing in the record to show that the finding could have related to any other articles. (*Vanderslice v. Matthews*, 79 Cal. 273.)

Finding as to loss in action for recovery. See ante, VII, 7.

Note redeemed from pledge reverts to drawer. See Bills and Notes, 325.

PLUMAS COUNTY.

Fees of clerk of supervisors, effect of new constitution on. See Constitutional Law, 89.

Fees of county clerk and auditor in. See Offices and Officers, 185.

Act relating to officers of, effect of, where certain provisions inoperative. See Statutes, VIII, 15.

POINT SAN JOSE MILITARY RESERVATION.

See San Francisco, XIV, 11.

POISONS.

Assault with. See Criminal Law, XXI, 6.

POLICE.

1. The office of police commissioner of the city and county of San Francisco is not an

elective office, and such commissioners are properly appointed under the provisions of the act of April 1, 1878, which is part of the local charter, and is in force under the new constitution. (*People ex rel. Pixley v. Pond*, 89 Cal. 141.)
Cited 93 Cal. 156.

2. Under the provisions of the act of April 1, 1878, with reference to the police force of the city and county of San Francisco, the police commissioners and chief of police are not elective officers. (*Staudé v. Board of Election Commrs. of City and County of San Francisco*, 61 Cal. 313.)
Cited 20 Or. 375.

3. The power of appointing police commissioners of the city and county of San Francisco, vested in the judges of certain district courts by the act of April, 1878, was not a judicial power, and did not pertain to the judicial system of the state. Such power was not continued in force by section 11 of article XXII of the new constitution, and does not devolve upon the judges of the superior court of the city and county of San Francisco. (*Heinlen v. Sullivan*, 64 Cal. 378.)
Cited 89 Cal. 143; 20 Or. 376.

4. Under the act of April 1, 1878, the respondent and two others were appointed by the district judges named in the act police commissioners of the city and county of San Francisco. No term of office was fixed by the act. By the constitution of 1879 the district courts were abolished, and a new judicial system established, with no specific provision for the exercise of the powers imposed upon the judges of the district court by the act of 1878. On August 1, 1884, the relator was appointed by the governor to the office of police commissioner in place of the respondent, and instituted this action to try his title under the appointment. Held, that he was not entitled to the office. (*People ex rel. Hinton v. Hammond*, 66 Cal. 654.)
Cited 89 Cal. 143; 93 Cal. 156, 158; 20 Or. 376, 378.

Effect of new constitution on police commissioner. See *Fire Department*, 3.

Police judge of San Francisco may act as police commissioner. See *Judges*, 77.

5. Chief of police is not an elective office under the provisions of the act of April 1, 1878. (*Staudé v. Board of Election Commissioners of City and County of San Francisco*, 61 Cal. 313.)
Cited 20 Or. 375.

Reduction of salary. See *Offices and Officers*, 157, et seq.

6. The act of the legislature of March, 1889, authorizing the police commissioners of the city of Sacramento to appoint policemen not exceeding thirty in number, and amending section 6 of the act of 1872, which authorized the board of police commissioners of said city to appoint a permanent police force, consisting of a captain and policemen not exceeding fifteen in number, is a special act, and forbidden by section 25 of article IV of the constitution, and the city board of trustees cannot be compelled by mandamus to proceed to levy a tax under it to raise a sum of money to pay

the salaries of the extra police force so appointed. (*Farrell v. Board of Trustees of the City of Sacramento*, 85 Cal. 408.)

7. The plaintiff was appointed a police officer of the city of Sacramento by the board of police commissioners, and was afterwards removed by them, without written charges or trial and conviction, as required by the sixth section of the act of March 6, 1872, amendatory of the act incorporating the city of Sacramento. (*Stats.* 1871-72, p. 244.) Held, the board had power to remove him. (*Smith v. Brown*, 59 Cal. 672.)
Cited 6 Dak. 511.

8. The act of April 1, 1878, creating a police life and health insurance fund out of part of the monthly salaries of police officers in the city and county of San Francisco, was repealed by the act of March 4, 1889, creating a police relief, health, and life insurance and pension fund, and merging the former fund in the latter, and such repeal and merger was constitutional and valid as against the legal representatives of a member of the police force whose salary was in part detained under the former act, but who did not die until after the passage of the latter act. (*Pennie v. Reis*, 80 Cal. 266.)
Cited 87 Cal. 544.

Act to create relief fund is valid. See *Constitutional Law*, 245.

9. Such repeal and merger did not deprive the police officer of any property without due process of law, or impair any vested right. A public officer, whose term and compensation are not fixed by the constitution, has no contract by which he can hold his office or salary against the legislative will, and a repealing statute destroying a mere expectancy under a former statute, depending upon the contingency of the death of such officer, does not affect a vested right, if the death does not occur before the statute is repealed. (*Pennie v. Reis*, 80 Cal. 266.)

10. The act of March 4, 1889, to create a police relief, health, and life insurance fund, is sufficient as to its title, does not create "a special commission" within the prohibition of section 13 of article XI of the state constitution, nor does it grant an extra compensation to any public officer, or make to him any gift of public money, but is in all respects valid and effective. (*Pennie v. Reis*, 80 Cal. 266.)

11. A police officer of the city and county of San Francisco has no vested right to the sum paid by him into the insurance fund created under the act of April 1, 1878 (*Stats.* 1878, p. 879), except upon the happening of the contingencies mentioned in the act. (*Clarke v. Reis*, 87 Cal. 543.)

12. The police officer, upon his dismissal from the force, is not entitled to a mandamus to compel repayment of the sum paid by him into the insurance fund, if the petition is insufficient to bring him within any of the contingencies of the statute which he invokes. (*Clarke v. Reis*, 87 Cal. 543.)

Power to create office of policemen. See *Constitutional Law*, 256.

Offer to bribe, offense when complete. See Criminal Law, 1341, 1342.

Arrest without warrant. See Criminal Law, 66, et seq.

Feigning accomplice. See Criminal Law, 777.

Resisting officers. See Criminal Law, XXI 43.

Liability of city for acts of. See Municipal Corporations, 170.

POLICE COURTS.

It seems that there is no provision of the law to authorize a transfer of an action from the police to the district court. (*City of Santa Cruz v. Santa Cruz R. R. Co.*, 58 Cal. 143.)

Creation and organization. See Courts, III, 2.

Act relating to, taking effect at different times, validity. See Constitutional Law, 493.

Amendment to constitution, effect on. See Constitutional Law, 117.

Legal establishment, question how presented. See Courts, 21.

Judges of. See Judges, VII, 5.

Jurisdiction of. See Jurisdiction, XI, 8.

Fines. See Home for the Inebriates.

Place of imprisonment on nonpayment of fine. See Criminal Law, 1077.

Transfer from police to superior court. See Taxation, 600.

Appeal, trial de novo. See Appeals, 3341.

POLICE POWERS.

See Ordinances, IV, 1.

Laws passed under. See Constitutional Law, VIII, 13.

POLICIES.

See Insurance.

POLITICAL CODE.

Effect of on existing municipalities. See Municipal Corporations, IV.

Revenue system in applies to San Francisco. See San Francisco, VIII.

Chapter relating to supervisors does not apply to San Francisco. See San Francisco, 18.

Construction of. See Statutes, VIII, 1.

POLLING JURY.

See Verdict, XIII.

POLLS.

See Elections, VIII, 1.

POLL TAXES.

See Taxation, XIV.

POLLUTION.

Water, pollution of. See Watercourses, XIV, 1, f.

POOLING CONTRACTS.

Recovery of loan. See Contracts, 146.

POOR LAWS.

Power of state to exclude paupers. See Constitutional Law, 45.

1. The act of 1883 appropriating one hundred dollars per annum for each aged person in indigent circumstances, supported and maintained in any institution conducted in whole and in part for their support and maintenance, provided there be not less than ten such persons supported in such institution, is confined solely to private institutions, and does not apply to counties, cities, and towns. But article IV, section 22, of the constitution is self-executing, and appropriates the same pro rata amounts granted by the legislature to private institutions for the support of orphans and indigent aged persons, in aid of counties, cities, and towns for similar purposes, without regard to the number of such persons, or whether all or any of them are kept in the same public building; and mandamus will issue to the state controller to compel payment of such pro rata amounts. (*County of Yolo v. Dunn*, 77 Cal. 133.) Cited 88 Cal. 512, 513.

2. Upon the passage of the act of March 15, 1883, making an appropriation of money for the support of aged persons in indigent circumstances in certain private institutions, the city and county of San Francisco, under section 22 of article IV of the constitution, without any further legislative action, became entitled to receive from the state a pro rata appropriation for the support of aged persons in indigent circumstances in the city and county almshouse. (*City and County of San Francisco v. Dunn*, 69 Cal. 73.) Cited 77 Cal. 135.

PORT.

See Collector of the Port; Gauger of the Port.

Duty to give bond on entering. See Shipping, V.

POSSESSION.

I. Right of Owner to Enter into Possession.

II. Kinds of.

III. Actual Possession, What Constitutes and Evidence of.

IV. Constructive Possession; Possession of Part Under Deed for the Whole.

V. Possession by Third Person.

VI. Possession as Evidence of Title; Prior Possessor, Rights of.

Possession in particular relations. See particular title.

Meaning of. See Taxation, 282.

Adverse possession. See Adverse Possession.

Taking possession as part performance under statute of frauds. See Statute of Frauds, II.

Dedication, effect of on occupant. See Dedication, IV.

Abandonment of. See Public Lands, VIII, 3.

Who to decide question of. See San Francisco, 231, 232.

Ouster from. See San Francisco, XIV, 7, d. Stipulation as to, construction of. See Stipulations, 25.

Action for. See Landlord and Tenant, V, 1.

Action for possession under deed absolute intended as mortgage. See Mortgages, II, 2, g.

Allegations of. See Ejectment, V, 3, a, b; Forcible Entry and Unlawful Detainer, 162, 163.

Question for jury. See Forcible Entry and Unlawful Detainer, VI, 6, b, F.

Judgment for possession where one in possession, validity of. See Judgments, XII, 14.

Writ of restitution. See Ejectment, XXI; Forcible Entry and Unlawful Detainer, VI, 16.

Writ of possession. See Assistance; Quiet-ing Title, III, 16; Writs of Possession.

Restraining writs of restitution. See In-junctions, II, 2, f.

Appeal, possession pending. See Mexican Lands, I, 23, i.

I. Right of Owner to Enter into Possession.

1. Parties having the title and the present right of possession can always enter peaceably into the possession of premises, and cannot be held liable for so doing in trespass or ejectment. If he uses force, the remedy is by forcible entry and detainer. (*Henderson v. Grewell*, 8 Cal. 581.)

II. Kinds of.

2. Possession of real property is of two kinds: the one constructive, depending upon the title and the right to the actual possession, and the other subsisting in the actual occupation. (*Cahoon v. Marshall*, 25 Cal. 197.)

Constructive possession. See post, IV.

Actual possession. See post, III.

Possession by third person. See post, V.

III. Actual Possession; What Constitutes, and Evidence of.

Actual possession, what constitutes. See Mexican Lands, 104; Public Lands, 101; San Francisco, 211, et seq.

Actual, meaning of. See Public Lands, 99.

3. If owner has full dominion and control of his property (which he has, if not held adversely), he may well be said to be in possession, in every sense of the word. Per Temple, J., dissenting. (*Sepulveda v. Sepulveda*, 39 Cal. 13.)

4. At common law the owner, after a mere entry, is deemed in the actual possession, until ousted by an actual adverse possession. By Temple, J., dissenting. (*Sepulveda v. Sepulveda*, 39 Cal. 13.)

5. Acts of ownership and dominion over land, which may be sufficient to constitute an actual possession, vary according to the condition, size, and locality of the tract. (*Brumagim v. Bradshaw*, 39 Cal. 24.) Cited 9 Utah, 29.)

6. The whole theory of a *possessio pedis* rests upon the assumption that the acts of dominion which establish it are such open, notorious acts of ownership as usually accompany the possession of real property, and naturally spring from a claim of exclusive dominion. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

7. Actual possession of land can only be taken by such open, unequivocal, and notorious acts of dominion as plainly indicate to

the public that he who performs them has appropriated the land, and claims the exclusive dominion over it. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

Cited 57 Cal. 546; 74 Cal. 15, 18; 76 Cal. 253; 85 Cal. 166; 3 Mont. 133.

8. A party may be in possession of land without personal residence thereon, or without having personally cultivated or improved it. (*Barstow v. Newman*, 34 Cal. 90.)

Cited 47 Cal. 31; 76 Cal. 254.

9. A sufficient inclosure is of itself an actual possession of land, without a residence upon it, cultivation, or other act of domain. (*Conroy v. Duane*, 45 Cal. 597.)

Cited 81 Cal. 595.

10. The word "occupation" may be so used in connection with other expressions, or under peculiar facts of a case, as to signify a residence. But ordinarily the expression, occupation, *possessio pedis*, subjection to the will and control, are employed as synonymous terms, and as signifying actual possession. (*Lawrence v. Fulton*, 19 Cal. 683.)

Cited 71 Cal. 211; 82 Cal. 143; 4 Nev. 67.

11. Residence upon premises is not indispensable to their actual possession, nor is cultivation necessary, nor improvement, as contradistinguished from the erection of fences or substantial barriers, marking the line of the premises over which control is asserted. (*Gray v. Collins*, 42 Cal. 152.) Cited 3 Mont. 135; 5 Utah, 121, 122.

12. The erection of a substantial fence and planting of ornamental trees around a city lot amount to actual possession and cultivation of it, as appropriate to such lot as the seasonable plowing and sowing of agricultural lands would be, and equally significant as acts manifesting control over the premises. (*Gray v. Collins*, 42 Cal. 152.)

13. Mere survey and marking lines of boundary, without inclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands. (*Bird v. Dennison*, 7 Cal. 297.)

14. Actual possession of land may be had without fences or inclosure. (*McCreery v. Everding*, 44 Cal. 246.)

Cited 67 Cal. 300; 74 Cal. 15.

15. Substantial, artificial inclosure, erected around entire tract, is act of dominion, and is held to be, of itself, sufficient to constitute actual possession. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

Cited 81 Cal. 595.

16. Inclosure, partly by natural and partly by artificial barriers, will, under certain circumstances, likewise establish an actual possession; but it does not follow that every such inclosure establishes an actual possession, as a conclusion of law. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

Cited 75 Cal. 586.

17. When an inclosure by such barriers is relied upon as establishing the actual possession it is the province of the jury, upon all the proofs, and considering the quantity, locality, and character of the land, to decide whether or not the artificial barriers were

sufficient to notify the public that the land was appropriated, and to impart to the claim of appropriation the characteristic notoriety and indicia of ownership. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

See post, 26.

18. It is error for the court, in its instructions to the jury, to assume, as a conclusion of law, that a substantial inclosure, partly natural and partly artificial, necessarily established the actual possession of the tract of land. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

19. A natural barrier, such as a deep stream, a precipitous cliff, the shore of the ocean, and the like, will serve as a portion of an inclosure of land, and render a fence unnecessary, in order to constitute possession. (*Conroy v. Duane*, 45 Cal. 597.)

20. A general inclosure of a large tract of land is not sufficient to constitute an actual exclusive possession of a specific parcel within it, when it appears that much of the land within the inclosure is not claimed, and much of it is in the actual occupancy of parties claiming and holding adversely. (*Walsh v. Hill*, 41 Cal. 571.)
Cited 57 Cal. 546.

21. Where several persons were owners of separate tracts of land within an outside fence, which formed a common inclosure, but the division lines of the separate tracts within the common inclosure were well known and defined, and each person cultivated his own tract, the general outside fence constituted as full and complete an actual possession in the owner of each separate tract as though it had been inclosed by a lawful fence. (*Hussey v. McDermott*, 23 Cal. 413.)

22. If two owners in severalty of adjoining tracts of land by mutual consent inclose the two tracts together by a fence around the exterior boundaries of both, the inclosure thus made constitutes possession as against any third party who is a mere intruder; and it is immaterial whether the lands are public or private, where the contest is merely one of alleged possessory rights between the parties to the action. (*Reay v. Butler*, 95 Cal. 206.)

23. Fact that party had cattle on land, or was there for short periods himself, or that he claimed within given limits, is, in the absence of any inclosure or some visible physical signs of the extent of his boundaries or claim, insufficient to show the fact of possession of any particular tract, when others were also in possession. (*Wilson v. Corbier*, 13 Cal. 166.)

24. Mere fact of cutting grass upon land in the previous possession of another is not evidence of actual possession of the land being in the one cutting it, in an action by the former occupant for the grass or hay so cut. (*Page v. Fowler*, 37 Cal. 100.)

25. Persons in the casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, and who do not occupy the land for purposes of husbandry, residence, or commerce, are not in such possession of the same as to entitle them to exclude others who

desire to occupy it for a like purpose, or to justify them in resisting by force others who attempt to land upon it to engage in the same pursuit. (*People v. Batchelder*, 27 Cal. 69.)

What constitutes possession. See Public Lands, VIII, 2.

Agricultural lands, possession of. See Forcible Entry and Unlawful Detainer, VI, 6, b, A.

Marsh land, possession of. See Forcible Entry and Detainer, VI, 6, b, A.

Salt marsh land, possession of. See Quiet-ing Title, 38.

Ditch, what constitutes possession of. See Watercourses, XII, 3.

Ditches and canals, possession of. See Watercourses, XII, 3.

Possession maintained by force. See Forcible Entry and Unlawful Detainer, VI, 6, b, B. Scrambling possession. See Forcible Entry and Unlawful Detainer, VI, 6, b, C.

Sufficiency of under Van Ness ordinance. See San Francisco, XIV, 7, d.

Sufficiency of is question for jury. See Public Lands, 104.

26. Whether one who claims possession of a particular piece of land has actual possession of it or not is a question of fact, and the burden is upon him to establish the fact by competent evidence. (*Bullock v. Rouse*, 81 Cal. 590.)

See ante, 17, 18.

27. A deed which conveys to the grantee all the grantor's right and title, and all his right of possession, does not show, or tend to show, any actual possession in the grantee, nor any change of possession from the grantor to the grantee. (*Sanchez v. Loureyro*, 46 Cal. 641.)

28. The finding of the court of possession by the defendants was justified by the evidence. (*Rousset v. Reay*, 60 Cal. 328.)

Evidence of possession. See Public Lands, VIII, 2; Trespass, III, 3.

Evidence of possession under Van Ness ordinance. See San Francisco, XIV, 7, d.

Title, possession of pueblo grant as evidence of. See Mexican Lands, II, 4, q.

Contract of sale as evidence to show nature of. See Vendor and Vendee, 178.

Notice of appropriation of water as evidence of possession. See Watercourses, 265.

IV. Constructive Possession; Possession of Part Under Deed for the Whole.

29. A party's possession is not always confined to his actual inclosure. (*Castro v. Gill*, 5 Cal. 40.)

30. Possession of a whole tract by entry on a part, under a deed calling for the whole, can only be obtained when it appears (1) that the deed is for a specific parcel of land, with distinct boundaries, and purports, on its face, to convey an estate in the whole tract, which entitles the grantee to the possession of the whole; (2) that the grantee entered under the deed, believing, in good faith, that by virtue of the deed he had acquired an estate in the land, which, in law, entitled him to the possession of the whole tract; (3) that there is no adverse possession. (*Wolf-skill v. Malajowich*, 39 Cal. 276.)

Cited 44 Cal. 606; 74 Cal. 16; 77 Cal. 492; 11 Nev. 182.

31. One who receives a deed of land from another who is residing on a portion of it, and claiming to the boundaries described in the deed, and who then enters on the possession of his grantor, is, in contemplation of the law, in possession of the whole tract described in the deed. (*Hoag v. Pierce*, 28 Cal. 187.)

Cited 38 Cal. 487; 74 Cal. 16.

32. When one enters upon a portion of a tract of land, claiming the whole under a deed, no other party being in the adverse possession of any part of it, his possession extends to the bounds of his deed. (*Russell v. Harris*, 38 Cal. 426, cited 44 Cal. 492, 74 Cal. 16; *Rose v. Davis*, 11 Cal. 133, cited 23 Cal. 437, 25 Cal. 138, 38 Cal. 487; *Hicks v. Coleman*, 25 Cal. 122, cited 28 Cal. 191, 30 Cal. 358, 639, 38 Cal. 428, 487, 676, 39 Cal. 280, 40 Cal. 306, 43 Cal. 575, 44 Cal. 493, 74 Cal. 15, 16; *Ayres v. Bensley*, 32 Cal. 620, cited 38 Cal. 476, 487, 39 Cal. 280, 43 Cal. 575, 74 Cal. 16.)

33. A party who enters into the actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure or possession, but acquires constructive possession to the entire tract, if it is not in the adverse possession of any other person at the time of his entry; and such person, in an action to recover possession of the land, will prevail against one who enters subsequently upon the uninclosed part as a mere intruder, or showing color of title only. (*Walsh v. Hill*, 38 Cal. 481.)

Cited 38 Cal. 674; 379 Cal. 280; 74 Cal. 16; 76 Cal. 255; 77 Cal. 492.

34. The rule in such cases is not limited to small tracts of land, such as are usually occupied and cultivated for farms. (*Hicks v. Coleman*, 25 Cal. 122.)

35. Possession of a part, under a deed to the whole tract, where the possessor's grantors had the land surveyed, and the lines marked by the blazing of trees, is sufficient possession, as against a party who enters upon a part of the tract, and builds a fence wholly insufficient for any other purpose than to mark the line of his claim. (*Baldwin v. Simpson*, 12 Cal. 560.)

Cited 23 Cal. 437; 25 Cal. 138; 38 Cal. 487, 488; 38 Cal. 675; 3 N. Mex. 238.

36. The principle, that one who enters upon land under a deed with specific boundaries possesses to the extent of the boundary given, extends to unrecorded deeds, with respect to those, at least, who have actual knowledge of the terms of the deed and the grantee's claim under it. (*Roberts v. Unger*, 30 Cal. 676.)

37. To enable a party to maintain a constructive possession of a large tract of land by the actual possession of a small portion of it, under a deed, it must appear that he entered under his deed, and founded his claim upon it in good faith. (*Cannon v. Union Lumber Co.*, 38 Cal. 672.)

Cited 39 Cal. 280; 74 Cal. 16; 19 Nev. 42.

38. A person who takes a deed from a stranger to the land, for the purpose of adding a

constructive possession of a larger tract to the actual possession of a smaller tract, obtains none of the benefits of a constructive possession thereby. (*Cannon v. Union Lumber Co.*, 38 Cal. 672.)

39. If the land conveyed is known to the parties to the conveyance to be a part of the public domain, to which the grantor has no title or color of title, an entry under the deed gives no constructive possession to any portion of it. Per *Crockett, J.* (*Cannon v. Union Lumber Co.*, 38 Cal. 672.)

40. The question not decided whether a person who enters into possession of a piece of land under a deed conveying a larger tract, with constructive notice that his grantor had before conveyed the whole tract to another, is so affected by this constructive notice that he cannot say he entered under his deed, believing in good faith that it transferred to him the right to the possession of the whole tract. (*Russell v. Harris*, 44 Cal. 489.)

Cited 2 Mont. 170.

41. If one who is in actual possession of portion of tract, claiming whole, makes conveyance of the whole, and the grantee enters into actual possession of such part, claiming the whole, such entry, under deed, gives the grantee constructive possession of the whole tract. (*Donahue v. Gallavan*, 43 Cal. 573.)

Cited 74 Cal. 16.

42. Fact that grantor in deed had neither title nor actual possession puts the case within, instead of without, the rule. It is the want of title and actual possession in the grantor that renders the rule necessary to the grantee. (*Walsh v. Hill*, 38 Cal. 481.)

43. The general rule is, that where a party enters, in good faith, upon a tract of land with color of title, under a deed purporting to convey the tract with specific boundaries, no person being in the adverse possession at the time, and he takes and holds actual possession of a part, bona fide, claiming title and possession of the whole tract described in the deed, he is deemed to have possession of the whole tract within the boundaries of the deed. This rule, however, cannot be held to apply to a case where a person in possession of a small tract makes a conveyance of a large tract greatly exceeding his actual possession, when he has no color of title beyond his possession. (*Kile v. Tubbs*, 23 Cal. 431.)

Cited 4 Mont. 463; 14 Or. 364.

44. A grantee, entering into possession under a deed, thereby acquires no greater possession than his grantor had. (*Bird v. Dennison*, 7 Cal. 297.)

Constructive possession. See *Adverse Possession*, II, 5, h; *Fraudulent Conveyances*, II, 9, b, B; *Landlord and Tenant*, V, 2; *Mines and Mining*, VIII, 2; *Public Lands*, VIII, 2.

Constructive, deed of possessory claim does not convey. See *Public Lands*, 161.

Part, possession of. See *Mines and Mining*, VIII, 2.

Possession of part, whether will support judgment. See *Ejectment*, 38, 39.

V. Possession by Third Person.

45. The plaintiffs had been in possession for more than two years; the premises had been

improved by them, and, at the time of the entry of the defendants, which was in their absence, the land was in express charge of their agents. Held, conclusive evidence of actual possession. (*Moore v. Goslin*, 5 Cal. 286.)

Agent, possession by. See Forcible Entry and Unlawful Detainer, VI, 6, b, A.

46. Possession of servant is possession of the master. (*Goodwin v. Garr*, 8 Cal. 615.)

47. In ejectment, when the issue is prior possession, proof by plaintiff that he was in possession, by his servants, of houses on the demanded premises, makes a prima facie case sufficient to go to the jury. (*Donahue v. Galavan*, 43 Cal. 573.)

48. Possession of the grantor under whom the plaintiff claims inures to the benefit of such plaintiff. (*Rose v. Davis*, 11 Cal. 133.)

49. If one who has not been in the actual possession of land claims title on the ground of prior possession he must not only show the conveyances of his grantors, but must show that they were in the actual occupation and possession of the land. (*Borel v. Rollins*, 30 Cal. 408.)

50. If possession is acquired of a part of a tract of land by the entry of a tenant within and upon certain described limits, it gives to the landlord possession only to the extent of the described limits; but, if the lease contains no definite boundaries, the possession of the tenant gives to the landlord a possession co-extensive with the boundaries of the whole tract. (*Walsh v. Hill*, 38 Cal. 481.)

Cotenants, possession by. See Cotenancy, II, 7.

Rights of sheriff to retain. See Sheriffs, IV, 3, j.

Partners, right of to possession. See Partnership, VIII, 1.

Pledgee, right to retain. See Pledges, VII, 3.

VI. Possession as Evidence of Title; Prior Possessor, Rights of.

51. Possession of personal property is prima facie evidence of ownership. (*Goodwin v. Garr*, 8 Cal. 615.)

52. Lawful possession of personal property is prima facie evidence of ownership. (*Killey v. Scannell*, 12 Cal. 73.)

53. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. (*Bailey v. Steamer New World*, 2 Cal. 370.)
Cited 8 Cal. 617.

54. Possession of personal property by a person engaged in business on his own account is only prima facie evidence of ownership, and does not prevail against the true owner, except as to negotiable instruments, and whatever comes under the general denomination of currency. (*Wright v. Solomon*, 19 Cal. 64.)
Cited 36 Cal. 158.

55. Lands held by no other tenure than possession may be the legitimate subjects of control. (*Johnson v. Rickett*, 5 Cal. 218.)

56. Parties in possession of land, claiming title, are presumed to be owners thereof. (*Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 577; *Williamson v. Tobey*, 86 Cal. 497.)

57. Proof that a party had actual possession of land is prima facie evidence of title. (*Kelly v. Mack*, 49 Cal. 523; *McGovern v. Mowry*, 91 Cal. 383.)

58. Possession of land at death of party gives prima facie title to his heirs or representatives. *Baldwin, J.* (*Gregory v. McPherson*, 13 Cal. 562.)

59. It is not province of jury to determine whether a grant could fairly be presumed from a possession of a certain character. (*Castro v. Gill*, 5 Cal. 40.)

60. Actual possession of property is only evidence of title and may exist without ownership. (*Zaro v. Dakan*, 76 Cal. 565.)

61. A party who has been permitted to remain in possession under contract for the purchase of land for a long period of time, without objection, will be held to be in possession under his contract, although his original entry may not have been under the contract, and no provision as to possession was contained in it. (*Love v. Watkins*, 40 Cal. 547.)

62. Where two parties rely upon possession solely, as proof of title, the presumption of ownership is in favor of the first possessor. (*Potter v. Knowles*, 5 Cal. 87.)

63. Where the title to land rests in possession only, the prior possessor has the better title. (*Ayres v. Bensley*, 32 Cal. 620.)

64. In an action for the recovery of land, possession gives the better right against a mere intruder; and, when the possession is shown in the plaintiff, a nonsuit should not be ordered. (*Wolfskill v. Malajowich*, 39 Cal. 276.)

65. Prior possession is evidence of title, and this cannot, by any system of reasoning, be made to yield to mere color of title. (*Norris v. Russell*, 5 Cal. 249.)
Cited 25 Cal. 141.

66. The fact of prior possession being evidence of title is not for a jury to determine; it is so declared by law. (*Castro v. Gill*, 5 Cal. 40.)
Cited 7 Cal. 319.

67. The person who first takes possession of land makes it his by occupancy as against all the world except the true owner, and the land remains his as against all persons entering afterwards without his consent, and without title, unless he abandons it, or it is taken from him by some method known to the law. (*Moon v. Rollins*, 36 Cal. 333.)

68. A had a house, corral, garden, and orchard on a tract of eighty acres of land, and claimed possession of the entire tract; but his actual possession did not extend beyond his improvements. B afterwards inclosed the entire tract with a fence, and put another house thereon. A then brought an action against B to recover possession of the entire tract, and the defendant recovered judgment. Held, that the judgment was erroneous in this, that A was entitled to

judgment for the house, corral, garden, and orchard, of which he had the prior actual possession. (*Kile v. Tubbs*, 23 Cal. 431.) Cited 38 Cal. 487, 489.

69. Mere prior possession of land cannot prevail against present possession of defendant, taken under claim of title derived, regularly or not, from the rightful owner. (*Gregory v. Haynes*, 13 Cal. 591.)

Notice, possession as. See Notice, II, 3.

Presumption of grant from long possession, what repels. See Presumptions, 24.

Presumption of title from possession. See Husband and Wife, 256; Public Lands, 227.

Prima facie evidence of title. See Forcible Entry and Unlawful Detainer, 83.

Equities of occupant without title. See Agency, 125.

POSTHUMOUS CHILDREN.

Inheritance of. See Estates of Deceased Persons, VIII, 4, e.

POSTMASTERS.

Mail contracts. See Mail Contracts.

Contract of, when void. See Contracts, 170, et seq.

If, in order to secure a fit location for an office, it should be necessary for a postmaster to agree to locate and continue it at a particular place, a contract to that effect might be valid, but to maintain an action thereon such necessity would be required to be affirmatively shown. (*Spence v. Harvey*, 22 Cal. 336.)

POSTOFFICES.

See Postmasters.

Mail contracts. See Mail Contracts.

POTRERO.

Judicial notice as to. See Judicial Notice, 47.

POWDER.

See Explosives.

POWDER MAGAZINES.

See Explosives, 11.

POWERS.

Extent of. See Agency, III.

Defective execution of. See Equity, III, 3, g.

Defective execution of power, aider of. See Agency, III, 4, c.

Sales under. See Estates of Deceased Persons, VII, 2.

Power to sell for delinquent taxes. See Taxation, XII, 5, b.

Judges, powers of at chambers. See Pleading and Practice, XVI.

Arbitrators, powers of. See Arbitration and Award, V, 4.

Mortgage, power of sale in. See Mortgages, VII, 7.

Franchise, power to grant. See Franchises, II.

Supervisors, powers of. See Supervisors, V.
Officers, powers of. See Offices and Officers, VII.

Municipalities, powers of. See Municipal Corporations, IX, 2.

Implied in statute. See Statutes, VIII, 17.

POWERS OF ATTORNEY.

See Agency.

Sufficiency of description in. See Public Lands, VIII, 4.

Certified copies of. See Evidence, II, 7, e.

A power of attorney, though coupled with an interest, and claimed to be irrevocable, cannot be used to justify a conveyance by the agent, when he claimed the property as his own, and conveyed it in his own name as his own, and not under the power of attorney. (*Watson v. Sutro*, 86 Cal. 501.)

PRACTICAL LOCATION.

Boundary, practical location of. See Boundaries, I.

PRACTICE.

See Federal Practice; Pleading and Practice.

PRACTICE ACT.

See Pleading and Practice, IV.

PRAYER.

Complaint, prayer in. See Pleading and Practice, VIII, 9.

Demurrer to prayer. See Pleading and Practice, X, 8.

Amendment of. See Pleading and Practice, XI, 13.

Judgment in excess of amount prayed for. See Judgments, XII, 4.

PRECATORY TRUSTS.

See Wills, XI, 16.

PRECEDENTS.

See Stare Decisis.

Effect of precedents on construction of will. See Wills, XI, 3.

PRE-EMPTION.

See Public Lands, IX.

PRE-EXISTING DEBT.

Sale in consideration of. See Fraudulent Conveyances, II, 6.

PREFERENCE.

Effect of. See Assignments for the Benefit of Creditors, V, 3.

Secret. See Composition, 10.

Power to prefer. See Bankruptcy and Insolvency, V.

Legacies and devises, preference between. See Wills, XI, 12.

Public administrators, preference of. See Executors and Administrators, XV, 3.

Right to letters. See Executors and Administrators, II, 4.

Validity of. See Fraudulent Conveyances, II, 6.

Carriers, discrimination by. See Common Carriers, II.

PREFERRED CLAIMS.

See Estates of Deceased Persons, 255.
Laborers. See Master and Servant, II, 6.

PRELIMINARY EXAMINATION.

See Criminal Law, XII.

PREMISES.

Conflict between and habendum. See Deeds, VIII, 2.

PREMIUM.

See Insurance, I, 7.

PRESCRIPTION.

See Adverse Possession.

Right to violate penal statute cannot be. See Watercourses, 30.

Prescriptive right to maintain dam. See Watercourses, XI, 1.

Effect of, on nuisance. See Nuisances, IV.

PRESENTATION.

Claims, presentation of. See Estates of Deceased Persons, VI, 3.

Claims against county, presentation of. See Counties, VIII, 6, a; Supervisors, V, 5, c.

Pueblo grant, presentation of. See Mexican Lands, II, 5.

Claims, presentation of. See Mexican Lands, I, 23, d.

PRESENTMENT.

Check, presentment of. See Banks and Banking, VI, 2, a.

Bills, presentment of. See Bills and Notes, VIII, 1.

PRESIDENT.

Authority to remove intruders on public lands. See Public Lands, VIII, 12.

Powers of. See Banks and Banking, II.

PRESUMPTIONS.

1. Presumptions are only indulged to supply absence of facts. There can be no presumption against ascertained and established facts. (Nieto v. Carpenter, 21 Cal. 455.)

2. Presumption of law that is disputable when not changed by evidence becomes to the court a rule indisputable for the case, and the court is bound to apply it. (Kidder v. Stevens, 60 Cal. 414.)

3. Presumptions of fact fall within exclusive province of jury, and it is therefore erroneous for the court to charge a jury that the existence of a fact developed in the evidence raises a reasonable presumption of the existence of another fact. (People v. Walden, 51 Cal. 588.)

Cited 52 Cal. 318; 54 Cal. 64, 153, 158; 55 Cal. 237; 61 Cal. 249; 73 Cal. 534; 81 Cal. 405; 94 Cal. 283; 4 Utah, 306.

4. The plaintiff, in an action to enjoin the collection of an unconstitutional tax, is presumed to know the law, and to know that a deed given at such tax sale would be void. (Williams v. Corcoran, 46 Cal. 553.)

5. In cases involving questions of confirmation a party is not necessarily presumed to know the law. This is a fact to be estab-

lished, and, even admitting the presumption to arise, it is not conclusive as against facts which go to establish ignorance of the law. (Holland v. San Francisco, 7 Cal. 361.)

Presumption of knowledge of law. See Criminal Law, 1485; Deeds, 208; Fraudulent Conveyances, 232; Irrigation Districts, 48; Payment, 104; Pledges, 73.

Knowledge of law by married woman. See Estoppel, 11.

6. A status once established is presumed by the law to remain until the contrary appears. (Kidder v. Stevens, 60 Cal. 414.) Cited 89 Cal. 140.

7. It is error to instruct the jury that a fact once shown to exist is presumed to continue until the contrary is shown. The true rule is, that a fact once shown to exist is presumed to continue as long as is usual with things of that nature. (Scott v. Wood, 81 Cal. 398.)

8. There is no presumption of law that a trespass continues from the time of the commission until any subsequent date. (Frazier v. Lynch, 97 Cal. 370.)

9. The law presumes a fact continuous in its nature and character, when once established by proof, to continue, and, in the absence of evidence to the contrary, legally infers therefrom its subsequent existence; but such a presumption never runs backwards, and the law never presumes, from proof of the existence of present facts, that the same facts existed many years previously. (Windhaus v. Boots, 92 Cal. 617.)

Continuance of state of facts once shown to exist, presumptions as to. See Criminal Law, 1166, 1336; Pleading and Practice, 50, 101; Public Lands, XIV, 8; Quieting Title, 139; Trusts and Trustees, 43.

10. In the absence of proof on the subject, the presumption is that the laws of another state are the same as those of this state. (Hill v. Grigsby, 32 Cal. 55.) Cited 61 Cal. 624; 93 Cal. 178.

11. In the absence of any statement to the contrary it is assumed in this case that the law of New York in regard to the issuance of letters to one of two or more executors appointed by a will, and his power to act as sole executor, is the same as in this state. (Brown v. San Francisco Gas Co., 58 Cal. 426.)

12. In the absence of evidence as to the law of another state, in which the property of the wife was acquired, it will be presumed to be the same as the law of this state. (Mortimer v. Marder, 93 Cal. 172.)

13. In the absence of proof of the law of a foreign state the presumption is that such law is the same as the law of this state, and not that it is the same as the common law. (Masters v. Lash, 61 Cal. 622.) Cited 67 Cal. 460; 69 Cal. 381; 93 Cal. 178.

14. In the absence of proof as to the laws of Texas the courts of this state, in interpreting a will made in that state, will presume its laws to be in accordance with the laws of California. (Norris v. Harris, 15 Cal. 226.)

Foreign law, presumptions as to. See Foreign Law, 1; Interest, 69.

Common law, presumption as to. See Common Law, 3.

15. Identity of person is presumed from identity of name. (*People v. Rolfe*, 61 Cal. 540; *Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597.)

16. When a former judgment is received in evidence the identity of the names in the judgment with those in the pending action is prima facie sufficient to establish the identity of persons. (*Garwood v. Garwood*, 29 Cal. 514.)
Cited 2 Mont. 553.

17. Where William J. Douglas was plaintiff in an action for rent, and the defendant set up a judgment obtained in another court against William J. Douglas without averring the identity, held, that the identity of the parties is to be presumed from the identity of names. (*Douglas v. Dakin*, 46 Cal. 49.)
Cited 2 Mont. 553.

Identity, presumptions as to. See *Idem* Sonans, 3.

Identity of person from identity of name. See Criminal Law, 970; Deeds, 16, et seq; Names, 6.

That different names indicate different persons. See Depositions, 32.

Identity of firms not presumed when. See Partnership, 188.

18. That a person has not been heard of for seventeen years by his wife is sufficient to justify a presumption of his death. (*Garwood v. Hastings*, 38 Cal. 216.)

19. The testimony of the wife that she had not heard from her husband for seventeen years, being herself, all the time, absent from his last known place of residence, living under various assumed names, and at no time bearing that of her husband, thereby suggesting the probability that she had endeavored to conceal herself from her husband, is not sufficient to justify the presumption of his death. Per Sprague, dissenting. (*Garwood v. Hastings*, 38 Cal. 216.)

20. In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years. (*Ashbury v. Sanders*, 8 Cal. 62.)

21. To shorten the time when presumption of life ceases from absence there must be evidence of some specific peril to the life of the individual. (*Ashbury v. Sanders*, 8 Cal. 62.)

22. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of his death. (*Ashbury v. Sanders*, 8 Cal. 62.)

23. The presumption of validity attends every grant, issued by parties authorized to grant, when there is nothing on its face impeaching its validity. It is incumbent on those who contest its validity to support their objections. The burden of proof rests upon them. Field, C. J. (*Payne v. Treadwell*, 16 Cal. 220.)
Cited 34 Cal. 585; 87 Cal. 518.

Pueblo grants, presumption in favor of. See Mexican Lands, II, 4, 1.

Consent of departmental legislature to grant, presumptions as to. See Mexican Lands, I, 6.

Patent, validity of, presumptions as to. See Public Lands, XX, 12.

Public, presumption that land is. See Public Lands, II.

Public land, listing over to state of, presumption as to. See Public Lands, III, 5.

24. Presumption of grant from long possession of land is repelled and destroyed by the production or proof of the instrument under which the possession was held. (*Nieto v. Carpenter*, 21 Cal. 455.)

Notice, possession as, presumptions as to. See Notice, II, 3, d.

Possession, presumption of from trespass, instructions as to. See Ejectment, 401.

Possession of mining claims, presumptions as to. See Mines and Mining, VIII, 1.

Possession, presumption of ownership from. See Possession, VI.

25. Existence of petition for probate of will, which is not on file, may, after the lapse of several years, be inferred from mention thereof in the minutes of the probate court and reference thereto in books kept by the clerk and papers on file, and oral testimony tending to prove, but not positively asserting, the fact. (*Will of Warfield*, 22 Cal. 51.)

26. Where it was shown that a petition, since lost or destroyed, was filed in the proper court, the object of which was to procure the probate of a will, that the testator was dead when the petition was presented, and resided at the time of his death in the county where the alleged probate was had, that the petition was drawn by lawyers whose business it was to prepare such papers, that the court assumed jurisdiction, took proof of the execution of the will, issued letters testamentary, and ordered and approved a sale of real estate by the executor, held that it should be presumed, after the lapse of eight years, that the petition contained a statement of the necessary jurisdictional facts. (*Will of Warfield*, 22 Cal. 51.)

Records, presumptions as to, where lost. See Records.

Lost execution, existence of, when presumed. See Executions, 66.

Record, presumption of due execution from. See Registration, VII.

Sheriff, presumption that in his return sheriff states all the acts. See Attachments, 239, et seq.

Return, presumption in favor of. See Summons, 135.

Recitals, presumption of truth of. See Mortgages, 188.

Record, no presumption against. See Estates of Deceased Persons, 403.

Alcalde's books, presumptions from entries in. See Mexican Lands, II, 4, o.

27. In the absence of proof that property decreed to be sold upon foreclosure of a mortgage in 1856 was ever sold it may be conclusively presumed, in an action of ejectment commenced in 1883, that the mortgage debt was paid, and that the property was never sold. (*Gage v. Downey*, 79 Cal. 140.)

Payment, presumption of arising from possession of note. See Bills and Notes, 480.

28. In the absence of a contrary showing the value of the property at a given time will be presumed to be what it was then worth in the market. (*Kisling v. Shaw*, 33 Cal. 425.)

29. Until a final determination has been reached in the inferior court it must be presumed that it will limit its action to its proper jurisdiction, and will not decide erroneously against a valid objection. (*Sayers v. Superior Court of the City and County of San Francisco*, 84 Cal. 642.)

Presumption of performance of official duty. See Appeals, 2724; Offices and Officers, VII, 5; Public Lands, 36, 255; Sheriffs, 92.

Presumption in favor of official action. See Appeals, 2870; Criminal Law, 452, 454; Mexican Lands, 27; II, 4, 1; Public Lands, 588, XX, 12.

Presumption that that which ought to have been done was rightly done. See Jurisdiction, 46.

In favor of proper exercise of discretion. See Appeals, 2958.

Ministerial acts, no presumption in favor of. See Unincorporated Associations, 19.

Official integrity, presumption in favor of. See Judges, 2.

That arbitrators intend to decide according to law. See Arbitration and Award, 58.

Presumption on review of action of supervisors in rejecting claim. See Supervisors, 54.

That elisor did his duty. See Elisors.

Excusing grand juror, presumption in favor of. See Jury and Jurors, 367.

Grand jurors, presumptions in favor of acts of. See Jury and Jurors, XVII, 5.

Conclusive, knowledge of state of one's own title. See Fraud, 52.

Conclusive, fraud from want of change of possession. See Fraudulent Conveyances, 63, 64.

That one intends the result of his acts. See Criminal Law, 530, 2102, et seq; Fraudulent Conveyances, 21.

Abandonment. See Mines and Mining, 231.

Acceptance, presumption of. See Deeds, 115, et seq; Gifts 16; Infancy, IV.

Acceptance of dedication, presumption of. See Dedication, 26.

Acceptance of act passed for one's benefit, presumption of. See Statutes, 29.

Acknowledgments, presumptions in favor of. See Acknowledgments, IV.

Notary's certificate, presumption in favor of. See Acknowledgments, 50, 51.

Acquiescence of owner of land in user, presumption from. See Highways, 14, 15.

Adverse possession, presumptions as to. See Adverse Possession, 215.

Adoption, there is no presumption of. See Parent and Child, 41.

Against party who has burden of proof. See Evidence, 697.

Agent, presumption on purchase of principal's land by. See Agency, 208.

Agent's authority, presumption of knowledge of. See Agency, 61.

Agency, ratification, presumption as to. See Agency, III, 7, e; Corporations, 464.

Agency, presumption of ratification of unauthorized act. See Agency, 153.

Allegations of presumptions of law. See Pleading and Practice, VII, 8.

Amendment, order allowing presumed to be right. See Pleading and Practice, 533.

Appeal, presumptions on. See Appeals, XI, 24.

Appeal, presumption in favor of right of. See Appeals, 107.

Appeal, injury, presumption of from error. See Appeals, XI, 24, d.

Appeal, presumption as to time of service of notice of appeal. See Appeals, 552, et seq.

Appearance, presumption arising from. See Appearance, III, 1.

Assessment, presumption in favor of. See Taxation, V, 2.

Assessment, regularity of, presumption of. See Swamp and Overflowed Lands, 290.

Attorney's authority, presumption in favor of. See Appearance, II; Attorney and Client, VI, 1.

Authority of city attorney to commence proceedings, presumption of. See Eminent Domain, 90.

Attorney, presumption in favor of on proceeding for disbarment. See Attorney and Client, 190.

Attorney's compromise, presumption of consent to. See Attorney and Client, 76.

Attorney and client, communications between, presumed confidential. See Privileged Communications, 32.

Authority of officers of corporation to contract. See Corporations, VI, 8, d, B.

Ballots, presumption that ballots have not been mutilated. See Elections, 182.

Insolvency, presumption of from assignment. See Assignments for the Benefit of Creditors, 11.

Bankruptcy, presumption as to preference by debtor. See Bankruptcy and Insolvency, 68, et seq.

Bona fide holders, presumptions as to. See Bills and Notes, XVII, 1.

Carriers, presumption that person on train is passenger. See Common Carriers, 75.

Carrier, presumption against from loss of goods. See Common Carriers, 44.

Certiorari, presumptions on. See Certiorari, IV, 8.

Check, presumption arising from. See Banks and Banking, VI, 1.

Constitutionality of law, presumption in favor of. See Constitutional Law, 204, 414.

Children, presumption as to competency to testify. See Witnesses, 26.

Commission, presumption that directed to properly qualified officer. See Depositions, 30.

Common property, presumptions as to existence of. See Marriage and Divorce, 213.

Commitment, presumption of regularity of. See Criminal Law, 318.

Consideration, presumption of. See Contracts, I, 1, c, B; Deeds, III, 1.

Consideration is presumed to be fair. See Vendor and Vendee, I, 4.

Consideration, presumption that consideration of deed was paid by grantee. See Deeds, 44.

Consideration, presumption of for check. See Banks and Banking, 50.

Consideration, presumption of from writing. See Agency, 243.

Contract being written, presumption as to. See Contracts, 295, et seq.; Statute of Frauds, VII.

Contract, presumption of meaning of words used in contract. See Contracts, 93.

Contract, presumption that writing contained entire contract. See Contracts, 86.

Contract, presumption of validity of contract by corporation. See Corporations, 371.

Corporation, presumption that corporation was organized for profit. See Corporations, 619.

Corporate existence, presumption of. See Corporations, 663.

Cancellation of stock, presumption from. See Corporations, 206.

Corporation, presumption that officer knows its usages. See Corporations, 496.

Corporation, presumption of right of to hold real estate. See Corporations, 341, et seq.

Coservants, presumptions as to. See Master and Servant, 101.

County, presumption that money in county treasury belongs to. See Treasurers, 4.

Damages from trespass. See Mines and Mining, 302, et seq.

Damages, presumption as to. See Trover, 38, et seq.

Deed, presumption that deed contained premises demanded in ejectment. See Deeds, 275.

Deed absolute, presumption as to. See Mortgages, 74.

Delivery, presumption of from execution of deed. See Deeds, 80.

Delivery of deed, presumption as to date of. See Deeds, 59.

Defalcation, presumption as to time of. See Suretyship, 45.

Default, presumption of entry of. See Defaults, 28.

Demurrer, presumption as to action taken on. See Appeals, 1350.

Diligence, presumption against. See Dismissal, 44.

Dishonor, presumption of. See Bills and Notes, IX, 5.

Easement, presumption of grant of from user. See Easements, 9.

Erasures, presumptions as to time of making. See Alteration of Instruments, 16.

Evidence, presumption from use of inferior. See Evidence, II, 1.

Evidence, presumption on offer to prove several facts. See Evidence, 523.

Execution sale, presumption of receipt of excess by debtor on not presumed. See Executions, 312.

Executors, residence of, presumption as to. See Wills, 108.

Executrix, presumption as to receipt of assets by. See Executors and Administrators, 174.

Executors, presumption of regularity of order accepting resignation of. See Executors and Administrators, 85, 86.

Findings, presumptions as to. See Findings, XI, 4.

Findings, presumption from. See Ejectment, 514.

Fraud, presumptions against. See Insurance, 96, 97.

Fraud never presumed. See Fraud, 128, 129.

Gift, presumption of on deed from husband to wife. See Husband and Wife, 159.

Grant, presumption of from possession. See Possession, 59.

Guest, one going to inn presumed to be. See Inns, 15.

Guilt, presumption as to degree of. See Criminal Law, 2085, 2086.

Innocence, presumption of. See Criminal Law, XVIII, 14, c.

Guilt, presumption of on application to reduce bail. See Bail, IV.

Insanity, presumptions as to. See Insanity, II, 1.

Incompetent, vendor is not presumed to be. See Witnesses, 153.

Indictment, decision on motion to set aside, presumption in favor of. See Criminal Law, XIV, 13, a.

Indictment, presumption in favor of. See Criminal Law, XIV, 10.

Instructions, presumptions as to understanding. See Instructions, XVII, 9.

Instruction, presumption that oral charge was taken down. See Criminal Law, 902.

Instructions, presumption of consent to oral not inferable from what acts. See Criminal Law, 888.

Intent and malice, presumptions as to. See Criminal Law, XXI, 31, d, B.

Joint tenancy, presumption as to. See Co-tenancy, 2.

Judgments, presumptions in favor of. See Judgments, XII, 22.

Judgments, presumption that judgment as entered was authorized. See Judgments, 53.

Jurisdiction, presumption in favor of. See Jurisdiction, IX.

Jurisdiction over insolvency proceedings, presumptions as to. See Bankruptcy and Insolvency, VI, 2.

Jurisdiction of county courts, presumption in favor of. See Jurisdiction, 112.

Jurisdiction of court of sessions, presumption in favor of. See Jurisdiction, 146, 147.

Jurisdictional facts, presumption that petition contains. See Executors and Administrators, 99.

Jurors, presumption of performance of duty by. See Jury and Jurors, XVI, 8.

Legitimacy, presumption as to. See Legitimacy, I.

Malice, presumptions as to. See Criminal Law, 2105; Libel, IV, 4, b; Malicious Prosecution, III, 3, a.

Malice, presumption from unlawful act. See Criminal Law, 2491.

Map and survey, conflict between, presumption on. See Surveys, 3.

Married woman's contract, presumptions against. See Husband and Wife, III, 10.

Negligence, presumptions as to. See Elevators; Negligence, V, 5.

Negligence, presumption of from accident. See Common Carriers, IV, 5, a.

Notice, presumption of giving of. See Agency, 108; Estates of Deceased Persons, 548.

Notice of directors' meeting, presumption of. See Corporations, 557.

Notice of illegality of note, presumption of. See Bills and Notes, 292.

Knowledge on part of subcontractor, presumption as to. See Mechanics' Liens, VI.

That every man knows condition of his own business. See Fraudulent Conveyances, 21.

Novation, contract of not presumed. See Novation, 11.

Office, validity of appointment to is presumed. See Offices and Officers, III, 4.

Officer, qualification of, presumption of. See Offices and Officers, 57.

Orders of court, presumptions in favor of. See Pleading and Practice, 696.

Ordinances, presumption in favor of. See Water Companies, 39.

Organization of toll-road, validity of, presumption of. See Turnpike Companies, III.

Ownership, presumptions of. See Accession; Possession, VI.

Owner, presumption that plaintiff is. See Bills and Notes, 352.

Payment, presumption as to kind of money in which notary demanded payment. See Bills and Notes, 125.

Payment of rent after term expires, presumption arising from. See Landlord and Tenant, 351, 352.

Pleader, presumptions against. See Pleading and Practice, VII, 11.

Plea, withdrawal of, presumption as to. See Criminal Law, 367.

Probate proceedings, presumptions in favor of. See Jurisdiction, 128.

Professional visits presumed to be necessary. See Physicians, 9.

Quieting titles, presumptions. See Quiet-ing Title, III, 10.

Residence of defendant served with summons, presumption as to. See Summons, IV, 2.

Sentence and judgment, presumption in favor of. See Criminal Law, XVIII, 19, b, D.

Separate and community property, presumptions as to. See Husband and Wife, II, 2, p.

Servants, presumption as to care used in hiring. See Master and Servant, II, 3, c.

Servant, actions for injury to, presumptions. See Master and Servant, II, 2, f, O.

Sessions of district court, presumption in favor of legality of. See Courts, 45.

Street contract, presumption of regularity of. See Streets, 373.

Sidewalks presumed to be safe. See Streets, 37.

Signature, drawee presumed to know, of drawer. See Banks and Banking, 58, et seq.

Signature, presumption that each obligor signed on condition that others would sign. See Bonds, 3.

Signature, presumption of genuineness of official. See Evidence, 288.

Surety, presumption that notice served on before entry of judgment. See Appeals, 793.

Survivorship, presumption as to. See Survivorship, 2, 3.

Taxes, order on equalization of, presumptions on. See Taxation, VI, 7.

Tax, action for delinquent, presumptions in. See Taxation, XII, 4, i.

Tax deed, presumption as to. See Taxation, XIII, 1.

Title in grantee, presumption of. See Dedication, 4.

Title, presumption of, from possession. See Conflict of Laws, 2; Possession, VI.

Undue influence, presumption as to. See Wills, 83.

Uniform procedure, presumption arising from. See Pleading and Practice, XV.

Validity of appointment of viewers. See Highways, 45.

Warrant, genuineness of, presumption of. See Treasurers, 10.

Wills, presumptions in favor of validity. See Wills, VII, 1.

Witnesses, presumption that they speak the truth. See Witnesses, 400.

PRETENSES.

False. See Criminal Law, XXI, 26.

PRETERMITTED CHILDREN.

See Estates of Deceased Persons, VIII, 4, a.

Deed by. See Trusts and Trustees, 52, 57.

May maintain ejectment. See Executors and Administrators, 158.

PRICE.

See Consideration; Sales, XII; Vendor and Vendee, XI.

Inadequacy of. See Executions, IX, 5, d.

Payment. See Payment.

PRIEST.

Communication between parishioner and priest. See Privileged Communications, V, 2.

Competency as witness. See Insanity, 40.

PRINCIPAL AND ACCESSARY.

See Criminal Law, IV.

PRINCIPAL AND AGENT.

See Agency.

PRINCIPAL AND SURETY.

See Suretyship.

PRINTER.

See State Printer.

PRIOR ACQUITTAL.

See Criminal Law, XVII, 3.

PRIOR CONVICTION.

See Criminal Law, XVII, 3.

PRIORITY.

See Executions; Liens; Mortgages.

Attachment lien, priority of. See Attachments, IV, 4.

PRISONS.

1. A creditor, whose debtor is imprisoned in the state prison for a term less than his natural life may sue and subject the property of such debtor to the satisfaction of his debt during the term of his imprisonment. (Estate of Nerac, 35 Cal. 392.)

2. A board of supervisors has authority to erect a county jail without a law authorizing the levy of a special tax therefor. (*Babcock v. Goodrich*, 47 Cal. 488.)

Contract for erection, adoption of plans. See Counties, 45.

3. The erection of a county jail is among the expenses of the current year, and may be paid for out of the money raised by the general tax which the board of supervisors are authorized to levy. (*Babcock v. Goodrich*, 47 Cal. 488.)

4. A certified copy of the judgment properly entered in a criminal action is sufficient authority in the hands of the warden of the prison for the detention of the defendant. (*Matter of Ring*, 28 Cal. 247.) Cited 31 Cal. 623.

5. The courts or judges of the state have no authority to release a prisoner upon a habeas corpus when the prisoner is in the custody of the authorities of the United States pursuant to a judgment of conviction by a federal tribunal of exclusive jurisdiction in the case. (*Ex parte Le Bur*, 49 Cal. 160.)

Prisoners, compelling attendance of. See Witnesses, II.

Duty of sheriff in relation to prisoners. See Sheriffs, IV, 3, a.

6. By section 17 of the act of April 15, 1880, "to define, regulate, and govern the state prisons of California," it was provided that the directors should be paid for traveling and other expenses while engaged in the discharge of their duties, twenty cents per mile for the number of miles annually traveled; and by the same section as amended in March, 1881, it was provided that they should receive ten cents per mile for traveling expenses and one hundred dollars per month for other expenses incurred while engaged in the performance of official duties. Held, that the provisions of this section—whether as originally passed or as amended—were in conflict with section 4 of article X of the constitution, which provides that "the members of the board shall receive no compensation other than reasonable traveling and other expenses incurred while engaged in the performance of official duties, to be audited as the legislature may direct." (*People v. Chapman*, 61 Cal. 262.)

7. The constitution did not direct the legislature to audit and allow the expenses of the directors; it restricted legislative power to directing how and before what tribunal or board "audit" should be had. (*People v. Chapman*, 61 Cal. 262.)

8. Conceding that the board of state prison directors have power to enter into contracts for the employment of convict labor, that power must be limited by the requirements of the act creating the board and prescribing its powers and duties. (*Porter v. Haight*, 45 Cal. 631.)

9. The board of state prison directors have no power under said act to enter into any contract for the employment of convict labor that would deprive it in any degree of the full and conclusive control of the prisoners and prison labor, or of the prison grounds, build-

ings, and property. (*Porter v. Haight*, 45 Cal. 631.)

10. If the board of state prison directors enter into a contract for the employment of convict labor, which is not void under the above rule, they have the right to terminate it whenever in their judgment the proper exercise of the powers conferred upon them may require it. (*Porter v. Haight*, 45 Cal. 631.)

11. Whether the exigence of a particular case requires the board of prison directors to annul a contract they have made for the employment of convict labor is a question which addresses itself to their judgment, and their determination on the matter is in the nature of a judicial and not of a ministerial act, and for which, if they act without fraud or malice, they do not incur personal liability. (*Porter v. Haight*, 45 Cal. 631.)

12. The support of convicts is as much the duty of the state as to provide for the salaries of her officers. It constitutes one of the ordinary sources of the state's expenditures; and a law authorizing a contract for keeping the prisoners at a fixed price—the payment and service being future acts—is not in conflict with the constitution. (*State of California v. McCauley*, 15 Cal. 429.)

13. The act of March 21, 1856, creating a board of state prison commissioners, and defining their duties, is constitutional. It does not create a debt or liability against the people of the state, in contravention of the eighth article of the constitution, and the contract made with E. still under the act is valid and binding upon the state. (*State of California v. McCauley*, 15 Cal. 429, cited 16 Cal. 25, 194, 253; *People ex rel. McCauley v. Brooks*, 16 Cal. 11.)

14. The fact that the act of 1856 authorizes the transfer of the convicts to private individuals, and the lease of the labor of future convicts, does not render the act unconstitutional. The power over the whole subject of punishment for crime is vested in the legislature—the only limitation being the inhibition against the infliction of cruel and unusual punishments, which mean those of a barbarous character, unknown to the common law. (*State of California v. McCauley*, 15 Cal. 429.)

15. The rights of the lessee, however, must be subordinate to the right of the governor to pardon, and thereby discharge the convicts from custody, and to such modifications in the extent of punishment as may be made by future legislation. (*State of California v. McCauley*, 15 Cal. 429.)

16. The objection to the contract with Estill, under the act of the 21st of March, 1856, that it contained stipulations for the release of claims held by Estill against the state, thereby increasing the amount of the monthly payments, cannot be raised at this late day, three years having elapsed since the execution of the contract, and it having been in part performed on both sides, and thus acquiesced in and affirmed. (*State v. McCauley*, 15 Cal. 429.)

17. The fact that the contract with Estill was signed by the commissioners with their

individual names, and not with the name of the state, does not make it defectively executed. The contract purports in its body to be between the state, acting by the commissioners under the act of March 21, 1856, of the one part, and Estill of the other, and is signed by the commissioners with the affix of "Board of State Prison Commissioners." This makes it the contract of the state and not of the commissioners. (*State v. McCauley*, 15 Cal. 429.)

18. Upon this point the rule applicable to contracts of a private character differs from the rule governing contracts made by agents of the government. Such public agents are presumed to contract, not personally, but officially, within the sphere of their duties. Cases on this rule cited. (*State v. McCauley*, 15 Cal. 429.)

19. The act of March, 1856, having authorized the commissioners to execute a lease, without prescribing any specific form, or containing any restrictions as to assigning, and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment to McCauley. The security of his bond was not impaired thereby. (*State v. McCauley*, 15 Cal. 429.)

20. If some of the covenants of the lease do not bind the assignee the state cannot have relief on that ground. She can claim no greater exemption than an individual from the consequences of an unwise contract. (*State of California v. McCauley*, 15 Cal. 429.)

21. The state cannot rescind the contract made with Estill for breaches of the covenants of the lease by him and his assignee, so long as she herself is in default. (*State of California v. McCauley*, 15 Cal. 429.)

22. In this case the state, being in default in making the monthly payments under the contract as they became due, and for months previous to this suit, refusing to pay at all, not offering to make restitution of the property received of the lessee, or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due, and it not being possible to restore Estill & McCauley to their original position, they having been in possession of the prison for nearly three years, and having performed valuable services, cannot claim in equity a rescission of the contract. (*State of California v. McCauley*, 15 Cal. 429.)

23. It is too late for the state to complain that the contract did not exact of the lessee security against breaches thereof, other than the bond of two hundred thousand dollars, required by the act of March 21, 1856, or did not reserve to the state the right to re-enter and resume possession of the premises, and control of the prisoners, whenever she deemed proper. (*State of California v. McCauley*, 15 Cal. 429.)

24. Under the contract made with Estill for the payment to him of ten thousand dollars per month on his lease of the prison and con-

victs, that sum per month is appropriated by the act; but these appropriations are to take effect, and the services are to be rendered, in future. Until these services are rendered there is no debt on the part of the state. The state became indebted only as the services were each month performed. The lessee could not have claimed, at any time after the contract was made, the aggregate of all the monthly installments, because the state never owed him that amount. (*State of California v. McCauley*, 15 Cal. 429.)

Cited 27 Cal. 207, 208, 219; 9 Col. 411; 6 Mont. 540; 5 Nev. 25.

25. In the act of April 7, 1856, appropriating moneys to defray the expenses of the state prison up to March 28th, after a copy of the contract with Estill had been transmitted to the senate, the legislature recognized the existence, and in effect the validity, of the contract, in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison, until he surrendered such contract and released the state from liabilities for such supplies "furnished after the leasing of said prison by the board of commissioners, under an act passed at this session of the legislature." (*People ex rel. McCauley v. Brooks*, 16 Cal. 11.)

26. The act of April 13, 1859, amendatory of the act concerning the office of controller, and providing that no warrants shall be drawn, except there be "an unexhausted specific appropriation" to meet the same, means only that the controller shall not draw a warrant for a specific object, when he has already drawn for the full amount of the appropriation made for that object; and this act does not qualify the right of Estill, or those representing him, to warrants for the monthly installments, as they respectively become due, under the contract between him and the state, relative to the state prison and its convicts. (*People ex rel. McCauley v. Brooks*, 16 Cal. 11.)

27. The contract between Estill and the state, from its terms, is incapable of apportionment, and the measure of damages for a breach of it is the sum fixed by the contract itself; and the assignees of Estill—relators here—are entitled to the full sum of ten thousand dollars per month, including the period during which the lessee and his assignee were forcibly and unlawfully kept from the possession of the prison, under the act of February 28, 1858. (*People ex rel. McCauley v. Brooks*, 16 Cal. 11.)

28. Any wrongs to the state, from mismanagement of the prison, or from disregard of the stipulations of the contract, must be redressed by proceeding upon the bond executed as security for the performance of the contract. (*People ex rel. McCauley v. Brooks*, 16 Cal. 11.)

29. The contract only gives the right to have warrants paid out of the moneys in the treasury not otherwise appropriated. When the warrants are presented to the treasurer it will be his duty to apply to them the unappropriated moneys in the treasury, and to continue to apply such moneys as they are

from time to time received, until the warrants are fully paid. (People ex rel. McCauley v. Brooks, 16 Cal. 11.)

30. The state can resume possession of the state prison and control of the convicts in one way only—by compensation, as is required in all cases where private property is taken for public use. The leasehold interest of Estill and his assignees is as much property, for which compensation is to be made before it can be subjected to the uses of the state, as are lands held in fee. (People ex rel. McCauley v. Brooks, 16 Cal. 11.)

31. Assuming the lease to have been valid, there was in the plaintiff a property of which he could not be divested for public use without just compensation. His right, so far as the land and buildings were concerned, was in no respect affected by the fact that they were designed as a place for the confinement of convicts. The purposes for which premises are leased cannot alter the nature of the leasehold interest as property. To take such property without compensation is beyond the reach of legislative power. Such compensation must be made, or a fund provided from which it can be made in advance. So strictly is this rule adhered to, that the enforcement of any statute to take such property, where the indemnity has not been provided, will be stayed by injunction. (McCauley v. Weller, 12 Cal. 500.)

Warden of Sacramento, duty as to moneys received. See Sacramento, 16.

Injuring public jails. See Criminal Law, XXI, 34.

Arresting investigation by governor of prison directors. See Prohibition, 31.

PRIVATE ROADS.

See Highways, III.

PRIVATE SALE.

Agreement for. See Estates of Deceased Persons, VII, 2.

PRIVATE USE.

Will not justify exercise of eminent domain. See Eminent Domain, III.

PRIVIES.

Who are. See Judgments, X, 10, a.

Distributees cannot set up statute where ancestor could not. See Statute of Limitations, 175.

Executor cannot plead statute if decedent could not. See Statute of Limitations, 176.

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PRIVILEGED COMMUNICATIONS.

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IV. Allegations in Legal Proceedings.

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3. *Attorney and Client.*
4. *Husband and Wife.*

VI. Waiver of Privilege.

See Libel, II.

New trial to prove privileged communications. See New Trial, 262.

I. Question, How Determined; Burden of Proof.

1. Whether slanderous words uttered are a privileged communication depends upon the circumstances under which they were uttered; and, in the absence of a concession of the facts under which it was made, the court cannot determine, as matter of law, whether the communication was privileged, but the jury must determine the facts. (Harris v. Zanone, 93 Cal. 59.)

2. The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute relating to confidential and privileged communications. (Sharon v. Sharon, 79 Cal. 633.)

Question is one of fact. See post, 33.

II. Malice in Communication.

3. There can be no privileged communication where the slanderous words are spoken with malice, and without the request of a person interested. Slanderous statements concerning the plaintiff, spoken voluntarily by the defendant without request, in a spiteful and malicious manner, in the presence of an attorney at law and justice of the peace, who had not been retained as a counsel or lawyer for either party, but with whom the parties met at the plaintiff's request for the purpose of adjusting the slanderous charges, and who repeatedly told the speaker he did not wish to hear them, are malicious slanders, and not privileged communications. (Preston v. Frey, 91 Cal. 107.)

4. An allegation in the answer that the words were spoken in a privileged communication raises the issue of malice, upon which the plaintiff is entitled to introduce any competent evidence of express malice as fully as though it had been alleged in the complaint and denied in the answer; and other utterances of words of similar import would be competent evidence for that purpose. (Harris v. Zanone, 93 Cal. 59.)

5. Evidence that defendant had repeated defamatory words to others upon different occasions, together with evidence tending to establish the falsity of the charge, and the defendant had expressed a purpose to injure the plaintiff's reputation, warrants the jury in finding that the defendant was actuated by express malice in the utterance of the words, and not, therefore, entitled to the immunity of a privileged communication. (Harris v. Zanone, 93 Cal. 59.)

6. Instruction asked by defendant to be given the jury respecting privileged communi-

cations, which omits the qualification that the communication was not privileged unless made without malice, is properly rejected by the court, especially where the jury were fully and properly instructed upon the law as to privileged communications. (*Harris v. Zanone*, 93 Cal. 59.)

III. Communication by Voter Concerning Candidate.

7. The reckless repetition by one voter to another of a charge against a candidate for public office, without any attempt at investigation of its truth or probability, is not privileged. (*Burke v. Mascarich*, 81 Cal. 302.)

IV. Allegations in Legal Proceedings.

8. An attorney, who, in the course of his employment, files specifications of opposition to an insolvent's discharge, alleging that the insolvent had been privy to making false and fraudulent entries in his books, with intent to defraud creditors, and had sworn falsely in relation to his estate, and, while acting in a fiduciary capacity, fraudulently converted property to his own use, of which facts he had been informed by his client, cannot be held for libel. The publication is absolutely privileged. (*Hollis v. Meux*, 69 Cal. 625.) Cited 93 Cal. 236.

9. Under section 47 of the Civil Code a complaint in a court of justice which has jurisdiction of the offense charged is a privileged communication, for which the complainant is not liable in a civil action. If the complainant in such proceeding makes a false accusation the proper remedy therefor is an indictment for perjury; but he cannot be made liable for damages in a civil action on account thereof. (*Ball v. Rawles*, 93 Cal. 222.)

10. If a party, in an application to the supreme court for an extension of time to file a transcript, goes outside of the facts material to procure the order, and states matter wholly foreign to the application, in which he charges his attorney with having entered into a collusive agreement with the attorney of the other party, this charge against his attorney is not a privileged communication, but is libelous per se. (*Wyatt v. Buell*, 47 Cal. 624.) Cited 69 Cal. 629.

V. Communications Between Persons in Particular Relations.

1. Physician and Patient.

11. The object of section 1881 of the Code of Civil Procedure, which provides that communications made by a patient to his physician or surgeon are privileged, is to enable the patient to make a full statement of his physical infirmities to his physician, with the knowledge that the law recognizes the communications as confidential, and guards against the possibility of his feelings being shocked, or his reputation tarnished, by their subsequent disclosure. (*In re Flint*, 100 Cal. 391.)

12. Testimony of a physician as to a conversation between himself and the defend-

ant, which was not "information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient," cannot be rejected as a "confidential communication." (*Harris v. Zanone*, 93 Cal. 59.)

13. The action was brought by a wife for a divorce on the ground of cruelty. On the trial a physician, who had acted professionally for each of the parties, was called as a witness for the plaintiff, and asked a hypothetical question as to the effect which would probably result to the plaintiff, in the condition in which he found her, from the acts of the defendant, which constituted the alleged cruelty. The plaintiff thereupon released the witness from any obligation of secrecy, but he refused to answer, on the ground that he might be compelled on cross-examination to reveal professional secrets confided to him by the defendant. Held, that the question did not concern a privileged matter, and that the court erred in not compelling an answer. (*Valensin v. Valensin*, 73 Cal. 108.)

14. The party claiming the benefit of the statute excluding the testimony of a physician as incompetent to testify, under subdivision 4 of section 1881 of the Code of Civil Procedure, must seasonably exercise the privilege by objecting to the evidence at the time it is offered. (*Wheelock v. Godfrey*, 100 Cal. 578.)

Physician as witness. See *Negligence*, 99.
Heir cannot waive privilege. See post, VI.

2. Parishioner and Priest.

15. The examination of a witness was confined to the facts which were brought to his knowledge on a preliminary examination, made with a view to learn whether the testatrix was in a proper condition of mind to make a confession. Held, that it was not a privileged communication under section 1881 of the Code of Civil Procedure. (*Estate of Toomes*, 54 Cal. 509.)

3. Attorney and Client.

16. Confidential counselor, solicitor, or attorney of party cannot be compelled to disclose the communications made to him, or letters, or entries made by him in that capacity. (*Landsberger v. Gorham*, 5 Cal. 450.)

Cited 23 Cal. 333.

17. Communications from a client to his attorney, touching the subject matter under investigation, are, on principles of public policy, privileged, and are not admissible in evidence, even though the attorney may be willing to disclose them. (*People v. Atkinson*, 40 Cal. 284.)

18. The rule excluding the testimony of an attorney as to confidential communications made to him by his client must be strictly construed, as it has a tendency to prevent a full disclosure of the truth. (*Satterlee v. Bliss*, 36 Cal. 489.)

19. When it appeared that an attorney, called as a witness in a criminal prosecution, was unable to state whether admissions to which he had testified were made to him as counsel, or by the defendant whilst under ex-

amination as a witness in his own behalf, the court should have excluded the testimony of its own motion. (*People v. Atkinson*, 40 Cal. 284.)

20. A communication made to a person who is an attorney at law, but not the attorney or legal adviser of the party making it, is not privileged. (*George v. Silva*, 68 Cal. 272.) Cited 79 Cal. 678.

21. The plaintiff, for the purpose of impeaching E., a witness for the defense, offered to prove certain communications made by E. to B., an attorney, who testified that he had incidentally done a great deal of business for E; but there was no evidence that any professional counsel, advice, or aid had been solicited or given in relation to this particular property. Held, the communication was not privileged, and the court erred in excluding it. (*Carroll v. Sprague*, 59 Cal. 655.)

22. The testimony of a witness as to conversations with a party to an action cannot be excluded on the ground that the witness was an attorney at law and the communication was confidential, unless it appears that he was the attorney for the party, and the communication was made in the course of professional employment. (*Sharon v. Sharon*, 79 Cal. 633.)

23. When lawyer acts as common attorney of two parties their communications to him are privileged as far as concerns strangers, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiation. (*Estate of Bauer*, 79 Cal. 304.)

24. It must appear that communication was in fact confidential, or at least that it was so regarded at the time by the party making it. (*Sharon v. Sharon*, 79 Cal. 633.)

25. The rule not permitting an attorney to testify to communications made to him by his client, as such, does not extend so far as to prohibit the attorney from stating by whom he was employed; neither does the rule prevent the attorney from testifying to communications made to him by his client, unless they are confidential communications made by the client in the course and for the purposes of the employment of the attorney. (*Satterlee v. Bliss*, 36 Cal. 489.)

26. While attorney will not be permitted to disclose the confidential communications of his client, yet, if he acquires information apart from, or independent of, such source, he is not protected from disclosing it. (*Hunter v. Watson*, 12 Cal. 363, 377.) Cited 23 Cal. 333.

27. Confidential communications made by a client to an attorney, respecting the business he is employed to transact, are privileged, and the attorney cannot be compelled to disclose them. But statements made by the client, to other persons at the time, or by other persons to him, are not thus privileged; the attorney is bound to disclose them the same as any other witness. (*Gallagher v. Williamson*, 23 Cal. 331.) Cited 79 Cal. 678.

28. Statement made to attorney in respect to matter concerning which he is not attorney

of the party making the statement, or a statement made to an attorney with the purpose of having it communicated to others, and not intended to be confidential, is not a privileged communication. (*Ferguson v. McBean*, 91 Cal. 63.)

29. If, pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not confidential. (*Hager v. Shindler*, 29 Cal. 47.)

30. If attorney is retained in action, and client, after final judgment, makes disclosures respecting the subject of the foregone employment, the communications are not privileged. (*Hager v. Shindler*, 29 Cal. 47.)

31. If attorney, while managing suit, receives deed of client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds. (*Hager v. Shindler*, 29 Cal. 47.)

32. Presumption is, that all communications between attorney and client are confidential, but this presumption may be rebutted. (*Sharon v. Sharon*, 79 Cal. 633.)

33. Whether a communication by a client to his attorney was made in confidence is a question of fact to be disposed of by the court. (*Hager v. Shindler*, 29 Cal. 47.) Cited 79 Cal. 678; 19 Or. 162.

34. On the examination of a witness who has testified that he was the attorney for the defendant in another matter, and had acted as his friend in respect to the transfer of property in question, without a retainer, an objection merely denying the consent of the defendant for the witness to testify as to what occurred with relation to the negotiations, or the part that he took in the negotiations of the sale, prior or subsequent to its date, is too general to avail the defendant. If there was any merit in the objection its force is destroyed by the subsequent testimony of defendant that the witness was not his attorney in respect to the sale. (*Schurtz v. Romer*, 82 Cal. 474.)

35. The rule as to the privileged communications between attorney and client also extends to the clerk of an attorney. (*Landsberger v. Gorham*, 5 Cal. 450.)

4. Husband and Wife.

36. The defendant, upon a trial of a homicide, who, as a witness in his own behalf, denies the killing, cannot be cross-examined as to conversations occurring between him and one who was his wife at the time of the conversations, though she was afterwards divorced from him. The code sweeps away all distinction between confidential and other communications between husband and wife, and extends the privilege to any communication made by one to the other during marriage; and no disclosure can be forced from either spouse without the consent of the one against whom the disclosure is sought to be used.

The privilege applies to the communication, however its disclosure may be sought. (*People v. Mullings*, 83 Cal. 138.)

VI. Waiver of Privilege.

37. An heir of a decedent, who contests the probate of a will with a devisee, is not the representative of the deceased, and cannot waive the privilege attaching to communications from the deceased to his physician. (*In re Flint*, 100 Cal. 391.)

Waiver of objection to physician testifying. See *Insanity*, 47.

PRIVITY.

Of contracts. See *Contracts*, V, 4.

Between tenant and purchaser under foreclosure. See *Mortgages*, 829, 834.

No privity between vendor and assignee of vendee. See *Vendor and Vendee*, 401, 402.

Between lessor and assignee of lessee. See *Landlord and Tenant*, 152, et seq.

Trespasser is not in privity with owner. See *Statute of Frauds*, 122.

PROBABLE CAUSE.

See *Habeas Corpus*, II, 3; *Malicious Prosecution*.

Certificate of. See *Appeals*, VIII, 5.

PROBATE COURTS.

See *Estates of Deceased Persons*.

Executors and administrators. See *Executors and Administrators*.

There was no probate court under Mexican law. See *Wills*, X, 1.

Wills. See *Wills*.

Wills, probate of. See *Wills*, X.

1. There is no relation of inferiority in the constitution or powers of the probate court as respects the district court. They are unlike, but, within their respective spheres, equal. They are both constitutional courts. No appeal lies from one to the other. (*Pond v. Pond*, 10 Cal. 495.)

2. Probate court is inferior court, and therefore cannot take jurisdiction or administer remedies other than those given in, and in the manner prescribed by, the statute. (*Grimes' Estate v. Norris*, 6 Cal. 621.)

3. Probate court was never made successor of courts of first instance, or alcalde courts, as to matters pending before them relating to the administration of estates. (*McNeil v. First Congregational Society of San Francisco*, 66 Cal. 105.)

4. Same superior court has jurisdiction both in equity and in matters of probate under the present constitution. (*Pennie v. Rooch*, 94 Cal. 515.)

5. Probate jurisdiction of superior court is separate and distinct from its jurisdiction in ordinary civil actions. (*In re Allgier*, 65 Cal. 228.)
Cited 80 Cal. 174.

6. Constitution does not confer on probate court jurisdiction of all matters relating to estates of deceased persons, but of such matters only as the statute directs it to exercise

jurisdiction over. (*Bush v. Lindsey*, 44 Cal. 121.)

7. The fact of the death of the intestate, and of his residence within the county, are foundation facts, upon which all the subsequent proceedings of the court must rest. Unless these facts exist the court cannot make a single binding order in reference either to the subject matter or the person. (*Haynes v. Meeks*, 10 Cal. 110.)

8. When the facts of residence within county and death do exist every subsequent movement of the court is the exercise of jurisdiction over the subject matter, and over all persons who have been brought properly before it. (*Haynes v. Meeks*, 10 Cal. 110.)
Cited 17 Cal. 344.

9. The forty-sixth section of the act of 1863, concerning courts of justice and judicial officers applies only to probate courts to be organized under the constitutional amendments of 1862. (*Pryor v. Downey*, 50 Cal. 388.)
Cited 55 Cal. 217.

10. The superior court, while sitting in matters of probate, is the same as it is while sitting in cases in equity, in cases at law, or in special proceedings; and, when it has jurisdiction of the subject matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact the determination of which is ancillary to a proper judgment in such case. (*Estate of Burton*, 93 Cal. 459.)
Cited 94 Cal. 521.

11. Question of extent of equitable jurisdiction which may be conferred on the probate court, as collateral to the main objects for which that court is created, not decided. (*Cory v. Hyde*, 49 Cal. 469.)

See *Jurisdiction*, 122, 124.

12. Probate judge is charged by law with execution of special duties; he is not vested with plenary powers, but acts within an inferior and limited jurisdiction. (*Haynes v. Meeks*, 10 Cal. 110.)
Cited 19 Cal. 205.

13. Question whether probate court has jurisdiction to specifically enforce the performance of a contract for the sale of real estate, not decided. (*Treat v. De Celis*, 41 Cal. 202.)

14. A probate court has no authority, on the petition of an executor, to order him, on the receipt of money loaned, to reconvey real estate, conveyed to his testator by deed absolute on its face, but intended only as security for the repayment of such money. (*Anderson v. Fisk*, 41 Cal. 308.)

15. Late probate courts had no power, save in certain excepted cases, to settle disputes between the heirs or personal representatives of a deceased person and third persons. (*Theller v. Such*, 57 Cal. 447.)
Cited 65 Cal. 230; 70 Cal. 360; 74 Cal. 517; 82 Cal. 72; 1 Wash. 343; distinguished 93 Cal. 464.

16. The probate court had no power to make an order purporting to authorize the assignment, by an administrator, of a bond of indemnity given to the decedent in his life-

time as sheriff. (*McDermott v. Mitchell*, 53 Cal. 616.)

17. Probate court has power to enforce terms of stipulation entered into by parties litigant before it in reference to a subject matter of which the court has jurisdiction. (*Grady v. Porter*, 53 Cal. 680.)

18. The statute of May 1, 1851, requiring the orders and decrees of the probate court to be entered at length in the minute-book, and to be signed by the judge, is directory merely, as it is entirely silent as to the consequences to follow from a failure of the judge to sign. (*McCrea v. Haraszthy*, 51 Cal. 146.)

19. Superior court, sitting, as court of probate, may examine into titles to parcels of real estate named in the inventory, for the purpose of selecting a homestead, but has no jurisdiction to try and determine the title as between adverse claimants. (*Estate of Burton*, 64 Cal. 428.)
Cited 68 Cal. 454.

Cannot settle questions of title. See Executors and Administrators, 454; Homesteads, 470.

Jurisdiction of. See Jurisdiction, XI, 4.
Jurisdiction of district court over probate matters. See Jurisdiction, XI, 1, e.

Jurisdiction to determine validity of trust. See Trusts and Trustees, 35.

Exclusive jurisdiction over expenses of administration. See Executors and Administrators, 419.

Have no jurisdiction of action to enforce trust. See Executors and Administrators, 315.

Jurisdiction of to enforce trust. See Trusts and Trustees, 199.

Jurisdiction of superior court sitting as is limited. See Estates of Decedents, 4.

Jurisdiction, effect on of formation of new county. See Counties, 9.

Jurisdiction over partition. See Partition, 35.

Jurisdiction to settle guardian's account. See Guardian and Ward, 95.

Power of probate judge at chambers. See Pleading and Practice, 676, 677.

Sale under order of is not within statute of frauds. See Statute of Frauds, 53.

Order to pay money, effect of. See Guardian and Ward, 41.

Have exclusive jurisdiction over distribution. See Estates of Deceased Persons, 540.

Personal notice of proceedings in, necessity of. See Estates of Deceased Persons, 2.

Cannot sell homestead for debts. See Homesteads, 217.

Jurisdiction over homestead questions. See Homesteads, 375.

Probate homestead. See Homesteads, XVI.

Power to appoint attorney for absent or minor heirs. See Estates of Deceased Persons, V, VII, 4, f.

May punish for contempt. See Contempt, 8.
Mortgage, probate court cannot foreclose. See Mortgages, 550, 551.

20. The doctrine of res adjudicata applies to judgments and decrees of the probate court as well as to those of any other judicial tribunal. (*Garwood v. Garwood*, 29 Cal. 514.)

21. The fair and legitimate interpretation of section 1908 of the Code of Civil Procedure is that a judgment or order respecting the administration of an estate is conclusive as to all matters directly involved in the judgment or order. (*Howell v. Budd*, 91 Cal. 342.)

Order of in contempt is final. See Contempt, 72.

Judgments of, pleadings in actions on. See Judgments, 814, 815.

Disobedience of probate decree. See Contempt, IV, 6.

22. Issues of fact are sent from the probate court to the district court, not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. But it was never intended to transfer any portion of the jurisdiction of probate courts to the district courts. Nor was it designed by the act of 1855, directing these issues, to make the judgments of the district courts binding upon the courts of probate. (*Pond v. Pond*, 10 Cal. 495.)
Cited 34 Cal. 687.

23. The probate court does not lose its jurisdiction over a subject of which it has taken cognizance, by adopting the proceeding of an issue whereby to determine the issue advisedly; the finding of a jury in the district court is merely in aid of its jurisdiction, by settling the facts, and thus furnishing the material upon which it is to act, and after such findings the functions of the district court cease. (*Pond v. Pond*, 10 Cal. 495.)

24. Therefore, where an administrator filed in the probate court his account for final settlement, and an issue of fact was made thereon, which was certified to the district court for trial, and trial was had, the jury finding on each issue, and the judge rendering his decision on such findings, and this was certified back to the probate court, which court refused to give effect to the decision and judgment of the district court, but gave judgment on such findings as it construed them, held, that there was no error in the judgment of the probate court. (*Pond v. Pond*, 10 Cal. 495.)

Issues framed in. See Jurisdiction, XI, 1, e.

Certifying issues to the district court. See Estates of Deceased Persons, 421; Wills, X, 9, e.

Discretion as to certifying issue of fact to district court. See Appeals, 2176.

25. A new trial may be granted by the district court of issues determined therein, which have been framed in a probate court, and an appeal from an order granting or refusing the same lies to the supreme court. Probate courts are bound by the final determination of such issues in the district court. (*Will of Bowen*, 34 Cal. 682.)
Cited 35 Cal. 510; 44 Cal. 125; 51 Cal. 439.

New trial in probate proceedings. See Appeals, II, 5.

Jury trial, time to move for new trial. See New Trial, 325.

26. When the probate court has jurisdiction of the subject matter all intendments are, under the statutes of California, in favor of the

correctness of the action of the court, the same as in other courts of record. (*Lucas v. Todd*, 28 Cal. 182.)
Cited 88 Cal. 102.

27. If the probate court, in a matter where it has jurisdiction, makes an order upon insufficient evidence, or contrary to the evidence, the order cannot on that ground be attacked in a collateral proceeding. (*Boyd v. Blankman*, 29 Cal. 19.)

28. One attacking a judgment or order of a probate court, made within the scope of its jurisdiction, must affirmatively show error. (*Lucas v. Todd*, 28 Cal. 182.)

29. Courts of probate in this state, in the construction of their proceedings had before the passage of the act of 1858, are to be regarded as courts of limited and inferior jurisdiction. (*Townsend v. Gordon*, 19 Cal. 188.)
Cited 20 Cal. 312; 9 Mont. 247.

30. Probate court should not accept resignation of administrator before he settled his account, but, having exercised the right so to do, the error of the court was merely voidable, and cannot be taken advantage of collaterally. (*Haynes v. Meeks*, 10 Cal. 110.)
Cited 70 Cal. 342.

31. Whenever issues of fact are tried by the probate court, findings of fact are proper. (*Estate of Crosby*, 55 Cal. 574.)
Cited 85 Cal. 153.

Power of probate courts to change venue. See Venue, II, 1.

Change of place of trial of issue of fact, certifying case back. See Venue, 180.

Disagreement of successive juries, change of venue for. See Venue, 63.

Probate judge interested in estate is disqualified. See Venue, 89, 90.

Costs in probate proceedings. See Costs, II, 4.

Appealability of orders and decrees in. See Appeals, II, 5.

No appeal from to district court. See Appeals, 3269.

Appeal, who may appeal in probate proceedings. See Appeals, III, 4.

Notice of appeal from. See Appeals, 540.

Appeal, time within which to be taken. See Appeals, IV, 4.

Probate appeal, orders in probate proceedings, how presented on. See Appeals, VII, 28.

Certiorari to review orders in probate. See Certiorari, III, 2, c.

PROBATE HOMESTEAD.

See Homesteads, XVI.

PROBATIVE FACTS.

See Findings, VIII, 3.

Ultimate and not probative facts should be stated in pleadings. See Pleading and Practice, VII, 4.

PROCEDURE.

See Pleading and Practice.

Uniform, presumption arising from. See Pleading and Practice, XV.

PROCEEDINGS IN REM.

Proceedings against boats and vessels. See Admiralty.

Proceedings for sale of ward's estate. See Guardian and Ward, 80.

Divorce suits are. See Marriage and Divorce, 128.

Proceedings to confirm irrigation district. See Irrigation Districts, 40, 41.

Against trespassing animals. See Animals, II.

Decree in suit to quiet title is quasi in rem. See Quieting Title, 160.

Action to enforce mechanic's lien is in nature of. See Witnesses, 51.

Probate proceedings are in nature of. See Estates of Deceased Persons, 2.

Probating of will is. See Wills, 137.

Making real estate a party. See Taxation, 647.

Jurisdiction over. See Jurisdiction, 151; Justices of the Peace, 41.

Jurisdiction in rem where defendants are nonresidents. See Jurisdiction, 165.

Seizure is not necessary to jurisdiction. See Jurisdiction, 14.

Jurisdiction to appoint trustee is in rem. See Trusts and Trustees, 231.

Right of harbor commissioner to institute. See Harbor Commissioners, 14.

PROCESS.

See Summons.

"Legal process," meaning of. See San Francisco, 204.

Order of arrest is not. See Arrest, 19.

Notice to creditors is not, and need not run in name of people. See Bankruptcy and Insolvency, 143.

County clerk may issue. See County Clerk, 6.

Execution not issued in name of people. See Executions, 89.

Process received on Sunday. See Sheriffs, IV, 3, b.

1. District courts have jurisdiction to make all necessary orders respecting process issued, or to be issued, on their judgments. (*Clark v. Sawyer*, 48 Cal. 133.)

2. The act of the legislature, giving the power to the late superior court of the city of San Francisco to send its process beyond its territorial limits, was constitutional. (*Hickman v. O'Neal*, 10 Cal. 292.)

3. The superior court had power to send a summons for service out of the city of San Francisco. (*Chipman v. Bowman*, 14 Cal. 157.)

Issuing to run out of county. See Habeas Corpus, III, 2.

Extends to all parts of state. See Prohibition, 53.

District court, process is co-extensive with state. See Jurisdiction, 59.

4. Under the Practice Act personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statute, the mode would be by showing the original under the seal of the court, and delivering a copy. (*Edmondson v. Mason*, 18 Cal. 386.)

5. Constable has no power to execute process out of his township. (*Lowe v. Alexander*, 15 Cal. 296.)
Cited 82 Cal. 188, 189.

6. Under sections 601 and 602 of the Practice Act a constable may serve an execution out of his township. (*Lafontaine v. Greene*, 17 Cal. 294.)
Cited 82 Cal. 188.

Service of garnishment. See Attachments, XI, 2.

Service of petition. See Mandamus, III, 7.

Service of certiorari. See Certiorari, IV, 5.

Service of intervention. See Intervention, V.

Service of injunction. See Injunctions, III, 4.

Injunction, who may serve. See Injunctions, 296.

Service of summons. See Summons, IV.

Service by publication. See Summons, IV, 7.

Diligence required of sheriff in executing process. See Sheriffs, IV, 3, b.

Failure or refusal of sheriff to levy writ. See Sheriffs, IV, 3, d.

Compelling sheriff to execute writ. See Sheriffs, IV, 3, c.

Execution of writ, motion to compel may be renewed. See Pleading and Practice, 691.

Service of process in contempt need not be by sheriff. See Contempt, 93.

Citation, service by publication. See Executors and Administrators, 362; Guardian and Ward, 99.

Order to show cause may be served by publication. See Bankruptcy and Insolvency, 162.

Service of order, what is not. See Contempt, 88.

Service of order on attorney for corporation, when proper. See Contempt, 91, 92.

Notice of motion to set aside execution sale, how served where purchaser absent. See Executions, 181.

Service of, where attorneys substituted. See Attorney and Client, 148.

Notice to creditors may be served by mail. See Bankruptcy and Insolvency, 144.

Appointment of elisor to serve. See Elisors.

Sheriff acts as officer of court in serving. See Sheriffs, 1.

Ex-sheriff to execute and complete process. See Sheriffs, 17.

Proceedings where part only of defendants served. See Judgments, 535, et seq.

Finding as to due service of process, conclusiveness. See Defaults, 68.

7. Attendance upon any court as a witness, juror, or party only exempts the person so in attendance from arrest in a civil action, but not from obeying any ordinary process of a court. (*Page v. Randall*, 6 Cal. 32.)

Subpoena, disobedience of. See Contempt, IV, 4.

Disobeying or obstructing. See Contempt, IV, 10.

Service, acceptance of by attorney. See Attorney and Client, VI, 5.

Abuse of, action for. See Injunctions, V, 2.

Abuse of process. See Contempt, IV, 5.

Power of court under, when ceases. See Contempt, 71.

Collateral attack upon. See Summons, 8.

Justification of sheriff under. See Sheriffs, IV, 3, r.

Summons, new, effect of on writ. See Attachments, II, 5.

Motion for alias writ may be renewed. See Pleading and Practice, 691.

Second writ. See Assistance, VI.

Amendment of return. See Attachments, 249.

Return of sheriff as evidence of partnership. See Partnership, 38.

Filing of complaint by "county clerk." See Judicial Notice, 20.

Bond for sale and appraisement, when deemed filed, though not marked. See Guardian and Ward, 83.

Filing papers and documents. See cross-references under Filing.

PROCLAMATION.

Election proclamation. See Elections, IV.

PRODUCE EXCHANGE.

Seat in is liable to execution. See Executions, 90.

PROFANITY.

See Criminal Law, XXI, 46.

Ordinance prohibiting profane swearing. See Ordinances, IV, 7, n.

PROFIT A PRENDRE.

Assignment of. See Deeds, 326.

Reservation of, effect of. See Deeds, 319.

Words of inheritance not necessary to assign. See Deeds, 237.

PROFITS.

Illegal, of directors. See Corporations, X, 1.

Undivided. See Corporations, V.

Agreement to share profits of resale. See Vendor and Vendee, X, 8.

Action for between cotenants. See Cotenancy, II, 8.

Recovery for loss of. See Damages, II.

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Books of account as exclusive evidence. See Assumpsit, 57.

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PROHIBITION.

I. Office of Writ; as Counterpart of Mandamus.

II. Practice in Relation to.

1. Parties; Petition and Affidavit; Service of; Jurisdiction to Issue.

2. Submission of Application on Pleadings; Discretion; Conclusiveness of Judgment.

III. In What Cases Application Granted or Refused.

1. Power of Legislature to Enlarge Office of; Enlarging by Stipulation.

2. Acts Already Completed; Discontinuance of Proceeding Sought to be Prohibited.

3. Plain, Speedy, and Adequate Remedy.

4. Ministerial Acts, Acts of Officers, and Void Acts.

5. Judicial Acts.

- a. Acts Must be in Excess of Jurisdiction; Incidental Question of Jurisdiction.
- b. Preliminary Objection in Lower Court.
- c. Staying Actions at Law.
- d. Ordering Judgment Without Trial.
- e. Controlling Actions of Receiver.
- f. In Insolvency Proceedings.
- g. In Criminal Actions; Miscellaneous Instances in Which Writ Granted or Refused.

Order enforcing sheriff to furnish rooms. See Judges, 26.

Violation of writ. See Contempt, IV, 7.

I. Office of Writ; as Counterpart of Mandamus.

1. The writ of prohibition mentioned in the constitution is the writ of prohibition as known to the common law, and its office is to restrain subordinate courts and inferior judicial tribunals from exceeding their jurisdiction. (Maurer v. Mitchell, 53 Cal. 289.) Cited 54 Cal. 406; 57 Cal. 553, 554; 58 Cal. 180; 61 Cal. 490; 66 Cal. 212; 97 Cal. 441; 4 Utah, 381.

Object of writ is preventive rather than remedial. See post, III, 2.

2. The word "counterpart," as employed in section 1102 of the Code of Civil Procedure, is designed to illustrate the operation of the writ of prohibition when issued in a proper case, but it is not intended to enlarge or add to the class of cases in which it may be resorted to. (Maurer v. Mitchell, 53 Cal. 289.)

II. Practice in Relation to.

1. Parties; Petition and Affidavit; Service of; Jurisdiction to Issue.

3. A writ of prohibition to prohibit the court from further proceeding in the matter of the removal of officers of a corporation may be brought in the name of the corporation. As representing the stockholders, it is a party beneficially interested. (Chollar Min. Co. v. Wilson, 66 Cal. 374.)

4. The affidavit to a petition for a writ of prohibition should state that the affiant has either knowledge or information concerning the matters stated in the petition. (Cariaga v. Dryden, 30 Cal. 244.)

5. If proceeding in lower court is not on its face in excess of jurisdiction, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form, to make the want of jurisdiction appear. (Havemeyer v. Superior Court, 84 Cal. 327.)

6. The rule of this court requiring that a petition for a writ of prohibition against a court shall disclose the names of the real parties in interest does not require that such parties be named as defendants in the writ, but only that their names should be disclosed by the petition, and that service of a copy of the petition and writ should be made upon them. (Havemeyer v. Superior Court, 84 Cal. 327.)

7. The effect of a failure to serve such parties would not be an abatement of the whole proceeding, but, at most, merely require a postponement of the hearing until they could be served, and have a reasonable time to appear. (Havemeyer v. Superior Court, 84 Cal. 327.)

Concurrent jurisdiction of supreme and superior courts in issuing prerogative writs. See Writs.

Supreme court, power of to issue writs of. See Appeals, I, 2.

2. Submission of Application on Pleadings; Discretion; Conclusiveness of Judgment.

8. If application for writ of prohibition is submitted on the petition and answer, and the answer denies the material allegations of the petition, the petition will be dismissed. (Cariaga v. Dryden, 30 Cal. 244.)

9. A court having jurisdiction to issue the writ of prohibition has no discretion to refuse it when demanded by the real party in interest in a proper case; but such party is entitled to the writ *ex debito justitiae* if he suffers from the usurpation of jurisdiction by an inferior tribunal. (Havemeyer v. Superior Court, 84 Cal. 327.)

10. In an action against a banking corporation brought out of the county where it has its principal place of business, where no motion was made to change the venue of the action to the county in which the principal place of the business of the corporation was situate, a decision upon an application of the defendant for a writ of prohibition to restrain further proceedings, upon the ground that the court had jurisdiction to proceed in the action, is res adjudicata as to that subject, and it will be considered as settled upon appeal from the judgment. (White v. Fresno National Bank, 98 Cal. 166.)

III. In What Cases Application Granted or Refused.

1. Power of Legislature to Enlarge Office of; Enlarging by Stipulation.

11. The legislature cannot extend or enlarge the office of the writ of prohibition so as to include ministerial functions. (Farmers' Co-operative Union v. Thresher, 62 Cal. 407, cited 66 Cal. 211, 4 Utah, 381; Hobart v. Tillson, 66 Cal. 210.)

12. There is no distinction in the provisions of the constitution relating to the supreme court and those relating to the superior court as regards the power of the legislature to enlarge the office of the writ of prohibition so as to include ministerial functions. (Farmers' Co-operative Union v. Thresher, 62 Cal. 407.)

13. The legislature had no power to enact the statute which purports to amend section 1102 of the Code of Civil Procedure, in so far as it attempts to enlarge the office of the writ of prohibition. (Camron v. Kenfield, 57 Cal. 550.) Cited 62 Cal. 410; 66 Cal. 211.

14. The legislature might enlarge the office of the writ when issuing from the superior court, but could not so enlarge the jurisdiction

tion of the supreme court. Thornton, J., concurring. (*Camron v. Kenfield*, 57 Cal. 550.)

15. The supreme court, in refusing a writ of prohibition, decided that the legislature could not constitutionally extend the office of the writ beyond its scope at common law. It also decided in the same case that the legislature had not attempted to so extend it. Held, that the latter point decided did not render the first obiter dictum. (*Camron v. Kenfield*, 57 Cal. 550.)
Cited 75 Cal. 286.

16. Upon an application for a writ of prohibition from a superior court to a justice's court, the only questions which can properly be considered are as to whether the act sought to be prohibited is in excess of the jurisdiction of the justice's court, and whether there is a remedy by appeal. A stipulation upon appeal to the supreme court submitting the question as to whether the justice's court erred in its action, and agreeing that the judgment of the superior court as to the writ of prohibition may be reversed or affirmed according to the decision of that question, must be disregarded. The writ of prohibition cannot be made by stipulation to serve the purpose of an appeal; nor can the supreme court exercise appellate jurisdiction by means of a writ of prohibition, without any appeal, and in a case to which its appellate jurisdiction does not extend. (*Powelson v. Lockwood*, 82 Cal. 613.)
Cited 21 Nev. 52.

2. Acts Already Completed; Discontinuance of Proceeding Sought to be Prohibited.

17. Prohibition will not lie to set aside acts already performed. (*Hull v. Superior Court*, 63 Cal. 179.)

18. Operation of writ of prohibition is primarily and principally preventive, rather than remedial, and is excluded where the action of the inferior tribunal is fully completed, and nothing remains to be done under its void order; but if its action is only partially and not fully completed, further proceedings may be stayed, and in such case the office of the writ is so far remedial that it will annul such prior proceedings as may be necessary to make the remedy complete. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

19. It is the time when the writ of prohibition is ordered, and not the time when it is served, that fixes the extent of the power of the higher court to interfere with the proceeding in the lower court. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

20. So far as concerns prohibition of action of superior court in holding possession of property seized under a void order appointing a receiver and directing him to seize specific property claimed by a stranger, it is immaterial whether the seizure of possession was or was not complete before the writ was ordered, the completion of possession being only material to be inquired into upon a proceeding for contempt for taking possession in violation of the writ. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

21. When alternative writ of prohibition is sued out to compel stay of proceedings in respect to the distribution of an estate, pending an appeal from an order settling the final account of the executor, if the heirs allege and show, upon a petition by them asking for a dismissal of the alternative writ of prohibition, that they have withdrawn their petition for final distribution by leave of court, and stipulate that they will not apply for final distribution pending the appeal, the application for dismissal of the writ will be granted, at cost of the moving party. (*Pezuela v. Superior Court*, 83 Cal. 49.)

3. Plain, Speedy, and Adequate Remedy.

22. Prohibition arrests the proceedings of an inferior judicial tribunal or officer when such proceedings are without or in excess of jurisdiction, and where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

23. Remedy by appeal is "plain, speedy, and adequate remedy in the ordinary course of law," within the meaning of section 1103 of the Code of Civil Procedure, and the fact that more time would probably be consumed by appeal than in a proceeding by a writ of prohibition does not render the remedy by appeal not "plain, speedy, and adequate." (*Agassiz v. Superior Court*, 90 Cal. 101.)
Cited 91 Cal. 103.

24. On a petition for a writ of prohibition to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, an appeal would not be a speedy and adequate remedy. (*North Bloomfield Gold Min. Co. v. Keyser*, 58 Cal. 315.)
Cited 4 Utah, 397.

Plain, speedy, and adequate remedy, what is not. See post, III, 5, e.

Remedy by appeal. See ante, 16.

Remedy by appeal in criminal cases. See post, III, 5, g.

Remedy by appeal is a bar. See post, 37, 38.

Remedy by motion to dissolve attachment, where prohibition sought because attachment not proper. See post, 54.

4. Ministerial Acts, Acts of Officers, and Void Acts.

25. Writ can only be invoked to restrain threatened acts which are judicial in their character. (*City of Coronado v. City of San Diego*, 97 Cal. 440.)

26. Prohibition does not lie to prevent acts of officer de facto or de jure. (*Hull v. Superior Court*, 63 Cal. 179.)

27. The writ of prohibition does not run to a ministerial officer; the collection of a tax by a town marshal is a ministerial act. (*Le Conte v. Town of Berkeley*, 57 Cal. 269.)
Cited 63 Cal. 179; 66 Cal. 212; 97 Cal. 442.

28. Tax-collector, being ministerial officer, cannot be restrained by prohibition from performing the duties of his office. (*Hobart v. Tillson*, 66 Cal. 210.)

29. Levy of tax is ministerial and not judicial act, and a writ of prohibition will not lie to restrain the levy. (*City of Coronado v. City of San Diego*, 97 Cal. 440.)

30. Prohibition will not lie to prevent the usurpation of an office. Quo warranto is the proper remedy. (*Buckner v. Veuve*, 63 Cal. 304.)

Cited 85 Cal. 338.

31. Under section 1 of article X of the constitution of the state, the governor has authority and jurisdiction to make an investigation into the conduct of the state board of prison directors with a view of removing them from office, and prohibition will not lie to arrest such an investigation. (*Chapman v. Stone-man*, 63 Cal. 490.)

32. Upon application for writ of prohibition to board of election commissioners of San Francisco, to arrest their proceedings in ordering an election for fifteen freeholders, to prepare and propose a charter to be submitted to the voters of the city and county, as provided in section 18 of article XI of the constitution, held, that their action was not judicial, and therefore the writ would not lie. (*People ex rel. Taylor v. Board of Election Commissioners*, 54 Cal. 404.)

Cited 63 Cal. 179; 66 Cal. 212; 97 Cal. 412.

33. A writ will not issue to arrest proceedings of board of supervisors, unless the proceedings themselves are absolutely without or in excess of the jurisdiction of the board. (*People ex rel. Brundage v. Supervisors of Kern County*, 47 Cal. 81.)

Cited 49 Cal. 31; 56 Cal. 231; 61 Cal. 490; 68 Cal. 402.

34. Matter of fixing water rates is not judicial, and a writ of prohibition will not be awarded to restrain a board of supervisors from performing that duty. (*Spring Valley Water Works Co. v. Bartlett*, 63 Cal. 245.)

Cited 82 Cal. 307.

35. The writ of prohibition ought not to issue to arrest the progress of any legislation pending in a board authorized by the laws to legislate with respect to matters of public interest. (*Spring Valley Water Works v. San Francisco*, 52 Cal. 111.)

Cited 53 Cal. 291; 54 Cal. 406; 57 Cal. 553; 66 Cal. 212; 82 Cal. 307.

36. Where the invalidity of an order of sale of property appears upon its face, a purchaser of the property takes no title, and the owners of the property are therefore not injured by a sale so as to warrant the issuance of a writ of prohibition to restrain it. (*Woodward v. Superior Court*, 95 Cal. 272.)

Controlling actions of receivers. See post, III, 5, e.

5. Judicial Acts.

a. Acts Must be in Excess of Jurisdiction; Incidental Question of Jurisdiction.

37. Writ will not lie where it appears that inferior court has jurisdiction of the subject matter, and there is a remedy by appeal. (*Murphy v. Superior Court of Santa Clara County*, 84 Cal. 592.)

Cited 90 Cal. 105; 95 Cal. 277; 2 Wash. 666.

38. When inferior court has power to determine jurisdictional fact its determination cannot be collaterally attacked upon an application for a writ of prohibition. (*Murphy v. Superior Court of Santa Clara County*, 84 Cal. 592.)

39. Writ will not issue to arrest judicial proceedings unless they are without or in excess of the jurisdiction of the court. (*More v. Superior Court*, 64 Cal. 345.)

Cited 82 Cal. 615; 84 Cal. 393; 95 Cal. 276.

40. Prohibition lies to arrest proceedings of judicial tribunal when they are without or in excess of its jurisdiction, but the writ is issuable only in cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (*Levy v. Wilson*, 69 Cal. 105.)

Cited 84 Cal. 398; 85 Cal. 50; 90 Cal. 105.

Excess of jurisdiction is the only question. See ante, 16.

41. A court that proceeds in the trial of a cause against the express prohibition of a statute is exceeding its jurisdiction, and may be prevented from doing so by prohibition from this court. (*Hayne v. Justice's Court*, 82 Cal. 234.)

42. The fact that a question of jurisdiction is incidentally raised in an action does not present a sufficient cause for granting a writ of prohibition. (*Agassiz v. Superior Court*, 90 Cal. 101.)

Excess of jurisdiction, what is not in insolvency proceedings. See post, III, 5, f.

In criminal actions. See post, III, 5, g.

b. Preliminary Objection in Lower Court.

43. Writ of prohibition will not go from this court unless the attention of the court whose proceedings are sought to be stayed has been called to the alleged excess of jurisdiction. (*Southern Pac. R.R. Co. v. Superior Court of Kern County*, 59 Cal. 471.)

Cited 72 Cal. 576; 84 Cal. 391, 402; 4 Utah, 395; distinguished 63 Cal. 438.

44. A writ of prohibition will not issue from the supreme court to restrain a superior court from proceeding in a matter alleged to be in excess of its jurisdiction, unless the attention of the superior court has first been called to the alleged excess of jurisdiction. (*Baughman v. Superior Court*, 72 Cal. 572.)

Cited 84 Cal. 382.

45. By the rule of practice adopted by this court, the writ of prohibition will not be issued until the objection to its want or excess of jurisdiction has been made in or overruled by the lower court, the whole foundation of the rule being the respect and consideration due to the lower court, and the expediency of preventing unnecessary litigation. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

46. It is not essential to the jurisdiction of the higher tribunal to grant a writ of prohibition that a preliminary objection to the jurisdiction of the lower court be presented in that court. The rule requiring it is one of practice merely, and the neglect to observe it is only laches, which may or may not be excused, according to circumstances. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

47. It is not necessary that the preliminary objection to the jurisdiction of the lower court should be made by formal plea or motion, nor that steps should be taken therein which there was no opportunity to take, before applying for the writ of prohibition to arrest a threatened seizure of property under

a void order; but it is sufficient if such objections to the jurisdiction as there was opportunity to make in the lower court were urged therein, and overruled before the writ is applied for. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

48. If want of jurisdiction is apparent on face of proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

c. Staying Actions at Law.

49. Writ cannot issue to prevent court from trying action which it has jurisdiction to try. (*Thomas v. Justices' Court of the City and County of San Francisco*, 80 Cal. 40.)

50. Writ will lie to restrain judge from proceeding in action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of the cause. (*North Bloomfield Gold Min. Co. v. Keyser*, 58 Cal. 315, followed in *Conolly Gold Min. etc. Co. v. Keyser*, 58 Cal. 328; *Milton Min. Co. v. Keyser*, 58 Cal. 328; *South Feather Co. v. Keyser*, 58 Cal. 329; *Blue Tent Co. v. Keyser*, 58 Cal. 329; *Excelsior W. & Min. Co. v. Keyser*, 58 Cal. 329.)

51. If the question of the jurisdiction of an inferior court in a case before it has been submitted to that court by an appropriate pleading or objection, a writ of prohibition will not issue to restrain such court from proceeding in the case while the question of its jurisdiction remains undetermined by such court. (*Chester v. Colby*, 52 Cal. 516.) Cited 84 Cal. 391, 402, 406.

52. Where court has jurisdiction and has ordered that summons be served upon defendants by publication, the question as to whether it acquires jurisdiction over the defendants so served is one which the court has authority to pass upon, and a writ of prohibition will not lie to restrain the court from further proceeding in the action until the defendants should appear or be personally served with the summons, on the alleged ground that the case is not a proper one for the publication of summons. The defendants have a plain and adequate remedy by appeal from any judgment which may be entered against them, if error should be committed in the decision of the court. (*Mines d'Or de Quartz Mountain Société Anonyme v. Superior Court*, 91 Cal. 101.)

53. Writ will not lie to prevent superior court of one county from proceeding in an action against a corporation whose principal place of business is in another county, in which it was served with summons, though the action is founded upon a contract for a building erected for the corporation in the latter county, and no obligation on the contract arose or breach thereof occurred in the county where the suit was brought; the superior court of any county having jurisdiction of the subject matter, with power to send its process into all parts of the state, and the petitioner having a plain, speedy, and adequate remedy at law by motion for a change of the action. (*Fresno National Bank v. Superior Court*, 83 Cal. 491.)

54. Where property situated in this state, belonging to nonresidents, is attached in an action against them upon a subscription to the stock of a corporation, prohibition will not lie to restrain the plaintiff from proceeding with the action, upon the ground that the action is one in which no attachment will lie, there being a remedy by appeal from an order refusing to dissolve the attachment. (*Agassiz v. Superior Court*, 90 Cal. 101.)

55. A writ of prohibition will not lie to restrain the prosecution of an action by city authorities to condemn a right of way for a sewer, on account of the absence of an averment or proof that the city authorities were unable to agree with the defendant, or that the local board of the municipal corporation had expressly directed the institution of the proceeding. (*Bishop v. Superior Court*, 87 Cal. 226.)

56. Whether or not the failure to agree or to authorize the suit is a bar to the condemnation proceeding is not a question going to the jurisdiction of the superior court, but is a question of law to be determined by it in the course of the proceeding; and any error in such determination is subject to review upon appeal, and does not furnish ground for a writ of prohibition. (*Bishop v. Superior Court*, 87 Cal. 226.) Cited 91 Cal. 457.

57. Trial of case after taking of appeal from an order denying motion for change of venue is not a proceeding without or in excess of the jurisdiction of the court, within the meaning of section 1102 of the Code of Civil Procedure, so as to authorize the issuing of a writ of prohibition. (*People ex rel. Scannell v. Whitney*, 47 Cal. 584.) Cited 54 Cal. 88; 56 Cal. 231; 63 Cal. 610; 68 Cal. 402; 70 Cal. 636; 18 Nev. 289.

58. Application for writ of prohibition to forbid the superior court from proceeding further in an action, until the determination of an appeal from an order in the action refusing to dissolve a temporary injunction. Held, it is only of orders or judgments which command or permit some act to be done that a stay of proceedings can be had. The order appealed from in this case is not of that character, hence the stay of proceedings has not the legal effect of suspending the jurisdiction of the court over so much of the action as is not affected by the order. (*Bliss v. Superior Court of Santa Clara County*, 62 Cal. 543.) Cited 81 Cal. 68.

59. The filing of a petition and bond for the removal of a cause from a state court to the circuit court of the United States does not divest the state court of jurisdiction so far as to authorize a writ of prohibition to prevent it from proceeding to try the cause. (*Southern Pac. R. R. Co. v. Superior Court*, 63 Cal. 607.)

60. In an action to recover state and county taxes, defendant answered and also filed a bond and petition for a removal of the cause to the circuit court of the United States on the ground that the suit was one arising under the constitutional laws of the United States, and, the petition being denied, applied to this court for a writ of prohibition.

Writ denied. *Central Pac. R. R. Co. v. Superior Court of Tulare County*, 62 Cal. 618.)

61. Writ will not lie to superior court to prevent hearing of appeal from a justice's court upon the ground that the undertaking was filed more than five days before service of the notice of appeal, and that no notice was given of the filing of the undertaking. (*Dutertre v. Superior Court of the City and County of San Francisco*, 84 Cal. 535.)

62. In an action in the justices' court of the city and county of San Francisco, wherein one Wilhelm was plaintiff, and the petitioner herein defendant, a judgment was rendered in favor of plaintiff. The defendant had answered denying all the allegations of the complaint, but failed to appear at the trial, whereupon the court gave judgment without the introduction of any evidence. The defendant appealed on questions of law alone, and the superior court reversed the judgment, and ordered a new trial in that court. The petitioner asked that the superior court and judge thereof be restrained by prohibition from trying the case. Held, that the new trial was properly ordered to take place in the superior court, and that the writ be denied. (*Curtis v. Superior Court*, 63 Cal. 435.)

Cited 68 Cal. 100; 77 Cal. 307.

In insolvency proceedings. See post, III, 5, f.

Preventing court from proceeding with removal of officers of corporation. See ante, II, 1.

Discontinuance of proceeding sought to be prohibited. See ante, III, 2.

Prohibiting judge from proceeding because he is disqualified, remedy by appeal. See ante, III, 3.

d. Ordering Judgment Without Trial.

63. If, after acquiring jurisdiction of parties and subject matter, superior court should order judgment for one of the parties without a trial, such judgment would not be "without or in excess of the jurisdiction" of the court, although it might be erroneous; and in such case the only remedy would be by appeal. (*Clark v. Superior Court of Lassen County*, 55 Cal. 199.)

Cited 75 Cal. 256; 82 Cal. 615; 84 Cal. 398; 95 Cal. 276; 4 Utah, 396.

e. Controlling Actions of Receivers.

64. Though the writ of prohibition does not run against ministerial officers, nor to arrest completed action, yet, if a receiver has been appointed and is acting under a void judicial order appointing him, and directing him to seize and hold certain property, and he has seized and is holding the property thereunder, the property in his hands must be regarded as in the hands of the court, whose instrument the receiver is; and since action by the court is necessary so long as the property remains undisposed of, there is judicial action to be arrested and injury to be prevented, and a writ of prohibition will run to and operate directly upon the court, and indirectly upon the receiver, to prevent further action, and to annul the action taken under

the void order, and compel restoration of the property seized. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

65. The existence of a right to move the court to set aside a void order appointing a receiver, or to apply to the court for leave to sue the receiver in ejectment or in forcible entry, or to appeal from the order, will not preclude the granting of a writ of prohibition, as neither of those remedies is speedy or adequate to prevent a deprivation of the possession or use of the property ordered to be seized. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

Cited 92 Cal. 267.

66. When a receiver acts in excess of authority in seizing property lawfully in possession of a stranger to the suit, he having a valid appointment which contains no directions in excess of the jurisdiction of the court, his void action may be resisted or remedied in other proper modes, and prohibition will not lie to prevent it; but when the court has exceeded its jurisdiction in appointing the receiver, or in directing him to take specific property out of the possession of a stranger, the wrong is in the order of the court, and prohibition will lie to prevent the resulting injury, which is directly due to the action of the court. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

67. The title to property cannot be tried upon a writ of prohibition; and when a court, by its order directing a receiver to seize and hold certain property has taken property out of the actual possession of a stranger to the proceeding, who claims it as his own, the order is in excess of jurisdiction and void, irrespective of the actual state of the title; because no man can be deprived of his property without due process of law, nor can a court take property from his possession without a hearing, and compel him to prove title to regain it. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

Right of assignee in insolvency to prevent court from ordering receiver to take possession. See post, III, 5, f.

Order appointing receiver to take property, prohibiting. See Supplementary Proceedings, 18.

f. In Insolvency Proceedings.

68. A writ of prohibition will not lie in favor of an assignee of an insolvent debtor for the benefit of creditors to prevent a superior court in a subsequent proceeding in insolvency, instituted by the debtor, from ordering the receiver to take possession of all the property of the insolvent, and to sell the same. Such order could not in any way affect the rights of the assignee, and if the receiver should take property belonging to him under the order in the insolvency proceeding, he would be a mere trespasser, against whom the assignee would have his remedy; but he cannot resort to the extraordinary remedy of prohibition. (*Haile v. Superior Court of San Bernardino County*, 78 Cal. 418.)

Distinguished 84 Cal. 399.

69. Writ will not lie to prevent assignee from prosecuting action against the peti-

tioners for the recovery of property alleged to have been transferred by insolvent partners to the petitioners by way of fraudulent preference, and which the assignee claims is vested in him as assignee of the insolvents, and to prevent a receiver appointed in said action from taking possession of the property; and it is immaterial to the jurisdiction of the superior court over such action whether the insolvency proceedings were or were not instituted by or on behalf of the firm, or whether the assignee appointed therein acquired title to the property of the firm or not. (*Goddard v. Superior Court*, 90 Cal. 384.)

70. Under section 45 of the Insolvency Act all proceedings against the insolvent debtor must be stayed upon his application, pending the examination of the court in insolvency on the question of discharge, except in certain cases enumerated, and, if a justice's court refuses to stay proceedings upon his motion in a case not within the exceptions of the statute, a writ of prohibition will issue to restrain it from further proceedings, notwithstanding an order of the superior court in which the insolvency proceedings are pending assuming to permit the justice's court to proceed with the cause. (*Hayne v. Justice's Court*, 82 Cal. 284.)

71. An order of stay in insolvency proceedings, if properly made, can be enforced by the court making it; and a disregard of the order by any court may amount to an error for which its judgment would be reversed; but such an order does not deprive other courts of their ordinary jurisdiction within the meaning of section 1102 of the Code of Civil Procedure, so as to authorize the issue of a writ of prohibition to restrain their proceedings. (*Bandy v. Ransom*, 54 Cal. 87.) Cited 68 Cal. 402; 82 Cal. 235; 18 Nev. 239.

To prevent proceeding under Insolvency Act in liquidation of bank. See *Banks and Banking*, X.

g. In Criminal Actions; Miscellaneous Instances in Which Writ Granted or Refused.

72. Writ will lie to prevent superior court from proceeding further in a criminal action of which it has no jurisdiction under the constitution. (*Green v. Superior Court*, 78 Cal. 556.)

73. Upon an application for a writ of prohibition, to stop the trial of an information against the plaintiff for assault with intent to commit murder, the grounds alleged were, that the magistrate before whom the preliminary examination took place did not examine on oath, or otherwise, the prosecutor or any other witness, etc. Held, that the omissions complained of did not affect the question of jurisdiction, and that therefore prohibition was not the proper remedy. (*Murphy v. Superior Court of Colusa County*, 58 Cal. 520, cited 59 Cal. 319; *Spect v. Superior Court of Colusa County*, 59 Cal. 319.)

74. A writ of prohibition will not lie to restrain a superior court from passing upon a motion to dismiss an information. (*Wreden*

v. Superior Court of Stanislaus County, 55 Cal. 504.)

Cited 82 Cal. 615; 84 Cal. 398; 95 Cal. 276.

75. The trial of a criminal case will not be restrained by prohibition for mere irregularities and errors in law occurring before and after the finding and return of the indictment. Such matters are reviewable on appeal. (*Levy v. Wilson*, 69 Cal. 105.) Cited 92 Cal. 260.

76. A writ of prohibition is not allowable to prevent a justice's court from trying a charge of vagrancy, under section 647 of the Penal Code, without a jury. The justice's court has jurisdiction of the subject matter, and any error as to its mode of procedure cannot be arrested or corrected by the writ of prohibition, the defendant having a plain, speedy, and adequate remedy by appeal to the superior court. (*Powelson v. Lockwood*, 82 Cal. 613.)

Cited 84 Cal. 398; 21 Nev. 52; 2 Wash. 666.

77. Where the petitioner was arrested under a warrant issued on a complaint filed in the police court, and charged with a misdemeanor in having carried on business without a license, and pleaded not guilty, and also filed a plea to the jurisdiction of the court, a writ of prohibition will not be issued to restrain the court from proceeding with the trial of the action, as the petitioner has a plain, speedy, and adequate remedy at law, by appeal to the superior court, if he should be convicted. (*Strouse v. Police Court of the City and County of San Francisco*, 85 Cal. 49.)

Cited 90 Cal. 104; 2 Wash. 666.

Grand jury, illegal, may be remedied by. See *Jury and Jurors*, 368.

On refusal to remove cause to federal court. See *Removal of Causes*, 10.

To restrain superior court from opening default. See *Appeals*, 3345.

Order requiring payment by guardian, prohibition of. See *Guardian and Ward*, 48.

Superior court allowing amendment after affirmance, prohibition of. See *Appeals*, 3199.

PROHIBITORY STATUTES.

See *Statutes*, VIII, 23.

PROMISSORY NOTES.

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Who are. See *Corporations*, II, 9.

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Distinction between evidence and proof. See *Evidence*, I.

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See *Parties*, VII.

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See *Criminal Law*, XVIII, 8; *District Attorneys*.

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PROSECUTION.

See Criminal Law; Malicious Prosecution.
Want of dismissal for. See Dismissal, IV, 2.

PROSPECTIVE DAMAGES.

See Damages, IX.

PROSTITUTION.

Enticing female to enter house of. See Criminal Law, XXI, 20.

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Taxation, XI, 3.
Opening of street, protest against. See Streets, IX, 8.

PROVISOS.

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"Once a week for four successive weeks," what satisfies. See Partnership, 212; Public Health, 4; Sanitary Districts, 4; Swamp and Overflowed Lands, 221.
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Powers, how exercised. See Offices and Officers, VII, 4.
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Mandamus against. See Mandamus, II, 13.

PUBLIC BUILDINGS.

See Courthouses; Eight Hour Law.

Sections 3233 and 3234 of the Political Code, which relate to labor and materials on public

buildings, seem to refer exclusively to the buildings of the state. (Babcock v. Goodrich, 47 Cal. 488.)

Injuring public jail. See Criminal Law, XXI, 34.

New City Hall in San Francisco. See San Francisco, X.

Schoolhouses, erection of in public squares. See Schools, IV.

Delegation of power to select site. See Constitutional Law, 170.

PUBLIC CORPORATIONS.

See Municipal Corporations.

Irrigation districts are. See Irrigation Districts, 3, et seq.

Levee districts are. See Swamp and Overflowed Lands, 179.

School districts are. See Schools, 2.

Power to act cannot be collaterally attacked. See Swamp and Overflowed Lands, 182.

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Appropriation, necessity and validity of. See Constitutional Law, VI, 2, b.

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County and municipal, power of supervisors over. See Supervisors, V, 5.

Power to create. See Constitutional Law, VI, 2, b; Counties, VIII, 5, a.

City or county debt, control of legislature over. See Constitutional Law, VIII, 6, c.

Power of municipality to incur indebtedness. See Municipal Corporations, IX, 5.

Limit upon, annual income. See Counties, VIII, 5, a.

Constitutional limitation upon power to create. See Offices and Officers, 147.

One-twelfth Act, effect of on compensation of officers. See Offices and Officers, 145-47.

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Funding, commissioners of funded debt,

title of to beach and water lots. See San Francisco, XIV, 10, d.

Funding, commissioners of San Francisco, interest of in wharves. See Wharves, VIII.

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Funding, construction of statute. See Sacramento.

Funding, title of commissioners of funded debt to beach and water lots. See San Francisco, XIV, 10, d.

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Funding, parties in suit to enjoin, issuance of bonds. See San Francisco, 93.

Funding, commissioners, enjoining sale by. See Injunctions, II, 11.

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Funding deed by board of commissioners, mistake in. See Rescission of Contracts, 52.

PUBLIC FUNDS.

Setting apart and transfer of. See Supervisors, V, 4.

Deposit of. See Municipal Corporations, X.

PUBLIC HEALTH.

1. The members of the board of health of the city and county of San Francisco are officers, within the meaning of article XI, section 7, of the old constitution, and of article XX, section 16, of the new constitution; and a statute fixing their term of office at five years is unconstitutional, and leaves the duration of the term unfixed, and subject to the pleasure of the governor, who may appoint a new incumbent at any time. (*People ex rel. Davidson v. Perry*, 79 Cal. 105.) Cited 84 Cal. 307.

2. A member of the board of health of the city and county of San Francisco is included within the literal terms of both the first and second subdivisions of section 909 of the Political Code, and might properly file his oath of office with the secretary of state, and also with the county clerk; but having duly taken the oath, and filed it with the secretary of state, his failure also to file it with the county clerk is not such a refusal or neglect to file his official oath as will forfeit his office or create a vacancy under subdivision 9 of section 996 of the Political Code. (*People ex rel. Davidson v. Perry*, 79 Cal. 105.) Cited 85 Cal. 511.

3. A petition for the organization of a sanitary district, under the act of March 31, 1891, asking the board of supervisors of the county to provide therefor, and to call an election within the district for the purpose stated in the act, giving the name and boundaries of the proposed district, and describing the

petitioners as residents and freeholders thereof, sufficiently shows the desire of the petitioners to form a district under that name, and it appearing that twenty-five of the petitioners are, in fact, both residents and freeholders of the proposed district, the fact that the petition is signed by the names of others not having the statutory qualifications does not vitiate the petition. (*Woodward v. Fruitvale Sanitary District*, 99 Cal. 554.)

4. The statute does not, in terms, provide that the "four successive weeks" in which notice shall be posted "prior to the election" shall be the four successive weeks next preceding the election, and a notice posted on the fourth day of October, 1892, and remaining posted for four successive weeks from that date, is a sufficient compliance with the letter of the statute. (*Woodward v. Fruitvale Sanitary District*, 99 Cal. 554.)

5. The fact that the sanitary board elected by the people of the district met and organized by the election of a president and secretary before the votes were canvassed by the supervisors, and the result declared, cannot invalidate the acts of the officers of the board under color of office, after receiving their commissions, and their acts thereafter as officers of such board in signing bonds issued by the sanitary board cannot be inquired into in a collateral proceeding by a taxpayer to test the validity of the organization of the district and the legality of the bonds, and the validity of a tax levied by the board upon property in the district. (*Woodward v. Fruitvale Sanitary District*, 99 Cal. 554.)

6. The act of March 31, 1891, permitting the organization and creation of sanitary districts, is within the "police power" of the legislative department of the state, and is not void as necessarily interfering with the exercise of municipal functions in cities and towns, and is operative to justify the organization of such districts, the boundaries of which do not embrace any city or town, or in any way interfere with the powers or government of a municipality. (*Woodward v. Fruitvale Sanitary District*, 99 Cal. 554.)

Avocations dangerous to health. See Constitutional Law, VIII, 13, d.

Validity of statute concerning. See Constitutional Law, 284.

Vaccination act is valid. See Constitutional Law, 250.

Sanitary laws. See Constitutional Law, VIII, 13, d.

Hospitals. See Hospitals.

Statutes relating to drainage. See Swamp and Overflowed Lands, XVI.

PUBLIC IMPROVEMENTS.

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City or county aid to. See Supervisors, V, 5, b.

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PUBLIC LANDS.

- I. Title of the United States to Land in California, and Manner of Holding.
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Sale of land for the relief of volunteers. See Treasurers, 1.

I. Title of the United States to Land in California, and Manner of Holding.

1. Territory of California passed to United States, subject to the power of the federal government to establish a territorial government, or erect the same into a state. It was garrisoned and held by United States troops and governed by United States officers. Every acre of land not the property of Mexican citizens passed to it, and the power of the federal government to acquire territory, either by purchase or treaty, is undisputed. (People ex rel. Attorney General v. Folsom, 5 Cal. 373.)

2. Federal government has not only right of eminent domain, but the fee, and the prime and uncontrolled right of disposition of the territory, all of which are attributes of sovereignty. (People ex rel. Attorney General v. Folsom, 5 Cal. 373.)

3. General government is entitled to possession of, and all beneficial interest in, the public lands, and its grantee takes the same subject to no conditions, except such as are expressed in the grant. (Doran v. Central Pac. R. R. Co., 24 Cal. 256.)

4. The title of the United States to the public domain in California relates back to the time of the occupation of the country by the American army; and, from that period, the Mexican laws in relation to the disposition of public lands ceased to be of force. (Woodworth v. Fulton, 1 Cal. 295.)

5. The United States, as owner of land within the limits of a state, only occupies the position of any private proprietor, with the exception of exemption from state taxation. (Hicks v. Bell, 3 Cal. 219.)

6. Since the admission of California the public lands of the United States, except such as have been reserved or purchased for forts, navy-yards, public buildings, etc., are held in the same manner as the lands of private persons, except that they cannot be taxed by the state, nor can the primary disposition of them be interfered with. (Lux v. Haggin, 69 Cal. 255.)

II. Presumption That Land is Public.

7. Presumption under our statute is that all land in state is public land, until the legal title is shown to have passed from the government to private parties. (Burdge v. Smith, 14 Cal. 380.) Cited 95 Cal. 113.

8. This presumption is reconcilable with the presumption of title arising from possession. (Burdge v. Smith, 14 Cal. 380.)

9. The possession of agricultural land is prima facie proof of title against a trespasser;

but, where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. (*Burdge v. Smith*, 14 Cal. 380.)

10. Where it does not appear whether the lands through which a stream ran at the time when a riparian proprietor claims to have acquired a right by appropriation were private or public property, it will not be presumed that they were public lands, but the burden of proving that they were such lands devolves upon the claimant. (*City of Santa Cruz v. Enright*, 95 Cal. 105.)

III. Lands Belonging to the State.

1. *Lands Belonging to State by Virtue of Sovereignty.*

11. The lands belonging to the state are distinguishable into two general classes: (1) Those which it owns by virtue of grants from the United States; (2) those which it owns by reason of its sovereignty. The class of lands belonging to the state by reason of its sovereignty includes the shore of the sea, and of its bays and inlets, in the common-law definition of the word "shore." (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.) Cited 32 Cal. 363; 46 Cal. 107; 69 Cal. 126.

2. *Grants to the State by the Federal Government.*

12. The act of Congress of September 3, 1841, is a present grant to each new state, upon its admission into the union, of five hundred thousand acres of land; but the grant does not attach to any particular parcel of land until the state, through its agents, has selected the same, and the selection has been approved by the United States. (*Megerle v. Ashe*, 27 Cal. 322.) Cited 33 Cal. 262; 34 Cal. 512; 63 Cal. 24.

13. California, upon her admission into the union, acquired, under the eighth section of the act of Congress of September 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," a vested and present interest in five hundred thousand acres of land, with a right to select and locate the same in such manner as her legislature might direct out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of Congress or the proclamation of the president. (*Doll v. Meador*, 16 Cal. 296.) Cited 21 Cal. 335; 25 Cal. 255; 33 Cal. 262; 45 Cal. 668; 2 N. Dak. 365, 371; 9 Or. 521.

14. *Doll v. Meador*, 16 Cal. 296, affirmed upon the points that the act of Congress of September, 1841, donating lands for internal improvements, is, as to the states to be subsequently created, a grant in present, and vests in each of them immediately upon its admission five hundred thousand acres of the government lands within its boundaries not reserved from sale, with the right to select the same in such manner as its legislature may direct; that such selection may be made before the land is surveyed by the govern-

ment, but must be subject to change if subsequently, upon the survey being made, it be found to want conformity with the lines of such survey. (*Van Valkenburg v. McCloud*, 21 Cal. 330.)

15. The state, by the act of Congress, received a present grant of five hundred thousand acres of land, to be selected out of such lands as were open thereto, in such manner as the state, by her legislature, should direct. (*Bludworth v. Lake*, 33 Cal. 255.) Cited 71 Cal. 24.

16. By the act of Congress granting to California the sixteenth and thirty-sixth sections in each township the state became the owner of said sections, with the right reserved in the general government of locating the same; and, as fast as townships are surveyed and sectionized, the state becomes the owner of said sections absolutely, not only as to quantity, but as to position also. (*Higgins v. Houghton*, 25 Cal. 252.) Cited 45 Cal. 687.

17. The title of the state to said sections does not depend in any manner upon the action or nonaction of the officers of the general government in approving of selections or sales of the same made by the state. (*Higgins v. Houghton*, 25 Cal. 252.)

18. Whatever title the state has to the sixteenth and thirty-sixth sections she acquired by the act of Congress to provide for the survey of the public lands in California, etc., approved March 3, 1853. (*Middleton v. Low*, 30 Cal. 596.)

19. The act of Congress of March 3, 1853, granting to the state of California the sixteenth and thirty-sixth sections of the public lands within said state, vested absolutely in the state the title to those sections, upon their being surveyed; and Congress had no power after the passage of said act to impair the grant, or prevent the title to those sections from vesting in the state, upon their being surveyed. (*Sherman v. Buick*, 45 Cal. 656.) Cited 48 Cal. 607.

3. *School Land Falling Within Mexican Grant.*

20. This state did not, by the grant from Congress of the sixteenth and thirty-sixth sections, acquire any title to those sections when they fell within the limits of a Mexican or Spanish grant. (*Middleton v. Low*, 30 Cal. 596.)

21. A thirty-sixth section of public land is not lost to the state, so that lieu land can be taken therefor, from the fact that it is included within the limits of a confirmed Mexican grant, until there has been a final survey of the grant. (*Rosecrans v. Douglass*, 52 Cal. 213.) Cited 56 Cal. 463; distinguished 56 Cal. 58.

22. An act of Congress, passed after March 3, 1853, permitting the purchasers from the claimant of a rejected Mexican grant to enter the land included within the boundaries of the grant, at one dollar and twenty-five cents per acre, does not divest the state of its title to the sixteenth and thirty-sixth sections within the grant; and a patent issued by the United States under said act to one of

said purchasers of a sixteenth or thirty-sixth section does not convey the title. (*Thompson v. True*, 48 Cal. 602.)

4. School Land Mineral in its Character.

23. The grant of the sixteenth and thirty-sixth sections of public land to the state, by the act of Congress of March 3, 1853, did not include lands known to be mineral at the date of the grant. (*Hermocilla v. Hubbell*, 89 Cal. 5.)

24. The grant of the sixteenth and thirty-sixth sections being a grant in present, if the land was known to be mineral in character at the time the grant was made, no title passed to the state, and the fact that the mines upon the lands were worked out and abandoned as unprofitable, after the grant was made, gives the state no title to them. (*Hermocilla v. Hubbell*, 89 Cal. 5.)

25. Mineral lands are not excepted from the operation of the grant of the sixteenth and thirty-sixth sections in each township, made to California for school purposes by the act of Congress of March 3, 1853. (*Higgins v. Houghton*, 25 Cal. 252.)
Cited 56 Cal. 644; 89 Cal. 8; 10 Nev. 310; distinguished 11 Nev. 458.

26. Under the act of Congress of March 3, 1853, "to provide for the survey of the public land in California," etc., the sixteenth and thirty-sixth sections, though mineral land, were granted to the state. (*Wedekind v. Craig*, 56 Cal. 642.)
Cited 89 Cal. 8.

27. Under the seventh section of the act referred to, the sixteenth and thirty-sixth sections are reserved from the grant to the state, when any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, has been made upon such sections prior to the survey of the same, and the state is allowed to select other land in lieu of such sections so settled upon. (*Wedekind v. Craig*, 56 Cal. 642.)

28. The settlement referred to in said section is not limited to land open to pre-emption, but extends alike to mineral land. (*Wedekind v. Craig*, 56 Cal. 642.)

29. The fact that sections sixteen and thirty-six contain mines of the precious metals does not prevent the state from selling the same and issuing patents therefor to the purchaser. The state may, however, by the passage of laws to that effect, prohibit the sale of such lands or the issuance of patents for the same. (*Higgins v. Houghton*, 25 Cal. 252.)

5. Listing Over of Land to the State.

30. The testimony of the ex-register of the state land-office is competent to prove the receipt and filing by him of a certified list of indemnity school selections. His testimony would be sufficient to prove the filing of the list without an indorsement of the filing thereon, because a paper is deemed to be filed when presented at the proper office and deposited with the papers therein. (*Howell v. Slauson*, 83 Cal. 539.)
Cited 10 Mont. 437.

31. A certificate of the register of the United

States land-office, to the effect that certain lands described therein had been previously listed to the state by the secretary of the interior as lieu lands, is not evidence of that fact. (*Murphy v. Sumner*, 74 Cal. 316.)

32. The issuance by the state of a certificate of purchase of lieu lands does not create the presumption that the lands included therein had been previously listed to the state. (*Murphy v. Sumner*, 74 Cal. 316.)

33. Where the evidence shows that the land selected has been certified over to the state by the commissioner of the general land-office, though the date of the certificate is not given, if no objection is made to the evidence, it will be presumed that it was done prior to the commencement of the action. (*Hodapp v. Sharp*, 40 Cal. 69.)
Cited 74 Cal. 319.

34. Where, by reason of the loss of school sections, a selection is made by the state of other lands in lieu thereof, the listing of such lands to the state by certificate from the general land-office of the United States conveys the legal title to the state as effectually as a patent would have done; and the title so transferred relates back to the date when the selection was made and reported to the local land-office, and cuts off all subsequent claimants. A state patent to such lands will prevail over a United States patent to a pre-emptor whose settlement upon the land was subsequent to the date of the state's selection, though prior to the listing of the land to the state. (*Howell v. Slauson*, 83 Cal. 539.)

35. The listing over of land to the state by the commissioner of the general land-office as lieu land, taken by the state in place of a thirty-sixth section included within the boundaries of a confirmed Mexican grant, is void, and confers no title on the state if such grant has not been finally surveyed when the land is listed over. (*Rosecrans v. Douglass*, 52 Cal. 213.)
Cited 63 Cal. 250.

36. When the certificate of the listing of indemnity school selections to the state was made in and transmitted from the department of the United States government, where the duty to make and transmit it resided, to the state land-office, the state has a right to rely upon the presumption that the officers of the general land-office of the United States properly performed their official duty in regard to the listing of the lands; and, whether the signature of the commissioner of the general land-office is genuine or not, the certificate cannot be assailed on account of any defect in the authentication of it, after the state has passed title to the land by its patent, and the certificate has been treated as genuine by both the state and federal land-office. (*Howell v. Slauson*, 83 Cal. 539.)

37. Upon the application of the defendant, one J. P., as deputy state locating agent, under appointment made by the state locating agent, made application to the register of the land-office, on behalf of the state of California, for the land in controversy; and in pursuance of that application the land was listed to the state. Afterward the plaintiff made his ap-

plication. Held, that he was estopped from denying the authority of the deputy locating agent. (*Wright v. Laugenour*, 55 Cal. 280.)

38. The listment of land to the state of California in lieu of a sixteenth section, on the first day of July, 1870, which listment was confirmed by the act of Congress of March 1, 1877, known as the Booth act, cannot, after the passage of such act, be canceled by the secretary of the interior, and a patent of the United States issued subsequent to an attempted cancellation is without authority of law, and void, and may be collaterally attacked in an action of ejectment based thereon by a defendant having a mere naked possession, though he fails to show priority with the title of the state. *McFarland, J., and Paterson, J., dissenting.* (*Oucamonga Fruit Land Co. v. Moir*, 83 Cal. 101.) Cited 96 Cal. 411.

Listing and certifying over of lands covered by Mexican grant. See post, 61, et seq.

Sale before listing over of land to state. See post, XIV, 3.

6. Selection and Location of.

39. No valid selection can be made except in the manner prescribed by the legislature of the state. (*Hastings v. Jackson*, 46 Cal. 234.)

40. Neither the secretary of the interior nor any officer of the land department of the general government has authority to determine the question of the regularity or the sufficiency of the selection of such lands. (*Hastings v. Jackson*, 46 Cal. 234.) Cited 62 Cal. 554.

41. Conformity in the locations with the sectional divisions and subdivisions of the United States survey is required to preserve intact the general systems of surveys adopted by the federal government, and to prevent the inconvenience which would ensue from any departure therefrom. (*Doll v. Meador*, 16 Cal. 295.)

42. The laws of this state, authorizing the selection or location of lands under the act of Congress, provide for securing conformity in the locations with the lines of the government survey. (*Doll v. Meador*, 16 Cal. 295.)

43. Proper officers of general government must approve of the selection of such lands when made in accordance with the laws of the state, and in such parcels and from such lands as the act of Congress prescribes, but beyond such approval they have no power to act. (*Hastings v. Jackson*, 46 Cal. 234.)

44. A certificate of the register of United States lands, issued to one who applies to him to locate a state land warrant on public land, that he approves of the location by the state, is a legal and valid consent of the United States to such location, because it is prescribed by the commissioner of the general land-office. It is also correct to surrender to the register the state land warrant. Per *Rhodes, J., Niles, J., concurring.* (*Pope v. Athearn*, 42 Cal. 607.)

45. If it appear that land was duly located by the state locating agent for the benefit of the state, at the United States land-office, with the consent of the register and receiver,

and that such location appears in their official books, a sufficient consent is thereby shown to the location on the part of the United States. (*Rush v. Casey*, 39 Cal. 339.)

46. The time of selection is the time of the notice from the state authorities to the register of the United States land-office under the second section of the act. If a notice was given before the passage of the act, the title passes at the date of the passage of the act; if given afterwards, the grant, like railroad grants, attaches as soon as the notice is given, and relates back to the passage of the act. The certifying over by the register does not affect the passing of the title, but is for the purpose of furnishing record evidence of the selection and identification. (*McNee v. Donahue*, 76 Cal. 499.)

47. The selection and sale of public land, before the same has been surveyed, claimed by a state under a congressional grant, is void. (*Huff v. Doyle*, 50 Cal. 16.)

48. A state selection of land granted by Congress, made before it is surveyed by the United States, is invalid. (*Chant v. Reynolds*, 49 Cal. 213.)

49. The state of California has no right to select or locate the five hundred thousand acres of land granted to her for purposes of internal improvement by the eighth section of the act of Congress of September 4, 1841, until after the lands selected have been surveyed and sectionized by the proper officers of the federal government. (*Terry v. Megerle* 24 Cal. 609, cited 27 Cal. 328, 520, 33 Cal. 89, 34 Cal. 512, 38 Cal. 33, 40 Cal. 363, 46 Cal. 243, 49 Cal. 217, 55 Cal. 398, 63 Cal. 24, 11 Nev. 455; *Hastings v. Jackson*, 46 Cal. 234, cited 62 Cal. 553, 554, 63 Cal. 24.)

50. New states, under the act of September 4, 1841, acquire their interest upon their admission into the union, and may make selections of land before the survey of the United States, which selections are only subject to three qualifications: (1) They must not be of lands reserved from sale by any law of Congress or the proclamation of the president; (2) They must be in parcels of not less than three hundred and twenty acres each; and (3) The parcels selected must be in such form as to correspond with the survey of the United States when made. (*Doll v. Meador*, 16 Cal. 295.)

51. State selections will not become absolute and definite until the survey; until then the parcels selected may be subject to a possible reservation from sale; and, when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the state, provision is made so as to secure such conformity. (*Doll v. Meador*, 16 Cal. 295.)

52. No title to any specific portion of said grant can vest in the state unless the land has been surveyed, and the selection is made of lands to which there is no subsisting valid claim by pre-emption or otherwise, and the selection is made in parcels conformably to sectional divisions and subdivisions of not less than three hundred and twenty acres, and the selection has been approved by the fed-

eral government. (*Terry v. Megerle*, 24 Cal. 609.)

53. The right of selection or location of the five hundred thousand acre grant was not suspended until the United States had made their surveys, but locations made previous to the survey of the United States were subject to change, if, subsequently upon the survey being made, they were found to want conformity with the lines of such survey. With this qualification and the further qualification of a possible reservation by a law of Congress, or a proclamation of the president, previous to the survey, which might have required further change, or the entire removal of the location, there was no limitation upon the right of the state to proceed at once to take possession and dispose of the quantity to which she was entitled by the grant. (*Doll v. Meador*, 16 Cal. 295.) Cited 21 Cal. 336; 24 Cal. 624.

54. Under the congressional grant to the state of lands for the use of an agricultural college, the state as owner, for the purposes of the grant, had the right to select the lands from surveyed or unsurveyed public lands of the United States, subject to pre-emption and sale, within the limits of the state. (*White v. Douglass*, 71 Cal. 115.)

55. The lands in controversy were not reserved from sale by the laws of the United States, or by the proclamation of the President, and consequently were subject to location by the state of California, under her laws; and the patent of the state properly issued to the plaintiff in this cause. (*Doll v. Meador*, 16 Cal. 295.) Cited 75 Cal. 296; 77 Cal. 261; 3 Or. 114.

56. The act of 1872 allows the selection to be made from any lands within the state which are subject to settlement, entry, sale, or location under any laws of the United States, with certain specified exceptions. And, in order to attack a patent not void upon its face, the party must show affirmatively that the land was not of any special character which would subject it to acquisition under any law of the United States. (*Leviston v. Ryan*, 75 Cal. 293.)

57. The selection by the state of public land as a portion of the seventy-two sections granted to the state for the use of a seminary of learning, even if approved by the register and receiver of the local land-office, does not confer a title on the state until the selection is approved by the secretary of the interior, and the plaintiff must prove such approval. (*Buhne v. Chism*, 48 Cal. 467.)

58. A selection of land, as lieu land, in place of the sixteenth and thirty-sixth sections granted to this state, made before the land selected has been surveyed by the United States, is unauthorized and void. (*Central Pacific R. R. Co. v. Robinson*, 49 Cal. 446.)

59. A selection of public lands made by the authorities of a state in lieu of the sixteenth and thirty-sixth sections granted to state for school purposes, before the lands selected have been surveyed by the United States, and the survey approved, is invalid, and confers no title upon the state. (*Grogan v. Knight*, 27 Cal. 515.)

Cited 30 Cal. 604; 34 Cal. 512; 38 Cal. 81, 33, 43; 40 Cal. 363, 370; 46 Cal. 243; 49 Cal. 217; 63 Cal. 24; 81 Cal. 594; 11 Nev. 455.

60. Official list of sections lost to the state was necessary as the basis of selection of land in lieu of those lost sections, and, until it was furnished, the right to select had not accrued. (*Aurrecoechea v. Sinclair*, 60 Cal. 532, 551.)

61. The listing and certifying over to the state, by the commissioner of the general land-office, of lands selected which at the time were claimed under a valid Mexican grant, is unauthorized and void, and a patent therefor afterward issued by the state does not convey any title. (*Huff v. Doyle*, 50 Cal. 16.)

62. Such lands remain public lands notwithstanding they have been listed over and certified to the state; and a qualified pre-emptor who enters upon a quarter section of the same when in the prior possession of the state patentee will hold the possession as against the state patentee, if he enters in good faith to pre-empt the same. (*Huff v. Doyle*, 50 Cal. 16.)

63. Selection of land within limits of confirmed Mexican grant as lieu land by the state is void as between the state and the federal government, and the state has no title which it can convey by patent. (*Rosecrans v. Douglass*, 52 Cal. 213.)

64. The state can make no valid selection under said act of land in the possession of a bona fide pre-emptor under the laws of the United States, nor can it convey any valid title therein to another. (*Terry v. Megerle*, 24 Cal. 609.)

Cited 25 Cal. 633; 29 Cal. 321; 34 Cal. 512; 40 Cal. 370; 68 Cal. 186; 3 Or. 113.

65. The commissioner of the general land-office of the United States cannot cancel the state's selection of lieu lands and the listing thereof to the state, in favor of a pre-emptor, the inception of whose right did not antedate the original selection of the land by the state. (*Howell v. Slauson*, 83 Cal. 539.)

66. The effect of a location pursuant to the laws of California upon lands subject to location is to make particular the general grant of the federal government, and to vest an absolute and perfect title to the same, which the state may, by her patent, convey. (*Doll v. Meador*, 16 Cal. 295.)

67. When the selection and location are once made pursuant to the legal directions of lands subject thereto the general gift of quantity to the state becomes a particular gift of the specific lands located, vesting in her a perfect title to the same, which title passes by her patent. (*Bludworth v. Lake*, 33 Cal. 255.)

68. The selection of land on behalf of the state is not confirmed, nor does the title pass until the land is certified over to the state by the commissioner of the general land-office, as required by the second section of the act of July 23, 1866. (*Hodapp v. Sharp*, 40 Cal. 69.)

Cited 48 Cal. 472; distinguished 78 Cal. 505.

69. Selections made by the state of land granted by Congress which are invalid when made do not become the property of the

state under the act of Congress of July 28, 1866, entitled "An act to quiet land titles in California," until the land has been certified over to the state by the commissioner of the general land-office. (*Chant v. Reynolds*, 49 Cal. 213.)

70. A certificate of United States register of lands that the plaintiff, as the agent of the state, has located land at his office in part satisfaction of lands granted to the state, is not admissible in evidence of the locator's right to recover in ejectment. (*Slaughter v. Fowler*, 44 Cal. 195.)

Selection of lands granted to state. See ante, III, 2.

IV. Survey of; Filing and Withdrawal of Plat.

71. There can be no township on the public lands except it has been actually surveyed and marked. (*Powers v. Jackson*, 50 Cal. 429.)

72. The survey of the public lands of the United States into sections and subdivisions of sections can only be made under the authority of Congress, and is beyond the control of the states. (*Grogan v. Knight*, 27 Cal. 515.)

73. The provisions of the act of May 3, 1852, for the survey of public land by county surveyors apply to such lands only as have not been surveyed by the United States. Per *Rhodes, J., Niles, J., concurring.* (*Poppe v. Athearn*, 42 Cal. 607.)

74. No survey of any portion of public land is complete until the lines and corners about that part are run and established as required by statute. The lines are created, and not merely ascertained, by the survey, and the tract has no separate legal identity until the survey is completed and approved under the authority of Congress. (*Bullock v. Rouse*, 81 Cal. 590.)

75. The south and west boundary lines of the south half of the southwest quarter of section thirty-one of a "township" surveyed by the United States are coincident with the south and west lines of that township. (*Harkins v. Nelson*, 53 Cal. 316.)

76. As determined by the practice of the land departments of the United States and of the state, lands are surveyed when the lines are run in the field and monuments or marks established by the proper surveyor. (*Oakley v. Stuart*, 52 Cal. 521.)

77. Sixteenth and thirty-sixth sections are deemed to be surveyed, for the purposes mentioned in section 3495, of the Political Code, only when the plat of the survey of the township has been approved by the United States surveyor general. (*Medley v. Robertson*, 55 Cal. 396.)
Cited 74 Cal. 178.

Evidence of survey and listing. See post, 556.

78. The monument placed at the township corner of the survey in the field would control the calls of the field notes of the same survey; a fortiori, it controls the field notes of a subsequent survey of one of the sections. (*Harkins v. Nelson*, 53 Cal. 316.)

79. Under the act of Congress of June 14, 1860, the confirmation of a survey is a judicial act, and the decree of confirmation has the force of *res adjudicata* against all persons, whether they intervened or not. (*Yates v. Smith*, 38 Cal. 60.)

Resurvey. See post, 338.

Sale before land surveyed. See post, XIV, 3.

Listing before survey, validity of. See ante, III, 5.

80. When the pleadings of both parties upon a contest of the right to purchase school land state that a proper survey was made, and a copy of the order of the state surveyor general, certifying that the land was listed to the state by the register of the United States land-office, is introduced in evidence without objection, the pleadings and evidence, taken together with the presumption that the certificate is truthful, and that the proper officers have performed the duties required of them before such certificate could be made, there being no evidence to the contrary, are sufficient to sustain a finding that the land had been surveyed by the surveyor-general of the United States, and that the survey and plat duly approved was filed by him in the United States land office, before the listing of the land to the state. (*Bode v. Trimmer*, 82 Cal. 513.)

Location before survey. See ante, III, 6.

81. If the statement shows that the only evidence introduced of the filing of the plat of survey in the local land-office was an indorsement on the same of the day of the filing, which is not signed by the register, the day named will be taken on that appeal as fixing the time. (*Megerle v. Ashe*, 33 Cal. 74.)
Cited 42 Cal. 608.

82. A notice published by the register and receiver of a United States land-office, notifying those who claim pre-emption rights to file their declaratory statements on or before a day named in the notice, is not admissible in evidence for the purpose of proving the day on which the plat of the survey of a township was returned by the surveyor general to the local land-office. (*Megerle v. Ashe*, 47 Cal. 632.)

83. An indorsement on the plat of the survey of public land, that it was filed in the land-office on a day named therein, which is not signed by any one, will, in the absence of other evidence on the subject, be taken as fixing the time of filing the plat. (*Poppe v. Athearn*, 42 Cal. 607.)

84. The evidence showed that the plat of the survey of the township containing the land in controversy was filed in the proper district land-office on the 13th of June, 1872. The defendant filed his declaratory statement on the 20th of December, 1873. The act of Congress of March 3, 1853, required a pre-emption claimant to file his declaratory statement within three months after the receipt at the district land-office of the approved plat of the township embracing his settlement. Held, that the court would presume that such plat was received and filed on the same day, and that, by reason of the selection by the state being prior to the filing of the declara-

tory statement by the defendant, its title derived by the listing in 1877 was superior in right. (*Schieffery v. Tapia*, 68 Cal. 184.)

85. When the filing of a plat is withdrawn by the proper authority it is as though the map had never been filed, and the day of its return to the files is, in contemplation of law, the date of its filing. Held, accordingly, in such a case, that the presentation of a claim, under the act of July 23, 1866, for land confirmed by that act to the state, was within time where presented within the prescribed time after the refiling of the plat. (*Wilkinson v. Merrill*, 56 Cal. 559.)

Parol evidence to contradict survey. See Evidence, 387.

V. Legislative Grants.

86. Legislative grants have all effect of patent, so far as the transfer of title is concerned, and the conferring of a right of entry and right of action; all that the patent under the grant adds is a convenient method of proving the exact boundaries. (*Ohm v. San Francisco*, 92 Cal. 437.)

87. A legislative grant is as effectual to pass title to lands owned by the government as a grant evidenced by a patent. (*Megerle v. Ashe*, 27 Cal. 322.)

88. Legislative grants are to be construed liberally in favor of the grantee. (*Hyman v. Read*, 13 Cal. 444.)

Petaluma, congressional grant to. See Petaluma.

Land grants to railroad. See Railroads, III. Title under act of legislature, how pleaded. See Pleading and Practice, 68.

VI. Scrip.

89. If a treaty is made with a tribe of Indians, by which they relinquish to the United States their lands, with certain reservations, and the treaty provides that the heads of families in the tribe shall each be entitled to eighty acres of land, to be selected under the direction of the President, and to be secured by patents, the officers of the land department cannot issue scrip for land selected under the treaty outside of the ceded territory, nor can the President issue patents therefor in the absence of legislation by Congress authorizing it to be done. (*Parker v. Duff*, 47 Cal. 554.)

90. Scrip issued for such lands selected outside the ceded territory is issued without authority of law, and patents issued therefor which show for what they were issued, are void on their face. (*Parker v. Duff*, 47 Cal. 554.)

Cited 49 Cal. 335; 7 Cal. 514.

91. In an action to quiet title, the plaintiff claiming under a United States patent, and the defendant under a state selection, and the evidence being substantially the same as in *United States v. Chapman*, 5 Saw. 528, held, that the patent was void, and that the plaintiff was not entitled to recover. (*Chapman v. Polack*, 58 Cal. 553.)

Cited 66 Cal. 267; 70 Cal. 492.

Chippewas, power of to select. See Indians, 5.

VII. Location of Military Land Warrants.

92. A certificate of the location of a United States military land warrant upon a quarter section of land, signed by the register of the land-office where the location was made, is prima facie evidence that the land is the property of the locator. (*Butterfield v. Central Pac. R. R. Co.*, 31 Cal. 264.)

93. A location of a United States military land warrant on a quarter section of land gives the locator or his grantee an interest in the land, and is a payment for the same. (*Butterfield v. Central Pac. R. R. Co.*, 31 Cal. 264.)

94. A location of a military land warrant on public land, made before the passage of the act of Congress, approved July 1, 1862, granting to the Central Pacific Railroad Company alternate odd sections on each side of the road, gave the locator or his grantee such an interest in the land as, coupled with possession, enables him to maintain trespass against the company for injury done to the same in constructing the road over the land. (*Butterfield v. Central Pac. R. R. Co.*, 31 Cal. 264.)

VIII. Possession of.

1. Extent of Land One can Claim.

95. The right of one who enters upon the public lands of the United States, without the consent of the government, to take possession of and hold more than one hundred and sixty acres, discussed. (*Dyson v. Bradshaw*, 23 Cal. 528.)

Cited 1 Nev. 202.

96. One who owns three hundred and twenty acres of land is not precluded thereby from acquiring and holding the actual possession of other land, and retaining the same by reason of his prior possession, as against one who enters without title. (*Slaughter v. Fowler*, 44 Cal. 195.)

Extent of land that may be sold. See post, XIV, 4.

2. What Constitutes, and Evidence of; Constructive Possession.

Rights under Possessory Act. See post, VIII, 11.

97. Nature of the possession requisite, when applied to different kinds of property, as agricultural lands, town lots covered with water, large districts where there is no timber, etc., suggested. (*English v. Johnson*, 17 Cal. 107.)

98. Mere entry on public land, without inclosing it, does not give a right of action on the possession alone. (*Wright v. Whitesides*, 15 Cal. 46.)

99. Where plaintiff relies not on the Possessory Act of the state, but on the prior possession of himself or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. (*Coryell v. Cain*, 16 Cal. 567.)

Cited 21 Cal. 324; 30 Cal. 356; 32 Cal. 20; 39 Cal. 44; 74 Cal. 15, 17; 1 Idaho, 157; s. c. 1 Idaho, N. S., 139; 3 Mont. 134; 4 Nev. 67, 69; 5 Nev. 67; 12 Nev. 354; 21 Nev. 258; 9 Utah, 30.

100. Possession must be actual and not constructive. (*Coryell v. Cain*, 16 Cal. 567.)

Validity of possession. See post, VIII, 8.

101. Where it appears that public land had been inclosed, but the fences were down in places and had become somewhat dilapidated, but it does not appear how long they had been down, nor that they had been repaired, or that any herders or other means were employed to prevent the escape of stock or intrusion of other stock, no such actual possession is shown as will defeat the right of a qualified person to enter upon such land for the purpose of filing a pre-emption or homestead claim thereupon. (*Bullock v. Rouse*, 81 Cal. 590.)

102. The commencement to build a fence for the purpose of inclosing a parcel of public land is not of itself, without the aid of other facts, a possession of the tract intended to be inclosed. (*Cummins v. Scott*, 20 Cal. 83.)

103. Fact that party has made application to United States land-office to obtain title to certain premises does not tend, even in the most remote degree, to show that such party ever had or exercised dominion and control over the premises. (*Pulliam v. Cherokee Flat B. G. Co.*, 52 Cal. 605.) Distinguished 75 Cal. 588.

104. In an action of ejectment for public lands, in which the plaintiff bases his right of recovery upon prior possession, the question is for the jury to determine whether or not the artificial barriers erected by the plaintiff and his acts of dominion were sufficient to notify the public that the land was appropriated, and to impart to the claim of appropriation the characteristic notoriety and indicia of ownership. (*Dodge v. Yates*, 76 Cal. 251.)

105. The grantee from an actual prior possessor of a tract of public land, the whole of which has been inclosed with a substantial fence, and on which valuable improvements have been erected, by entering into the actual possession of a portion of the tract acquires a constructive possession of the whole as against a subsequent intruder. (*Dodge v. Yates*, 76 Cal. 251.)

106. When a person erects a house upon a tract of public land and moves into it, but does not cultivate or inclose any part of the tract, his possession does not extend to the entire tract. (*Le Roy v. Cunningham*, 44 Cal. 599.)

107. Merely going on waste, uninclosed public land, and building or occupying a house and corral, and even subsequently cutting hay on part of the land, does not give a party any claim to or possession of the whole tract of one hundred and sixty acres. The case would be different if the party claimed and entered under the Possessory Act of this state, and pursued the necessary steps prescribed by it; or probably if he had made his entry

under the pre-emption laws of the United States. (*Garrison v. Sampson*, 15 Cal. 93.) Cited 16 Cal. 573; 32 Cal. 20, 22; 4 Nev. 69; 5 Nev. 67.

108. Where in such case—there being no claim under the Possessory Act, or the pre-emption laws of the United States—plaintiff claims one hundred and sixty acres by force of his prior possession, and a contract or consent on the part of defendant, whom he let into possession to hold the premises for him, or subject to his order, the judgment cannot be in favor of plaintiff for the whole tract, but only for the small part on which the house and corral were situated, and of which plaintiff was in the actual occupancy, there being no proof, except defendant's general consent, as above named, that defendant agreed to hold the whole tract for plaintiff. (*Garrison v. Sampson*, 15 Cal. 93.)

109. Constructive possession of what is known to be public land cannot be established except by a compliance with the provisions of the Possessory Act. (*Wolfskill v. Malajowich*, 39 Cal. 276.)

110. Has the legislature competent power to confer upon a settler upon the public lands of the United States constructive possession of any parcel of such lands, query? Per *Rhodes, C. J.* (*Wolfskill v. Malajowich*, 39 Cal. 276.)

Assignment by one in constructive possession. See post, 115.

Possession of, sufficiency of. See Ejectment, III, 3; Forcible Entry and Unlawful Detainer, VI, 6, b, D.

Entry under deed of land for gives no constructive possession. See Possession, 39.

Bona fide settlers, who are. See Railroads, 49, 50.

3. Residence; Abandonment.

111. One who has public land inclosed by a fence and a shed on it, and cuts hay on it, but does not reside on it, has possession. (*Kelly v. Mack*, 49 Cal. 524.) Cited 74 Cal. 15.

Residence under the possessory act. See post, 158, 159.

Absence for more than sixty days. See post, 145.

112. An actual settler upon state lands, who is compelled to seek a temporary residence elsewhere for the purpose of obtaining relief for a sick member of his family, does not thereby abandon his settlement. (*Greenwade v. Decamp*, 79 Cal. 1.)

113. An abandonment of a possessory right to land may be inferred from disuse and cessation of occupancy. (*Gluckauf v. Reed*, 22 Cal. 468.)

114. The right which a party acquires to public land by possession and occupancy may be lost by abandonment. An abandonment divests the title as fully as a conveyance. (*Gluckauf v. Reed*, 22 Cal. 468.) Cited 23 Cal. 536.

Abandonment of. See Abandonment, 13. Actual settlement, temporary removal. See Swamp and Overflowed Lands, 82.

Abandonment of pre-emption claim defeats right of grantee to divert water. See Water-courses, 284.

4. Assignment or Sale of Right; Taking Under Execution.

115. The right to be protected in his constructive possession is a personal right accorded to the claimant, who complies with the act, and, if assignable at all, is clearly only assignable to one who shall actually reside upon the land. (*Wolfskill v. Malajowich*, 89 Cal. 276.)
Cited 44 Cal. 494; 19 Nev. 42.

116. If the purchaser of land, who acquires possession from his grantor, contracts to pay the purchase money when his grantor obtains the title of the United States, and if this possession disables the grantor from acquiring the title of the United States, and enables the purchaser to obtain it in his own name, the purchaser must pay the purchase money, less the expense he was at in obtaining the title from the United States. (*Snow v. Ferrea*, 45 Cal. 195.)
Cited 51 Cal. 519, 520.

117. One in possession of public land sufficiently describes the same in a power of attorney by calling it his claim of land. (*Henley v. Hotaling*, 41 Cal. 22.)

Deed by one in possession passes after-acquired title. See Deeds, 289.

Mortgage by one in possession, after-acquired title passes by. See Mortgages, 242, et seq.

Possessory claims and improvements, exemption of. See Taxation, 187.

Quitclaim deed of. See Deeds, 893, et seq.

After-acquired title in, whether passes by sheriff's sale. See Executions, 277, et seq.

118. The legislation of the state from the beginning has treated the possession of public land as legal, and as vendible under execution, and has protected the title of the purchaser. (*Wilson v. Madison*, 55 Cal. 5.)

5. Entry Under Another's Occupancy.

119. One who obtains possession under permission of an occupant of public land to enter thereon as a tenant, while secretly intending to obtain possession of the land adverse to the occupant, for the purpose of claiming the land as a settler under the homestead laws, is entitled to no advantage to the prejudice of such former occupant, obtained by his fraudulent deception. (*Peterson v. Kinkad*, 92 Cal. 372.)

Entry on public land. See Forcible Entry and Unlawful Detainer, V, 1, c.

Right to enter claim where one is in possession. See Quieting Title, 12.

Entry upon in possession of another. See Forcible Entry and Unlawful Detainer, 274.

One entering under another, estoppel of to deny title of other. See Vendor and Vendee, VI.

6. Nature and Protection of Possessory Rights; Rights Against Others Entering or Against Government; Adverse Possession.

120. The possessory rights of the occupants of portions of the public lands, or of the waters

thereon, recognized by the California courts, are protected by the common law. (*Lux v. Haggin*, 69 Cal. 255.)

121. The right to be protected in the possession of the public lands in this state is founded alone on the doctrine of presumption; for a license to occupy, from the owner, will be presumed. (*Conger v. Weaver*, 6 Cal. 548.)
Cited 69 Cal. 355.

122. A person in possession of public land under a judgment giving him possession is presumed to be rightfully in possession until some one shows a right to the possession derived from the United States. (*Rich v. Maples*, 83 Cal. 102.)

123. Possession carries with it privileges and incidents of ownership against every one but the government, subject only to rights antecedently acquired. (*Orandall v. Woods*, 8 Cal. 136.)

124. A prior appropriation of the public domain establishes a quasi private proprietorship, which entitles the owner to be protected in its quiet enjoyment against all the world but the true owner, except in the case of agricultural and grazing lands, as against the privileges granted to miners. (*Tartar v. Spring Creek Co.*, 5 Cal. 395.)
Cited 6 Cal. 46; 12 Cal. 70; 14 Cal. 376; 22 Cal. 453.

125. A naked possessor of public lands is deemed in law the owner of the same, until the general government, or a person showing title under it, makes an entry upon the same, and, when this is done, the right or claim of the possessor must yield to the paramount authority of the United States, or its grantee. (*Doran v. Central Pac. R. R. Co.*, 24 Cal. 256.)

126. As against a mere trespasser, one in possession of public land will be presumed to be the owner. (*Brandt v. Wheaton*, 52 Cal. 430.)

127. A party in the actual possession of public land, to which he has no title, is to be deemed the owner as against mere intruders without title or color of title; and the fact that such party has a deed for the land from one who did not own it does not place him in a worse position, nor does it enable a trespasser to claim that he must rely on his paper title and not on his prior possession. (*Page v. Fowler*, 37 Cal. 100.)
Cited 43 Cal. 16.

128. Possession of agricultural land is prima facie proof of title against a trespasser. (*Bindge v. Smith*, 14 Cal. 380.)

129. The plaintiffs' grantor, holding under a state patent, was in the actual possession of the land in controversy, and was ousted by the defendant. In an action to recover the possession, the defense was, that the land at the time of the state location was within the limits of a pending Mexican claim, and the patent therefore void; and the court found that the defendant was a qualified pre-emptor, and had entitled himself to the rights of a pre-emption claimant, provided the land was subject to pre-emption at the time of his entry. Held, that the plaintiffs, by virtue of their prior possession, were entitled to recover the possession of the premises

from the defendant, who was a mere intruder, and it was therefore unnecessary to inquire into the validity of the plaintiffs' title. (*Fletcher v. Mower*, 56 Cal. 421. Cited 83 Cal. 109.)

Rights of settler where school land is of mineral character. See ante, III, 4.

Actions by one in possession. See post, VIII, 9.

130. A settler upon the public lands in this state, having no other title than that of occupancy, cannot, consistently with the policy of the general government and of the state in reference to such lands, be treated by the courts as a naked wrongdoer. As against persons claiming a simple privilege like that conferred upon railroad companies by the act of Congress of August, 1852, he has an equitable right to his possession and improvements which the courts will protect. (*California Northern R. R. Co. v. Gould*, 21 Cal. 254.)

Cited 24 Cal. 258; 1 Ariz. 407.

131. Mere possession of public land does not give any right as against the government, or prevent it from disposing the land as it pleases. (*Southern Pac. R. R. Co. v. Purcell*, 77 Cal. 69.)

132. A bare occupancy of public land of the United States does not vest in the occupant any rights or equities in the land, as against a subsequent congressional grant not based upon such occupancy. (*Labish v. Hardy*, 77 Cal. 327.)

False imprisonment in removal of trespasser. See Criminal Law, 1559.

Possession of island for gathering eggs does not exclude others. See Possession, 25.

Rights of one in possession, where land granted to railroad. See Railroads, 48.

Adverse possession of. See Adverse Possession, III, 2.

Prescriptive right to flood land of United States. See Watercourses, 283.

Patent, statute of limitations does not run anterior to. See Statute of Limitations, VI, 3, d.

7. Right to Growing Trees; Right to Clear Land.

Right of pre-emptor to cut timber. See post, IX, 7.

133. In an action between occupants of the public lands neither party can claim a right to the growing timber thereon under the laws of the United States. The cutting or destruction of the timber by any occupant is expressly prohibited by act of Congress of March 2, 1831. (*Rogers v. Soggs*, 22 Cal. 444.)

134. A person in the possession of public lands of the United States has a right to clear the same of scrub-oaks and other wild shrubbery, for the purpose of preparing it for cultivation. (*O'Hanlon v. Denvir*, 81 Cal. 60.)

Right to growing trees between occupants. See ante, VIII, 7.

Agreement allowing another to cut timber before pre-emption. See Contracts, 196.

8. Conflicting Rights to Possession.

135. As between two locators of public land, the rule, qui prior est in tempore, potior est

in jure, must always apply. (*Orandall v. Woods*, 8 Cal. 136.)
Cited 71 Cal. 117.

136. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the state, where neither party connects himself with the government, is considered vested in the first possessor, and to proceed from him. This possession must be actual and not constructive; and the right it confers must be distinguished from the right given by the Possessory Act of this state. (*Coryell v. Cain*, 16 Cal. 567.)
Cited 21 Nev. 258; 9 Utah, 30.

137. A personal action cannot be made the means of litigating and determining the right to the possession of real property as between conflicting claimants to the possession where the title is in the United States. (*Page v. Fowler*, 28 Cal. 605.)

138. In an action for the recovery of a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual inclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the pre-emption laws of the United States, or the possessory law of this state. (*Bradshaw v. Treat*, 6 Cal. 172.)
Cited 23 Cal. 537; 4 N. Mex. 59.

Rights of one claiming under Possessory Act against prior possessor. See post, VIII, 11.

9. Actions by Occupant.

139. Prior possession will entitle possessor to maintain action against a trespasser. (*Grover v. Hawley*, 5 Cal. 485.)
Cited 2 Wash. Ter. 64.

140. One who was in the prior actual possession of public land open to settlement under the Forfeiture Act of Congress of September 28, 1890, may maintain ejectment against a person who made a peaceable entry upon such actual possession, intending to occupy the land as a homestead, but who is not otherwise connected with the government title. (*Rourke v. McNally*, 98 Cal. 291.)

141. An action brought under the act of 1850 must show that the possession of the plaintiff has been invaded. (*O'Conner v. Corbitt*, 3 Cal. 370.)

142. Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States," that subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H's executor is offering the same for sale, and plaintiff prays an injunction and damages for the occupation, held, that the complaint sets forth no principle on which to base a claim. (*O'Conner v. Corbitt*, 3 Cal. 370.)

Rights of occupants against trespassers. See ante, VIII, 6.

Actions between claimants. See ante, VIII, 8.

Actions by occupant against pre-emptor. See post, IX, 1.

Actions by one claiming under Possessory Act. See post, VIII, 11.

Right of one in possession to sue to quiet title. See Quietting Title, II, 2.

Mere possessor cannot quiet title of one entering to claim as homestead. See Quietting Title, 12.

10. Rights of Heirs.

143. A mere occupant of unsurveyed public lands of the United States, who has taken none of the steps required by law for its pre-emption, has a mere privilege of pre-emption. Such a privilege is not an estate legal or equitable in the land, and, upon the death of the occupant, it does not descend to his heirs, nor clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another. (*Buxton v. Traver*, 67 Cal. 171.)

Right to possession may descend to executor. See Executors and Administrators, 188.

11. Possessory Act, and Rights Under.

144. The act known as the Settlers Act is unconstitutional and void. (*Anderson v. Fiak*, 36 Cal. 625, 632.)

Settlers Act, validity of. See Constitutional Law, 392, et seq.

145. The Possessory Act of 1852 is intended for the benefit of actual settlers. And where plaintiff resided upon a tract of land adjoining the land in dispute, and then located his claim under said act upon this disputed tract, by complying with its provisions so far as to mark out its boundaries, file his affidavit, inclose and plant fruit trees on about one acre of it, and occasionally work other portions thereof, but still residing on the other tract, and never actually living on this, held, that he cannot recover in ejectment against a party subsequently surveying, taking possession of, and inclosing the land preparatory to claiming it under the act of 1852; that whatever may have been plaintiff's rights during the period allowed for putting improvements on the premises, they were lost at the expiration of that period by his nonresidence. Held, further, that if plaintiff had perfected his claim by actual residence on the land, he might have absented himself for sixty days without forfeiting his rights; but that the fifth section of the act of 1852 does not apply where the party has never resided upon the land. (*Gird v. Ray*, 17 Cal. 352.) Cited 39 Cal. 279.

146. The possessory statute (Stats. 1852, p. 158) confers no right, such as will maintain ejectment, upon a settler, until all the acts required by it shall have been performed; and it does not affect the question that he has been prevented, by force or otherwise, from making his intended improvements. (*Crowell v. Lanfranco*, 42 Cal. 654.)

147. A party relying on the Possessory Act of the state must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing an actual inclosure or actual possession of the whole claim. (*Coryell v. Cain*, 16 Cal. 567.)

148. To enable a party to recover lands under the Possessory Act of this state he

must have complied with the provisions of the act. (*Sweetland v. Froe*, 6 Cal. 144.)

Cited 6 Cal. 649; 7 Cal. 311; 15 Cal. 48; 23 Cal. 408; 42 Cal. 656.

149. A party claiming land under the Possessory Act of 1852 must show compliance with the provisions of the act. He must be a citizen of the United States, must file the affidavit required by section 2, and make his improvements within the ninety days, etc. Merely residing on a part of the land, tracing lines, putting up stakes for boundaries, etc., is not sufficient. (*Wright v. Whitesides*, 15 Cal. 46.)

Cited 16 Cal. 573; 23 Cal. 408; 42 Cal. 656.

150. Where a person, with intention to take up a tract of public land under the Possessory Act (Stats. 1852, p. 158), filed his affidavit of location, and within ninety days thereafter hauled lumber upon the ground for a house, and such lumber was removed during the night, and, on his attempting to replace it next day, he was driven off with threats of violence by a band of armed men, held, that he had acquired no rights under the Possessory Act which would enable him to maintain ejectment against those who drove him off. (*Crowell v. Lanfranco*, 42 Cal. 654.)

151. In an action of ejectment for public land of the United States, by a person claiming to be entitled to the possession under the Possessory Act of April 20, 1852, evidence is admissible to show a compliance with the act, that the plaintiff had built a house upon the land, and the cost thereof, and that the defendant had torn down a part of the house. (*Gray v. Dixon*, 74 Cal. 506.)

152. If there is a defect in the affidavit taken to claim land under the Possessory Act of the legislature, passed in 1852, the defect cannot be cured by an affidavit subsequently taken under the same act to correct the same. Such subsequent affidavit, if it amounts to any thing, must be regarded as an original proceeding. (*Hawthurst v. Lander*, 28 Cal. 331.)

153. A declaration of location, under the Possessory Act of this state, described the tract of land as being in township 21; and also gave the names of the land claims adjoining it on its different sides. The tract was in township 22. Held, that this mistake did not vitiate the declaration, and that it was admissible in evidence. (*Hicks v. Whiteside*, 23 Cal. 404.)

154. In an action to recover possession of a tract of land, claimed by plaintiff under the Possessory Act of this state, evidence tending to show that at the time plaintiff filed his declaration he knew that the land in controversy, or any portion of it, was claimed by defendant, is relevant. (*Hicks v. Whiteside*, 23 Cal. 404.)

155. Where, in an action by H. against W., to recover possession of a quarter section of land, being part of the public domain, H. made claim under the Possessory Act of this state, and his statutory notice whereby the claim was made, in addition to certain specified metes and bounds, described the land as the southeast quarter of section 8, township 21 north, of range 1 east, etc., while, in fact,

the demanded premises were in township 22, instead of said township 21, held, that so much of said description as attempted to identify the land by reference to the government survey must be disregarded, because of the error in the number of the township. (*Hicks v. Whitesides*, 35 Cal. 152.)

156. Where, in such cases, by the other descriptive calls of H's said notice, by which alone his claim was designated and identified, his claim was bounded on the north by the land claims of W., which was shown to embrace the northern portion of the demanded premises, and on which for several years prior to H's claim W. had been settled, and had a part inclosed with fences, held, that H's claim included no part of W's claim because bounded by it. (*Hicks v. Whitesides*, 35 Cal. 152.)

157. Proof of the location under the Possessory Act of 1852 of a tract of one hundred and sixty acres, and of the occupation of thirty or forty acres, together with testimony that defendant's entry was within lines claimed by plaintiff as his boundaries, is not sufficient. The proof must show that the boundaries described in the affidavit include the land entered upon. (*Cummins v. Scott*, 20 Cal. 83.)

158. No one can obtain the benefit and protection of the Possessory Act of this state, and of the acts amendatory thereto, but they who actually reside upon the land. (*Wolfskill v. Malajowich*, 39 Cal. 276.)
Cited 42 Cal. 152; 13 Nev. 409.

159. The term "occupy," as employed in the Possessory Act, is equivalent to the term "reside upon." (*Wolfskill v. Malajowich*, 39 Cal. 276.)

160. In ejectment for a portion of a tract of land taken up by plaintiff's grantor under the Possessory Act of April 20, 1852 (Stats. 1852, p. 158), where it appeared that all the acts done were that such grantor, besides filing his claim and affidavit, built a fence on one side, ran furrows around the whole tract, put stakes at the corners and along the lines, occupied and cultivated a portion not embraced in the suit, and while so occupying and cultivating sold to plaintiff, but by consent remained in possession till his crop was off, held, insufficient to prove either actual or constructive possession in the plaintiff of the land sued for. (*Hughes v. Hazard*, 42 Cal. 149.)

Constructive possession under. See ante, 109, 110.

161. Where the vendor of a tract of land taken up under the Possessory Act (Stats. 1852, p. 158), remained in possession, with vendee's consent, of the only portion ever actually occupied by him, and vendee never entered under his deed, held, that whether such possession by the vendor might be considered as an entry under his deed by the vendee or not, the deed would certainly not extend the vendee's possession by construction to any portion of the tract never in the actual possession of the vendor. (*Hughes v. Hazard*, 42 Cal. 149.)

162. The two hundred dollars of improvements, pertaining to the realty, required by

the fourth section of the Possessory Act, must be made on the land claimed, before an action can be commenced to recover possession of the same. (*Hicks v. Whiteside*, 23 Cal. 404.)

163. The Possessory Act of April 20, 1852, in so far as it regulates the rights of parties in possession of public lands of the United States, was not repealed by title 8 of the Political Code, or by the act of March 3, 1874. (*Gray v. Dixon*, 74 Cal. 508.)

164. The survey of land, and making an affidavit and recording the same, in accordance with the Possessory Act of 1852, does not invest the claimant with the right to recover the possession of the land from one who was before them in the actual possession of it. (*Hawthurst v. Lander*, 28 Cal. 331.)

165. The prospective Pre-emption Act of Congress of 1841 is expressly confined to the surveyed lands, and was not extended to California at the time of the acts complained of, and the statute of this state, which protects the possession of settlers on public lands to the extent of one hundred and sixty acres, was not passed until April, 1852, long after the commencement of this suit. Under neither of these acts can the plaintiff claim any rights, and by his own showing he is a mere trespasser. (*O'Conner v. Corbitt*, 3 Cal. 370.)

166. The lines of a quarter section of government land, which are distinctly marked by natural boundaries, and by stakes placed at convenient distances, so that the lines can be readily traced, are sufficient to authorize the occupant to maintain an action for trespass thereon, under the provisions of the act of April 11, 1850. (*Taylor v. Woodward*, 10 Cal. 90.)

167. It does not matter that such lines were marked out before the passage of the act any more than it does that the possession was anterior to its passage. (*Taylor v. Woodward*, 10 Cal. 90.)

168. Nor does it make any difference when the act has been repealed, if the plaintiff's right accrued and the trespass of the defendant occurred prior to such repeal. The right of action being complete, the repeal of the act would not divest such right. (*Taylor v. Woodward*, 10 Cal. 90.)

169. In ejectment, a plea of the statute of limitations of two years, under the "Settlers Act," is no defense. (*Anderson v. Fisk*, 36 Cal. 625.)

Certified copy of affidavit and claim under Possessory Act. See Evidence, 91.

Action to quiet titles to lands in California, construction of. See Swamp and Overflowed Lands, 167.

12. Authority of President to Remove Intruders.

170. Act of Congress of March 3, 1807, entitled "An act to prevent settlement upon lands ceded to the United States until authorized by law" (1 *Lester's Land Laws*, 28), provides for the removal of intruders from the public lands by the President of the United States, and invests him with authority to act on behalf of the United States in his discretion, but does not enlarge the rights of the defendant in this case. (*McBrown v. Morris*, 59 Cal. 64.)
Cited 73 Cal. 256; 75 Cal. 588.

IX. Pre-emption.**1. What Land Subject to; Priority and Actions Between Possessors and Pre-emptors.**

171. Section 2257 of the Revised Statutes does not contain any thing more than was enacted by the acts of Congress on the subject of pre-emptions previously in force. (*McBrown v. Morris*, 59 Cal. 64.)

172. The act of Congress of May 30, 1862, authorizing settlements to be made on unsurveyed lands, did not have the effect of extending the right of pre-emption to the sixteenth and thirty-sixth sections in the state of California. (*Sherman v. Buick*, 45 Cal. 656.)

173. Facts that pre-emptor settles upon and improves south half of quarter section, and files his declaratory statement for that and the south half of an adjoining quarter section, do not preclude another person from afterwards settling upon and pre-empting the north half of the first-named quarter section. (*Hess v. Bolinger*, 48 Cal. 349.)

174. The laws of the United States do not authorize an entry upon public land in the actual possession of another, for the purpose of making a settlement, though made by one qualified to purchase from the government or to acquire a homestead, and made with intent to acquire the title in some lawful mode. (*Rourke v. McNally*, 98 Cal. 291.)

175. One person cannot enter upon land in the possession of another for the purpose of pre-emption. (*Kendall v. Waters*, 68 Cal. 26.)

176. The right of pre-emption under the laws of the United States cannot be acquired by intrusion and trespass upon lands in the actual possession of others. (*Davis v. Scott*, 56 Cal. 165.)

Cited 59 Cal. 74; 63 Cal. 517; 81 Cal. 593, 595; 92 Cal. 377; 1 Ariz. 407; 17 Nev. 195.

177. If the plaintiff in ejectment relies, to recover, only on the fact that the secretary of the interior awarded him the land as a pre-emptor in a contest with the defendant, and that he paid for the land and obtained the receipt of the receiver of the local land-office, and that he had cultivated and improved a part of the land, the defendant may prove that when the plaintiff entered on the land a large portion of it was, and ever since has been, in the adverse possession of the defendant or his grantors. (*Conlan v. Quinby*, 51 Cal. 412.) Cited 84 Cal. 502.

178. The land in controversy was within a larger tract, which for nearly twenty years had been inclosed by fences, and occupied and used for dairy purposes by the plaintiff and his tenants. The defendant, who was a qualified pre-emptor, entered with the intention of pre-empting the land, and within due time filed his declaratory statement. Held, in an action of ejectment, that the defendant did not acquire a right to pre-empt the land, and that the plaintiff was entitled to recover. (*McBrown v. Morris*, 59 Cal. 64, cited 59 Cal. 318, 71 Cal. 140, 81 Cal. 595, 92 Cal. 377, 1 Ariz. 407, 17 Nev. 195; *McBrown v. Wilson*, 59 Cal. 318; *McBrown v. Emerson*, 59 Cal. 319.)

179. A qualified pre-emptor, intending at the time of settlement to take the whole of a quarter section of land, can initiate a valid claim to the whole, by performing acts of settlement on one-half, while the other half is inclosed and cultivated by another person before and at the time the attempt begins. (*Haven v. Haws*, 63 Cal. 514.) Cited 78 Cal. 298; 83 Cal. 170.

180. A qualified pre-emptor may enter upon public land of the United States, as against one whose only right is that of a prior possessor, and may hold the same until he can prove up and pay for the land. (*Huff v. Doyle*, 50 Cal. 16.)

Pre-emption of land in occupation of another. See post, 192.

181. In action to recover possession of public land, where the plaintiff claims to recover by reason of prior possession, and the defendant claims as a pre-emptor under the laws of the United States, he is entitled to prove the necessary facts to establish his pre-emption right. (*Tyler v. Green*, 28 Cal. 406.) Cited 68 Cal. 186.

182. If the defendant, in an action to recover the possession of land, justifies his entry upon the prior possession of the plaintiff on the ground that the land was public land, subject to the pre-emption laws of the United States, and that he entered in pursuance of said laws, with intent to pre-empt, occupy, and enter the land in accordance with the provisions of the same, it devolves on him to show that he is one of the persons entitled to the benefit of said laws. (*Page v. Hobbs*, 27 Cal. 483.)

183. Neither the act of 1858 as to the location of seminary land, nor the act of Congress donating it, allows mineral land to be located. (*Burdge v. Smith*, 14 Cal. 380.) Cited 15 Cal. 105; 23 Cal. 456.

Townsites, pre-emption of lands in. See post, XII.

184. Replevin for hay cut on public lands cannot be maintained by a prior possessor against one who was in adverse possession, claiming a pre-emption right, when he cut the hay. (*Page v. Fowler*, 28 Cal. 605.) Cited 39 Cal. 415, et seq; 42 Cal. 15; 1 Idaho, N. S., 363.

185. If one in possession of public land plows it and sows grain, the title to the growing crop is in him, as against one who afterwards enters and attempts to claim it as a pre-emptor, but who does not get into possession. (*West v. Smith*, 52 Cal. 322.)

186. Where one enters upon public lands in the prior possession of another, and the prior possessor brings an action against him to replevy hay cut by him on the land, he has a right to prove that he has filed his declaratory statement of intention to pre-empt, and possesses the necessary qualifications of a pre-emptor, to show his adverse possession. (*Page v. Fowler*, 28 Cal. 605.)

187. If P. is in the possession of public land, and, while thus in possession, F. and others, being qualified pre-emptors, enter into actual possession in good faith to pre-empt the same, and are proceeding according to the forms of the law to perfect their pre-emption,

their possession is adverse under color of title, and P. cannot maintain a personal action for hay cut by them on the land, even if P. claims under a rejected Mexican grant, and is proceeding to perfect a pre-emption under a special act of Congress. Whether F. and others acquire actual possession is a question of fact. (Page v. Fowler, 37 Cal. 100.) Cited 72 Cal. 374.)

188. It is not material in such cases whether the persons thus entering upon the prior possession are qualified pre-emptors, provided they enter in good faith, believing themselves entitled to pre-empt, and entered for that purpose. (Page v. Fowler, 37 Cal. 700.)

189. One who is in possession of public land, and has secured a right of pre-emption thereto under the laws of the United States, stands in such relation to the United States government as entitles him to retain the possession as against a prior possessor who is a mere trespasser. (Kile v. Tubbs, 28 Cal. 402.)

Pre-emption of lands within exterior limits of Mexican grant. See Mexican Lands, I, 12. Rejected Mexican grant is subject to pre-emption. See Mexican Lands, 284, 285.

2. Conditions Precedent to Right of; Citizenship.

190. No estate vests in a pre-emptor until he has performed the conditions required and has proved up and paid for the land. (Thrill v. Delaney, 69 Cal. 188, 192.)

191. One claiming to hold public lands as a pre-emptor, as against a prior possessor, must show that he is one of the class of persons entitled to pre-empt, and that he has performed the acts prescribed by the pre-emption laws, or the prior possession will prevail. (Page v. Hobbs, 27 Cal. 483.) Cited 87 Cal. 298.

192. To create a right of pre-emption, there must be settlement, inhabitation, and improvement by the pre-emptor—conditions which cannot be met when the land is in the occupation of another; and therefore settlement upon one piece of land can confer no rights to another adjacent to it, which, at the commencement of the settlement, is in the possession of others, though upon a subsequent survey by the government it proved to be a part of the same sectional subdivision. (Hosmer v. Duggan, 56 Cal. 257.) Cited 59 Cal. 74; 81 Cal. 595; 1 Ariz. 407; 17 Nev. 195.

193. It is essential to the right of a party to enter land under the pre-emption law, that proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district. (Chapman v. Quinn, 56 Cal. 266.)

194. One claiming a right of pre-emption to land must prove the existence of the state of facts which the law requires to give him a pre-emption right to the premises, and may go behind his patent for this purpose. (Megerle v. Ashe, 33 Cal. 74.) Cited 40 Cal. 377.

195. Where the defendant claimed title to the premises as a part of a pre-emption claim

located by him, he must prove an inclosure of, or marked and visible boundaries embracing the lot in dispute. (Larue v. Gaskins, 5 Cal. 164.)

196. The existence of the conditions making one a pre-emptor, and the performance of the acts necessary to give a right of pre-emption, are facts for the jury to find from the evidence, and not for the court to determine. (Megerle v. Ashe, 33 Cal. 74.)

197. The fact that an appellant under the pre-emption laws of the United States, after filing his declaratory statement, made a declaration of his intention to become a citizen, is but evidence tending to prove that at the time he was not a citizen, but would not necessarily prove fraud on the part of the applicant. (Burrell v. Haw, 40 Cal. 373.)

Purchaser of land from state must be citizen. See post, XIV, 8.

Right of alien to pre-empt land. See Aliens, III, 2.

3. Declaratory Statements.

198. There are some classes of lands subject to pre-emption which may be purchased by pre-emptors without filing declaratory statements, such as lands reserved for railroad purposes which have been settled on; and one attacking a patent issued to a pre-emptor, on the ground that no declaratory statement was filed, must show that it belonged to that class of lands to purchase which a declaratory statement is required. (Collins v. Bartlett, 44 Cal. 371.) Cited 75 Cal. 297.

199. A party who desires to avail himself of the pre-emption laws, authorizing a settlement on unsurveyed land, must file his declaratory statement within three months after the filing of the township plat. (Damrell v. Meyer, 40 Cal. 166, cited 45 Cal. 25, 47 Cal. 485, 77 Cal. 261; Megerle v. Ashe, 47 Cal. 632.)

200. One who settles on unsurveyed public land as a pre-emptor, but who fails to file with the register of the proper land-office his declaratory statement within three months after the plat of survey of the land is filed in the register's office, loses his pre-emption claim, as against one who in the mean time has taken the necessary steps to acquire the title to the land. (Poppe v. Athearn, 42 Cal. 609.) Cited 68 Cal. 188.

201. The filing of a declaratory statement in the register's office before the surveyor general files the plot of the survey is premature and of no effect. (Daniels v. Lansdale, 43 Cal. 41.) Cited 56 Cal. 578; 69 Cal. 433, 438.

202. Courts have no power to dispense with the requirement of the act of Congress that pre-emptors must file their declaratory statements within three months after the return of the plat to the land-office. (Megerle v. Ashe, 33 Cal. 74.) Cited 40 Cal. 170; 42 Cal. 618.

203. The question whether the declaratory statement filed by a pre-emptor includes a piece of land in controversy is to be decided on the face of the statement, in the light of

the surrounding circumstances. (*Hess v. Boller*, 48 Cal. 349.)

204. A declaratory statement for the purpose of pre-empting lands, or the register's certificate of the filing of such statement, confers no title. It is merely an application, an offer to purchase, after the requisite proof of residence, qualifications, etc., shall be made. (*Hemphill v. Davies*, 38 Cal. 577.)

205. Section 2261 of the Revised Statutes of the United States does not prohibit a pre-emptor from filing a second declaration of intention to pre-empt the same tract of land described in a former declaration, when, by reason of defects or other reason, the first declaratory statement has become unavailing, and there have intervened no rights of third persons. (*Cumens v. Cyphers*, 56 Cal. 383.)

Filing new declaration on execution sale of pre-emption right. See post, IX, 8.

4. Payment Under; Receiver's Receipt or Certificate.

206. A receiver's receipt for land pre-empted in a United States land-office contains the whole substance of an official certificate of purchase, and ejectment may be maintained on the title and right of possession evidenced by such certificate. (*Witcher v. Conklin*, 84 Cal. 499.)

207. Absence of any record in local land-office showing payment of the purchase money does not overcome the receiver's receipt as evidence of payment. The making of such record is a matter between the officer and the government, and cannot affect the rights of the purchaser under the certificate of the receiver, which is sufficient evidence that the pre-emptor had taken all the necessary steps toward pre-empting the land. (*Witcher v. Conklin*, 84 Cal. 499.)

208. A certificate of the receiver of a land-office of the United States that a person therein named has made full payment for a tract of land therein described, under a pre-emption entry, is evidence that the person to whom it is given has taken the necessary steps towards pre-empting the land, and has paid for the same, and establishes in such person a right to the possession of the land, as against one who shows no title. (*McDonald v. Edmonds*, 44 Cal. 328.)

Cited 75 Cal. 588; 84 Cal. 502, 504.

Receiver's receipt as evidence. See post, XI.

209. Certificate of pre-emption does not tend to show actual possession of the land in the party to whom it was issued. (*Pickard v. Kelley*, 52 Cal. 89.) Distinguished 75 Cal. 588.

210. When a pre-emptor of public land of the United States pays for the land, and takes the receiver's receipt, he thereby becomes the equitable owner of the land, and the government cannot thereafter sell it or hold it open to pre-emption by another, and a subsequent settlement and filing upon the land by another gives no title or right whatever. (*Witcher v. Conklin*, 84 Cal. 499.)

211. A pre-emptioner on public lands, by paying for the same and obtaining a certifi-

cate of purchase, acquires only an equitable title to the land, which entitles him to a conveyance of the legal title by a patent from the government. (*Kenyon v. Quinn*, 41 Cal. 323.)

212. Where a person, possessing all the necessary qualifications of a pre-emptor, and having complied with the requirements of the pre-emption laws, is permitted by the commissioner of the land-office at Washington to enter certain public land which is subject to pre-emption, and to pay therefor, receiving from the government the appropriate evidence of payment, the right thus acquired relates back to the inception of the proceedings taken by him for its acquisition under the pre-emption laws, and takes priority over a subsequent location under the Soldiers' Additional Homestead Act of March 3, 1873. (*Cothrin v. Faber*, 68 Cal. 39.)

Withdrawing land from sale after payment. See post, XIV, 6.

5. Proof of Claim.

213. The fact that a pre-emption claim was made should be proved by documentary evidence; but the facts upon which the claim rests cannot be proved, as against a person claiming under the United States by another title, by recitals in opinions of the commissioner of the general land-office, or the secretary of the interior. (*Megerle v. Ashe*, 33 Cal. 74.)

Receiver's receipt or certificate as evidence. See ante, IX, 4.

6. Who may Question.

214. A person not in privity with the source of paramount title (the United States) cannot question the validity of a pre-emption allowed by the United States. (*Mahoney v. Van Winkle*, 33 Cal. 448.)

Pre-emptor holds against state patentee, when. See ante, 62.

Bona fide settlers, who are. See Railroads, 50, et seq.

State cannot select lands in possession of pre-emptor under United States. See ante, 64, 65.

7. Right to Cut Timber.

215. Pre-emptor of public land, before payment, has no right to cut the timber therefrom, unless it is cut either for the use of the navy, or to enable the pre-emptor to cultivate the land. (*Ladda v. Hawley*, 57 Cal. 51.)

Right of one in possession to cut trees or clear land. See ante, VIII, 7.

8. Assignment or Sale by Pre-emptioner; Execution Sale of Interest.

216. The valuable privilege of pre-emption attaches to the entire property, and is therefore assignable. (*Laffan v. Naglee*, 9 Cal. 662.)

Fraudulent vendee of pre-emption, rights on obtaining patent. See Fraudulent Conveyances, III, 3, d.

217. Right to a pre-emption in public lands is not assignable. (*Whitney v. Buckman*, 13 Cal. 536.)

Cited 12 Mont. 287.

218. After a pre-emptor has made the necessary proofs, and paid for the land, and re-

ceived a certificate of purchase, and before the patent issues to him, he may make a valid sale of the land. (Thurston v. Alva, 45 Cal. 16.)

Cited 45 Cal. 25; 84 Cal. 504; 16 Nev. 242.

219. All transfers of right of pre-emption are void by the statute; and the sale and delivery of possession of the land to another extinguishes all the incipient pre-emption rights which the first occupant may have acquired. (Quinn v. Kenyon, 38 Cal. 499.)

Cited 43 Cal. 514.

220. The purchaser, if he had the proper qualifications, may acquire a new pre-emption right of his own, provided he can do it before a right should attach in any other person; but it would only date from the time he himself performed the necessary acts. (Quinn v. Kenyon, 38 Cal. 499.)

221. The fact that a subsequent pre-emptor has purchased the claim of a prior pre-emptor, and that the abandonment of the pre-emption claim was induced by the purchase, does not render the subsequent pre-emption entry of the purchaser fraudulent or illegal; nor can the grantee of a water right claiming under the first pre-emptor be considered as defrauded by the subsequent pre-emption of the land by the purchaser from his grantor. (Conkling v. Pacific Improvement Co., 87 Cal. 206.)

222. Evidence that a party who entered on land was a qualified pre-emptor, and that he entered upon it for the purpose of pre-empting, and took the necessary steps to acquire a pre-emption right, is not admissible for the purpose of showing the good faith of the possession of one who entered upon the same land under a deed from the pre-emptor, but who was not qualified to pre-empt. (Iburg v. Suanet, 47 Cal. 265.)

223. If a qualified pre-emptor enters upon land in the prior possession of another, and enters in good faith for the purpose of pre-empting, and then sells and delivers possession to one who is not a qualified pre-emptor, the possession of the one who is not a qualified pre-emptor is tortious as against the prior possessor. (Iburg v. Suanet, 47 Cal. 265.)

224. The question whether a pre-emption claim on the public lands is subject to seizure and sale, under an execution against the pre-emptor, not decided. (Kenyon v. Quinn, 41 Cal. 325.)

225. The sale of a possessory right held under a declaration to pre-empt, at sheriff's sale, and the subsequent eviction of the party in possession by the purchaser at such sale, under a judgment in ejectment, is no impediment to the filing, by the party evicted, of a new declaration of intention to pre-empt, and the perfecting of the same, under a new settlement, on the same subdivision of the public lands, and embracing the same lands from which he had been evicted. (Montgomery v. Whiting, 40 Cal. 294.)

Cited 3 Mont. 319, 320, 334.

226. A judgment creditor, by a purchase at a sale under execution, of land to which the judgment debtor had only a pre-emption right, obtains no interest in the land which

will enable him to procure the title under the pre-emption laws of the United States. (Moore v. Beese, 43 Cal. 511.)

Conveyance of pre-emption right to one purchasing improvements. See post, X.

Mortgage by pre-emptor. See post, IX, 9.

Sale of pre-emption claim subject to mortgage, after acquired title. See Mortgages, 386.

9. Mortgage by Pre-emptor.

227. A party in possession of public land, claiming title to it, must be presumed to be the owner of it, and can mortgage it. (Houseman v. Chase, 12 Cal. 290.)

228. The possession of public land, whether taken for the purpose of getting a pre-emption right, or any other purpose, or the land itself may be mortgaged; and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it. (Whitney v. Buckman, 13 Cal. 536.)

Cited 12 Mont. 287.

229. A mortgage by a pre-emption claimant before entry is not void, and does not fall within the terms of the Revised Statutes of the United States, declaring that "all assignments and transfers" of the right of pre-emption "prior to the issuing of the patent shall be null and void." (Stewart v. Powers, 98 Cal. 514.)

230. A mortgage on public land, or the improvements thereon, is not void because it does not follow the provisions of the Chattel Mortgage Act. That act gives a new remedy, but does not take away the old. (Haffley v. Maier, 13 Cal. 13.)

231. The mortgagor, having mortgaged the land as his own property, is estopped, as are his privies in estate, from saying it is public land. (Haffley v. Maier; 13 Cal. 13.)

Oited 31 Cal. 457.

232. A title derived by patent from the United States, under the pre-emption laws, may be sold under foreclosure to satisfy a mortgage given by a pre-emptor on the land pre-empted prior to making his final proofs and entry. (Stewart v. Powers, 98 Cal. 514.)

233. D. mortgaged to plaintiff a tract of land on which D. resided, intending to claim the same as a pre-emptor. Thereafter D. filed his petition in insolvency and in due course received his final discharge. Thereafter D. filed his claim to said land as a pre-emptor; plaintiff furnished the money and in due course a patent issued to D. Thereafter D. and wife conveyed by absolute deed to defendant N. Thereafter D. dying intestate, his wife—defendant J.—administered on the estate, which was insolvent. Thereafter plaintiff brought action to foreclose against J., as administratrix, and N., but expressly waived judgment against the estate of D. for any deficiency. In answer J. confessed the complaint; but N. set up, as ground of equitable defense, the said insolvency proceedings and discharge of D., and the deed containing full covenants of title. To the answer of N. there was no replication filed. Plaintiff had judgment as prayed for. Held, (1) that said new matter was immaterial; (2)

that as no judgment passed against the estate, section 151 of the Probate Act had no application, and the judgment as to interest after administration commenced was proper: (3) that the title acquired under said patent inured to the benefit of plaintiff; and (4) that plaintiff was entitled to enforce his mortgage against the land, notwithstanding the personal liability of D. for the debts may have been barred by said discharge. (*Christy v. Dana*, 34 Cal. 548.)

234. If a qualified pre-emptioner, who is residing on a tract of land which he desires to pre-empt, executes a mortgage on the same to secure a debt, a court of equity will not set it aside for the reason that the statute prohibits him from perfecting his pre-emption after he executes the mortgage, and that he gave the mortgage in ignorance of the law. (*Douglas v. Gould*, 52 Cal. 656.)

10. Survival of right to Heirs.

235. Under section 2269 of the Revised Statutes of the United States, the right to pre-empt upon the death of a pre-emptor survives only for the benefit of his heirs. (*Elliott v. Figg*, 59 Cal. 117.)

Rights of heirs of occupant of lot in town. See post, XII.

X. Improvements on Public Lands; Water Rights on.

Sale of land on which there are improvements. See post, XIV, 5.

236. Improvements erected upon public lands of the United States, by one in the mere possession thereof, may be sold, and constitute a good consideration for the promise of the buyer to pay the agreed price. (*O'Hanlon v. Denvir*, 81 Cal. 60.)

237. A party who has erected improvements on land, and has sold them to another, cannot afterward, by making a survey and filing affidavit with the county recorder, acquire any right to the possession of land in the possession of another. (*Sweetland v. Froe*, 6 Cal. 144.)

238. And, if he conveys subsequently to the same person who purchased the improvements, the latter acquires no rights to any portion of the land attempted to be pre-empted, except that covered by his actual inclosure. (*Sweetland v. Froe*, 6 Cal. 144.)

239. The act of the legislature of this state (Stats. 1867-68, p. 708), allowing those who have put improvements on lands of the United States to remove the same within six months after the lands shall have become the private property of any person, in so far as it relates to improvements which are a part of the realty, is void, because in conflict with the act admitting this state into the Union. (*Collins v. Bartlett*, 44 Cal. 371.) Cited 48 Cal. 163; 63 Cal. 24.

240. The legislature of this state cannot authorize parties who have placed improvements, which have become a part of the realty, on public lands of the United States, to remove the same after the lands have become private

property. (*Pennybecker v. McDougal*, 48 Cal. 161.)

Cited 51 Cal. 596.

241. If buildings and fences, which are erected on public lands of the United States, are not attached to the soil, and are not a part of the realty, the United States has no interest in them, and they do not pass to a purchaser from the United States, and the person who constructed them has a right to remove them after a patent has issued to the purchaser. (*Pennybecker v. McDougal*, 48 Cal. 161.) Cited 7 Nev. 148.

242. All improvements on public lands of the United States which become a part of the realty pass to the purchaser from the United States. (*Collins v. Bartlett*, 44 Cal. 371.) Cited 51 Cal. 596.

Personalty affixed to public land. See Fixtures, II, 4.

Improvements on, power to tax. See Taxation, 102.

Water flowing over public lands, rights in. See Watercourses, XIV, 2, f.

Appropriation of springs on public lands. See Watercourses, VIII.

Non-navigable streams on. See Watercourses, III.

Rights of one appropriating water as against subsequent purchaser from United States. See Watercourses, XIV, 2, f.

Right to construct dam on public land. See Watercourses, 60.

Ditches on public land, protection of. See Watercourses, 118.

Right to construct ditch across public land. See Watercourses, XII, 2.

Adverse possession of water on public land. See ante, 120; Watercourses, XIV, 2, g, A.

Prescriptive right to flood land of the United States. See Watercourses, 283.

XI. Homesteads.

243. A settlement cannot rightfully be made upon improved land in the actual possession of another, for the purpose of making a homestead entry, even though the land is public land, open to homestead entry, and the party entering thereon possesses all the requisite qualifications to make the entry. (*Peterson v. Kinkead*, 92 Cal. 372.)

244. This rule, that a homestead entry upon public land in the actual possession of another is invalid, does not apply where the possession is not actual but merely constructive. (*Goodwin v. McCabe*, 75 Cal. 584.)

245. A homestead entry upon public land in the actual possession of another is invalid, although no force be used to gain possession. (*Goodwin v. McCabe*, 75 Cal. 584.)

246. A party who makes a valid homestead entry under the laws of the United States, and pays what is required, has a right to the possession as against third persons, and can defeat an action of ejectment brought upon a prior possession. (*Goodwin v. McCabe*, 75 Cal. 584.) Cited 81 Cal. 595; 92 Cal. 377.

247. Mineral land of the United States located and chiefly used by the owner as a placer mining claim, but also used as a place of residence for himself and family, and to some ex-

tent for pasturing stock and raising vegetables, is subject to selection as a homestead. (*Gaylord v. Place*, 98 Cal. 472.)

248. The fact that the land in controversy was, at the time of the filing of the application of the plaintiff's grantor for a homestead thereon, within the exterior boundaries of a Mexican grant does not render the homestead claim void, if the grant was a floating one, and the land in controversy was excluded from the final survey. (*Grant v. Oliver*, 91 Cal. 158.)

249. Whether a pre-emption claimant of land had possession and a pre-emption right to it, which could not be invaded by the entry of a homestead claim, is a matter to be considered and determined by the land department upon a contest of the homestead right, and the decision rendered thereupon against the possession and right of the pre-emption claimant must be regarded as final. (*Stewart v. Sutherland*, 93 Cal. 270.)

250. An unauthorized inclosure of public land of the United States by a mere trespasser cannot prevent a homestead entry of the land by a citizen of the United States, who goes peaceably upon a portion of the tract, and in other respects complies with the law. (*Whittaker v. Pendola*, 78 Cal. 296.)

251. The lands in controversy were indemnity school lands selected by the state in lieu of a portion of a sixteenth section included within an Indian reservation. The selection was subsequently canceled by reason of the relinquishment by the United States of the reservation. Prior to the cancellation, the grantors of the plaintiff purchased the lands of the state in good faith, and a patent was issued to them. Ever since the date of their purchase the plaintiff and his grantors have been in the actual possession of the land, cultivating and improving it. Subsequent to the cancellation, and while the plaintiff was so in possession, the defendants, each of whom were qualified to make a homestead entry, applied to enter different portions of the land under the United States homestead laws, and afterward entered thereon, built houses, and exercised other acts of ownership over the same. The action was brought to quiet the title of the plaintiff against the homestead claims of the defendants. Held, that the title acquired by the plaintiff, even conceding it to be bad as against the United States, must prevail as against the defendants, because the latter, having forcibly entered upon the land while in the actual possession of the plaintiff, could not acquire any rights under the homestead laws. (*Hambleton v. Duhain*, 71 Cal. 136.)

Rights of holder of certificate of purchase against one filing homestead claim. See post, 431.

Prior occupant may maintain ejectment against homestead claimant. See ante, VIII, 9.

252. No estate in the land will vest in a homestead claimant until he has complied with the conditions prescribed by law. (*Thrifty v. Delaney*, 69 Cal. 188, 194.)

253. Bare entry of a homestead does not confer a right to or estate in the land, or a

right to its possession, as against the government. (*Thrifty v. Delaney*, 69 Cal. 188, 194.)

254. The receipt of the receiver of the United States land-office for payments upon a homestead entry are admissible to show such payments. (*Goodwin v. McCabe*, 75 Cal. 584.)

255. The production of the receiver's receipt is sufficient prima facie proof of a homestead entry in the United States land-office. It must be presumed that the official duty of the register and receiver was regularly performed in accordance with the department rules, of which the court takes judicial notice. (*Whittaker v. Pendola*, 78 Cal. 296.)

256. By the terms of the act of March 23, 1874, every qualified homestead claimant who has made a homestead entry according to law is deemed to have title and to be in possession of all the land described in the entry, as against trespassers, and all persons not having a superior right, so long as he resides thereon and complies with the law. Such homestead claimant is therefore entitled to recover the whole premises in ejectment against a trespasser, who has held part thereof under an inclosure. (*Whittaker v. Pendola*, 78 Cal. 296.)
Cited 83 Cal. 169.

257. There is nothing in the act of Congress of May 20, 1862, granting homesteads to settlers on public lands, which forbids a voluntary alienation of the land by the grantee who has acquired the same as a homestead. (*Kirkaldie v. Larrabee*, 31 Cal. 455.)
Cited 12 Mont. 287.

258. Section 2296 of the United States Revised Statutes does not prohibit the voluntary mortgaging of land entered as a homestead. (*Orr v. Stewart*, 67 Cal. 275.)

259. A tract of land claimed as a homestead under the laws of the United States, and patented to the claimant, is exempt from execution sale for a debt contracted by the patentee before the patent was issued, even if the patentee sells the land before the debt is put into a judgment. (*Miller v. Little*, 47 Cal. 348.)
Cited 5 Or. 350.

260. When it is claimed that the land department erred in deciding that a homestead claim was not forfeited by the conveyance of part of the premises, the complaint must show that the fact that such conveyance was made was proved, and found to be true by the land department. If the conveyance was made before the homestead claim was filed, it is not forbidden by law. If it is not alleged how much was conveyed, or for what purpose, it will be considered against the pleader that the conveyance was for a purpose permitted by section 2288 of the Revised Statutes of the United States. (*Hays v. Steiger*, 76 Cal. 555.)

261. After an entry is made, and before the patent is issued, for a soldier's additional homestead right, he may sell the land, and pass a good title thereto; and such rights will be deemed assignable, where there is nothing to show that the assignments were not made after the entries of the homesteads in the local land-office. (*Stewart v. Sutherland*, 93 Cal. 270.)

262. The provisions of chapter 5 of the United States Revised Statutes, requiring a homestead claimant of public lands to be an occupant thereof, and restricting his right to alienate the same prior to the issuance of the patent, are not applicable to the additional homesteads allowed to honorably discharged soldiers and sailors, under section 2306 of the Revised Statutes. Under the restrictions imposed by the commissioner of the general land-office, such additional homesteads may be located and entered by an agent or assignee of the claimant, and may be alienated by him prior to the issuance of the patent. (*Rose v. Nevada etc. Wood and Lumber Co.*, 73 Cal. 385.)

Cited 86 Cal. 604; 91 Cal. 162; 93 Cal. 275; 94 Cal. 289.

263. An additional homestead acquired by a soldier under section 2306 of the Revised Statutes may be alienated prior to the issuance of the patent therefor; and a power of attorney authorizing a conveyance of such homestead, and a conveyance thereof pursuant to the power, executed prior to the issuance of the patent to his grantor, are admissible in evidence to sustain the right of the grantee to sue in ejectment for the land. (*Grant v. Oliver*, 91 Cal. 158.)

264. Upon the death of a husband, who has taken up and entered a homestead, under the act of Congress of May 20, 1862, if the five years have not expired for a patent to issue, the widow, upon performing the remaining conditions, is entitled to a patent, and acquires a title in fee, free from all trust in favor of the children, whether adults or minors. (*Jarvis v. Hoffman*, 43 Cal. 314.) Cited 67 Cal. 174.

Homestead claimants, power to hold patentee as trustee. See post, XX, 14.

Agreement to file homestead claim for benefit of partnership. See post, XV.

Homestead entry after sale on execution. See Executions, 278.

Homestead claimants' rights are subject to claims of prior appropriator of water. See Watercourses, 279.

Quitclaim deed of United States homestead claim. See Deeds, 400.

Husband entering homestead claim before marriage, rights of. See Homesteads, 55.

XII. Townsites, Pre-emption in; Rights of Possession of Lots in.

265. The effect of the act of Congress of July 1, 1864 (U. S. Stats. 1863-64, p. 343), in relation to the disposition of coal lands and of town property on the public domain, was to withdraw lands upon which cities and towns had been established before its passage, or might be thereafter established, from the operation of the general statutes in relation to the disposal of public lands, and to provide a new system for their disposal. (*Jones v. Petaluma*, 36 Cal. 230.) Cited 38 Cal. 558.

266. The effect of said act as to towns and cities which had been established, and those thereafter to be established, on public lands, was to secure to them privileges which the

former had usurped and the latter would need. (*Jones v. Petaluma*, 36 Cal. 230.)

267. The effect of the act in said cities and towns was to dedicate to public use so much of the public land as had been therein appropriated as streets, squares, and alleys, and to confer a license for a like appropriation in the future. (*Jones v. Petaluma*, 36 Cal. 230.)

268. Neither the tenth section of the act of 1841, nor the act of May 23, 1844, entitled "An act for the relief of citizens of towns upon the lands of the United States, under certain circumstances," nor the act of March 3, 1853, providing "for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," in effect reserves townsites from sale. (*Doll v. Meador*, 16 Cal. 295.)

269. The Municipal Pre-emption Act of May 23, 1844, confers a right upon the corporate authorities, or county judges, to purchase the land forming a townsite, at the minimum government price, for the benefit of the inhabitants thereof, before the commencement of the public sale of the body of the land in which the townsite is included, and if such right be not exercised, such lands, with the general mass, are offered for sale to the public. (*Doll v. Meador*, 16 Cal. 295.)

270. The prohibition against pre-emption of lands in an incorporated city does not prevent their acquisition in other modes. (*Leviston v. Ryan*, 75 Cal. 293.)

271. A patent of the United States for the lands of a pueblo, confirmed under the act to settle private land claims in California, is issued in pursuance of authority conferred by said act, and is admissible in evidence. (*Canfield v. Thompson*, 49 Cal. 210.)

272. The fact that the mayor of a city has no knowledge of the issuance by the United States of a patent for the pueblo lands of the city is prima facie evidence that no such patent has been issued. (*Morris v. De Celis*, 51 Cal. 56.)

273. In legislating in respect to towns which had already grown up on the public domain, and others thereafter to be established, Congress had in view two objects, to wit: (1) To protect the equitable rights of those in the bona fide occupation of lots in towns already established, and to enable persons to acquire small parcels at a nominal price in towns thereafter to be located; (2) to enable the inhabitants of the existing or proposed town to establish proper streets, blocks, and squares adapted to the particular locality. (*Aleman v. Petaluma*, 38 Cal. 553.) Cited 65 Cal. 165; 19 Col. 598; 12 Nev. 71.

274. In legislating in respect to towns grown up on the public domain, one of the objects of Congress was the protection of the titles of bona fide occupants. (*Eversdon v. Mayhew*, 65 Cal. 163, 165.)

275. The act of Congress entitled "An act for the disposal of coal lands and of town property in the public domain," approved July 1, 1864, and the supplementary act thereto, approved March 3, 1865, were designed for the benefit and relief of such persons as, having settled upon the public land,

might desire to lay out and establish a town or city, including their possessions; or, having already laid out a town or city on unoccupied public lands, and settled upon lots or municipal subdivisions within the boundaries thereof, to enable the occupants of such town or city lots to procure a title thereto from the United States at a minimum price; and to enable other parties desiring to purchase lots within an established city or town, upon the public lands, to procure a valid title thereto. (*Jones v. City of Petaluma*, 38 Cal. 397.)

Cited 65 Cal. 165; 10 Col. 205; 12 Nev. 71; 3 Wash. Ter. 80; 3 Wash. 651.

276. In the passage of these laws Congress had in view the individual interests of bona fide settlers upon small parcels of public lands, as well as the common interests of a community of persons, so contiguously settled as to justify the establishment of a city or town, and did not intend the act for the especial benefit of municipal organizations or corporations. (*Jones v. City of Petaluma*, 38 Cal. 397.)

277. Under the act of Congress of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns," the corporate authorities of the municipalities were mere trustees for the occupants of the lands within the limits of the municipality, and were to execute their trust under such regulations as might be prescribed by the legislature. (*Cerf v. Pfleging*, 94 Cal. 131.)

278. When a portion of the public domain had been laid out as a town, into streets, blocks, and lots, settled upon, occupied and appropriated, prior to the act of July 1, 1864, persons who, in good faith, were in the actual possession and occupation of any one or two lots, or other municipal subdivisions, with substantial improvements thereon, then actually existing, or subsequently represented by a proper map, plat, etc., filed, certified, and verified by parties assuming to act for the inhabitants of the town, with the view of securing the benefits and privileges contemplated by said act, acquired legal rights, and a vested interest in such lots or municipal subdivisions which, under the law, they had the privilege of ripening into a perfect title, and of which they could not legally be divested, except by neglect or failure on their part to avail themselves of the privileges secured by the law, or a voluntary relinquishment thereof. (*Jones v. Petaluma*, 38 Cal. 397.)

279. The act of Congress authorizing the county judge or corporate authorities to make entry of the public lands occupied as townsites, "in trust for the several use and benefit of the occupants thereof, according to their respective interests," did not intend to give the benefits of the entry to mere temporary occupants of particular tracts at the date of the entry, without reference to the character of their occupancy, and thereby, in many instances, deprive the original bona fide settlers of their premises and improvements in favor of those who had, by force or otherwise, intruded upon their settlement; but the intention was that the original and bona fide occupants should be the recipients of the benefits of the entry, to the extent, at least, of

their interests—that is, of their actual occupancy and improvements. (*Ricks v. Reed*, 19 Cal. 551.)

280. The legislature of this state is directed to carry into effect the intention of the acts of Congress, and the provision in the fifth section of the act of 1856, that any person who has been in peaceable possession of a lot one year previous to the passage of the act of 1855, entitled "An act to provide for the disposal of lots in the towns and villages on the public lands of Humboldt county," and has improved the same, shall be deemed to have the better right to said lot, was designed to prevent the right of the original occupants and locators from being preserved without continued occupancy, and this provision is constitutional. (*Ricks v. Reed*, 19 Cal. 551.)

281. The fact that the possessor of a town lot became the occupant under a deed from a prior occupant made to her as grantee under an assumed name, by which she was known, instead of her real name, is unimportant, and cannot affect her rights as a beneficiary under the townsite patent. (*Eversdon v. Mayhew*, 85 Cal. 1.)

282. The record of such deed to the occupant of the town lot under such assumed name is notice to a subsequent purchaser from the husband of the grantee, who acquired the title to the whole lot, in fraud of the rights of plaintiff as a co-heir, sufficient to put such purchaser upon inquiry as to the true condition of the title, and he is chargeable with notice that the plaintiff was the equitable owner of one-half of the property, if the evidence shows that slight inquiry would have apprised him of that fact. (*Eversdon v. Mayhew*, 85 Cal. 1.)

283. The fifth section of the act of 1855, relative to the disposal of lots in towns on public lands in Humboldt county, as amended by the act of 1856 (Stats. 1856, p. 76), prescribing the evidence necessary to establish the title or right of the claimant to the lot, is constitutional. (*Ricks v. Reed*, 19 Cal. 551.)

284. An heir of one who was in possession of a town lot under color of title, and who was one of the class for whose benefit the townsite acts were passed, can enforce a trust for his moiety of interest against a co-heir who obtains title to the whole lot under a patent issued "in trust for the several use and benefit of the occupants of the townsite according to their respective interests," and may enforce such trust against a purchaser from such co-heir with notice of the rights of the plaintiff. (*Eversdon v. Mayhew*, 85 Cal. 1.)

285. Right of bona fide occupants of lots in a town grown up on the public domain, under the acts of Congress, descends to the heirs on the death of a deceased bona fide holder. (*Eversdon v. Mayhew*, 65 Cal. 163, 165.)

286. Where a bona fide occupant of town lots on the public domain dies, leaving a husband, and a minor child by a previous husband, the property descends to the husband and child as co-heirs, any entry by the husband inures to the benefit of the child, and he takes and holds the legal title to her un-

divided interest in trust. (*Eversdon v. Mayhew*, 65 Cal. 163, 165.)
Cited 80 Cal. 318; 86 Cal. 600.

287. In order that the possessor of public land may have the confirmation and patent of the lands inure to his benefit he must show a grant from the pueblo or city. (*Mills v. Los Angeles*, 90 Cal. 522.)

288. Where land is granted by Congress to a city, in trust, to dispose of and to convey the same to parties in possession thereof, on such conditions as the legislature shall prescribe, and a condition prescribed is the payment of previous taxes before a certain time, and the person in possession does not make such payment, there is no beneficiary of the trust, and the city acquires the legal title divested of the trust, and may convey the same to any party. (*Dupond v. Barstow*, 45 Cal. 446.)
Cited 87 Cal. 334.

289. If a city holds the title to land in trust to be conveyed to persons who were, on a certain day, in the bona fide possession of the same, and executes a deed of a portion thereof, with a recitation therein that the grantee is one of the beneficiaries, in ejectment brought by the grantee against one in possession, but who does not claim to be a beneficiary, the defendant cannot raise the question that the plaintiff was not a beneficiary. The deed is conclusive as against him on that question. (*McCreery v. Duane*, 52 Cal. 293.)

290. If a city holds the title to lands within its limits as a trustee for the parties in possession of the same, and to be conveyed to such parties upon the compliance by them with certain conditions, and the proper authorities of the city convey the land, one who has no claim to the land cannot raise the question whether the grantee was a beneficiary and entitled as such to the conveyance. (*McCreery v. Sawyer*, 52 Cal. 257.)
Cited 60 Cal. 340; 72 Cal. 186.

291. Such deed is conclusive as evidence in favor of the grantee, in ejectment by the grantee, against one who has no claim to the title of the city. (*McCreery v. Sawyer*, 52 Cal. 257.)
Cited 52 Cal. 263, 294.

292. If a city holds the title to lands within its limits as a trustee for the parties in possession of the same, and the proper authorities of the city convey the land, one who has no claim to it himself cannot raise the question whether the grantee was a beneficiary and entitled as such to the conveyance. (*Palmer v. Galvin*, 72 Cal. 183, 187.)

293. Under the constitution and laws of the state, making the superior courts successors to the county courts, and clothing the judges of the superior courts with the powers formerly exercised by the county judges, where a townsite patent was issued to a county judge, of lands to be held in trust by him for the use and benefit of the town, the trust created by the patent is an official trust, and the superior court judge, as the successor of the county judge, is authorized to convey the land. (*Smith v. Hill*, 89 Cal. 122.)

294. The act of January 24, 1860, amendatory of the act of 1856, regulating the mode of settling claims to lots in townsites situated on public lands in Humboldt county, authorizing certain proceedings before the county judge or the corporate authorities, as the case might be, to determine the rights of contesting parties to such lots, and giving the county court jurisdiction on appeal from the action of the corporate authorities, is constitutional. (*Ricks v. Reed*, 19 Cal. 551.)

295. The jurisdiction vested in the county court by the act of January 24, 1860, is not strictly appellate, but original. The right of the parties to the lots, under the rules and regulations prescribed by the legislature, is the subject of consideration and determination by the court, without reference to the evidence presented to the corporate authorities, and the whole matter is investigated anew. (*Ricks v. Reed*, 19 Cal. 551, cited 31 Cal. 15; *Ryan v. Tomlinson*, 81 Cal. 11.)

296. The proceeding in a county court to determine conflicting claims to town lots under the act of 1860 (*Laws 1860*, p. 6), is original and not appellate, and the action is governed by the same rules applicable to actions commenced in a court of record. (*Ryan v. Tomlinson*, 81 Cal. 11.)

297. When the act says that in case any claimant shall feel aggrieved by the decision of the trustees he may take an appeal to the county court, and requires the proceedings there to be by complaint, answer, or demurrer, and in conformity with the rules applicable to actions in courts of record, it only means that if the claimant be dissatisfied with the decision of the trustees he may have his right investigated and determined in an action brought against the successful claimant in the county court. (*Ricks v. Reed*, 19 Cal. 551.)

298. The mere use of the word "appeal" in the act does not make the jurisdiction of the county court appellate. The substance and intent of the whole proceeding authorized by the statute must be looked to in determining the nature of the jurisdiction in such cases. (*Ricks v. Reed*, 19 Cal. 551.)

299. The action authorized before the county court is only a mode provided for testing, before one of the regularly constituted tribunals of the country, the conflicting rights of adverse claimants to the town lots under the acts of Congress and the legislation of the state. (*Ricks v. Reed*, 19 Cal. 551.)

300. The proceeding before the corporate authorities of the town, under the act of 1860, is a "special case" within article 6, section 9, of the constitution. It is a purely statutory proceeding, commenced and prosecuted for the ascertainment of a particular fact to guide the corporate authorities in the execution of the trust devolved upon them under the act, and not an ordinary action at law or equity, nor conducted according to the forms of such action. (*Ricks v. Reed*, 19 Cal. 551.)

301. The proceeding in the county court, on appeal from the action of the corporate authorities, by complaint, answer, or demurrer, takes the form of a regular action; but still this proceeding also is a "special case" within the constitution, because marked by one pe-

culiarly which distinguishes it from ordinary actions at law or equity, to wit, that the parties—the corporate authorities or board of trustees in the present case—who are to be governed by the judgment of the court, are not parties litigant before it, or parties to the record. They do not appear at all, and yet must obey and carry into effect the decision of the court. The proceeding is, in effect, only an inquisition through the form of a regular action, like the proceeding before the corporate authorities for the ascertainment of a particular fact, upon which, when once judicially ascertained, the corporate authorities must act independent of any violation on their part. (*Ricks v. Reed*, 19 Cal. 551.)

302. Where the complaint, filed in the county court by the party appealing from the decision of the corporate authorities under the act of 1860, relating to disposal of lots in townsites on public lands in Humboldt county (Stats. 1860, p. 5), alleges that plaintiffs derive title to the lot claimed from one of the original occupants and locators of the town, the name of such original occupant and locator should be given, so as to direct the attention of the defendant to the particular fact to which evidence would be offered. (*Ricks v. Reed*, 19 Cal. 551.)

303. Where to such complaint defendant sets up, among other things, that in 1855 the premises were in the peaceable possession and occupancy of one Duff and were improved by him; that afterward, in January, 1856, by permission and consent of Duff, defendant entered into possession of the lots and improved them, and has since continued in the actual and peaceable possession and occupancy thereof; and that the premises were conveyed to plaintiffs, by said Duff, by deed executed on the 30th of August, 1859, held, that these allegations were properly stricken out, on motion of plaintiffs, as irrelevant and immaterial matter, because the possession and improvement of Duff in 1855 did not confer a right superior or equal to that of the original occupant through whom plaintiffs claimed, as under the act of 1856, the possession, to confer a superior right, must have preceded the act of April, 1855, by at least one year. (*Ricks v. Reed*, 19 Cal. 551.)

304. Where the complaint alleges that plaintiffs claim title to the lots under the original occupants and locators of the town, and on the trial plaintiffs proved that one Wilson was one of such original occupants and locators, and that he took up and occupied a tract embracing the lot in controversy, and then traced title from Wilson to one Crosier, in 1850, and from Crosier to themselves, and defendant then offered in evidence a contract entered into in May, 1850, between the Mendocino Exploring Company and the Union Company, by which the first-named company agreed to locate three quarter sections of land opposite to the same number of sections selected by the latter, and that the six quarter sections should form a site for Eureka, and that the town should be allotted to each member of both companies, and offered to prove that Wilson was a member of the Union Company, and, in pursuance of the contract, lo-

cated the land described in his conveyance to Crosier, and that at its date Ricks, one of the plaintiffs, knew of the contract; held, that such contract and the evidence offered were properly excluded; that if Wilson sold in violation of the trust, it was matter for the companies to complain of; and as defendant did not claim under or in privity with them, he was not in a position to call in question the good faith of the acts of their agent. (*Ricks v. Reed*, 19 Cal. 551.)

305. One O., who purchased land from W., was a bona fide purchaser for a valuable consideration, and took the land free from any secret trusts existing against W. and in favor of a third party, in connection with whom W. was alleged to have taken up the land, there being no evidence that O., when he purchased from W., had any knowledge of the relation of W. to such third party. (*Ricks v. Reed*, 19 Cal. 571.)

Property acquired under townsite acts, whether separate or community. See Husband and Wife, II, 2, e.

Lands passing under townsite patents, right to enter upon to mine. See Mines and Mining, V, 2, d.

XIII. Character and Classification of Lands; Suitableness for Cultivation.

306. The courts can make no other classification of lands belonging to the state for purposes of sale than that made by the constitution, as suitable or not suitable for cultivation. (*Fulton v. Brannan*, 88 Cal. 454.)

307. The phrase "lands belonging to the state which are suitable for cultivation," as used in section 3 of article XVII of the constitution, includes all lands ready for occupancy, and which, by ordinary farming processes, are fit for agricultural purposes. (*Manley v. Cunningham*, 72 Cal. 236.) Cited 81 Cal. 605; 88 Cal. 459, 461; 90 Cal. 48.

308. The fact that school land is in most cases heavily covered with redwood timber and brush, that it would not, when cleared, produce ordinary agricultural crops in average quantities, and that it is more valuable for timber than for agriculture, does not render it unsuitable for cultivation, within the meaning of the constitution. (*Jacobs v. Walker*, 90 Cal. 43.)

309. The land in controversy is situated in the Santa Cruz mountains, about six miles from the coast, and is difficult of access on account of the absence of roads. Its surface is rolling and uneven, but not steep, and its soil of a rich nature. The greater portion of the surface is covered with brush and redwood timber, which would have to be removed before the land could be plowed. There are, however, spaces and openings, aggregating less than one-half, ready for plowing. The land has a distinct value for its timber, but would be more valuable for agricultural purposes after the timber was removed. Held, that the land was suitable for cultivation within the meaning of the constitution. (*Manley v. Cunningham*, 72 Cal. 236.) Cited 88 Cal. 456; 90 Cal. 48.

310. Lands suitable for the cultivation of the ordinary fruit crops grown in this state are agricultural lands within the meaning of section 3495 of the Political Code. (Reeves v. Hyde, 77 Cal. 397.)

311. Whether a particular tract of land is suitable or not suitable for cultivation is a question of fact. (Fulton v. Brannan, 88 Cal. 454; Dillon v. Saloude, 68 Cal. 267; cited 77 Cal. 535; 89 Cal. 44.)

312. A certified copy of the map in the office of the register of the United States land-office is admissible upon the question of the character of the land. (Goodwin v. McCabe, 75 Cal. 584.)
Cited 20 Or. 540.

313. If facts appearing in evidence show that the land is suitable for cultivation, an objection that some of the witnesses were allowed to express their opinions as to the question of suitability for cultivation is not ground for reversing the judgment. (Belcher v. Farren, 89 Cal. 73.)

314. Where the evidence is conflicting as to whether a half-section of school land applied for as timber land is such in its character, or is suitable for the cultivation of ordinary crops, the decision of the court below that it is timber land, for which such an application might be made, will be upheld. (Barnum v. Bridges, 81 Cal. 604.)

315. The evidence of the plaintiff that the school land in controversy was grazing land, that some of it could be plowed but not more than the smallest legal subdivision at any one place, that the land is hilly and in his judgment not fit for agriculture, does not materially conflict with the testimony of witnesses, who testify that they are well acquainted with the land in controversy, and that it is suitable for cultivation; and if the evidence is free from conflict that the plaintiff was never an actual settler upon the premises, the finding of the court that the plaintiff is the owner of and entitled to the possession of the premises will be held upon appeal to be not justified by the evidence. (Miller v. Prentice, 82 Cal. 104.)

Suitableness for cultivation. See *Swamp and Overflowed Lands*, VI.

"Lands suitable for cultivation," meaning of. See *Constitutional Law*, 80.

XIV. Sale of.

1. Interest of United States, How Conveyed; Power of State to Sell.

Power of state to sell school land of mineral character. See ante, III, 4.

Power of state to convey land granted to it by confirmatory statute. See post, XIX, 2.

316. Only manner in which right, title, or interest of United States in or to any of the public lands can pass to or vest in any private person is by means of an act of Congress directly making the grant, or authorizing the grant to be made in their behalf by some person or officer. (Doran v. Central Pac. R. R. Co., 24 Cal. 256.)

317. The state of California has no power to interfere with the public lands within its limits, or grant a license or permission to

occupy the same. (Doran v. Central Pac. R. R. Co., 24 Cal. 256.)

318. The state of California has no right to sell lands within her limits, to which she has no present or prospective title, by grant from the United States. (Kile v. Tubbs, 23 Cal. 431.)

2. Statute Relating to; Statute Providing for Sale of Five Hundred Thousand Acre Grant.

319. Only such portions of prior acts relating to the same subject as are repugnant to or are in conflict with its provisions were superseded or repealed by the act of April 27, 1863, to provide for the management and sale of the lands belonging to the state. (Chapman v. Buckman, 39 Cal. 674.)

320. Act of May 3, 1852, providing for disposal of five hundred thousand acres of land granted by Congress to this state, is not in conflict with the act of Congress of 1841, providing for their location after they are surveyed. (Nims v. Palmer, 6 Cal. 8.)
Cited 7 Cal. 417.

Statute providing for sale. See post, XIV, 4.
Location of school land warrants. See post, XIV, 14.

3. Before Land Surveyed or Listed.

321. The state has no title to nor can she vest any title in a purchaser from her of the sixteenth and thirty-sixth sections, until after the same have been surveyed by the United States. (Middleton v. Low, 30 Cal. 596.)
Cited 50 Cal. 249; 55 Cal. 398; 81 Cal. 595; 88 Cal. 593; 11 Nev. 455.

322. The act of the legislature, passed April 27, 1863, to provide for the sale of state lands, does not provide for the disposal of the sixteenth and thirty-sixth sections until after they have been surveyed by the United States. (Middleton v. Low, 30 Cal. 596.)

323. Application to purchase school lands cannot be made until after the township in which the same may be situated has been surveyed by the United States. (Prentice v. Miller, 82 Cal. 570.)

324. Lands donated to the state by Congress are not subject to sale until they have been surveyed by the United States. (Rooker v. Johnston, 49 Cal. 3.)

325. The state acquires no title to lieu lands, which it can convey to a purchaser, until the land has been listed over to the state by the United States. (Churchill v. Anderson, 53 Cal. 212.)
Cited 63 Cal. 24; 98 Cal. 404.

326. Lieu lands cannot be sold by the state officers until the selection of them by the state has been approved by the register of the proper land-office. (Berry v. Cammet, 44 Cal. 347.)

327. The statutes of this state do not contemplate a sale of the sixteenth and thirty-sixth sections until the title to the same has vested in the state, and the title to said sections does not vest in the state until the plat of the survey is approved by the United States surveyor general. (Finney v. Berger, 50 Cal. 248.)
Cited 55 Cal. 399.

328. A sale and certificate of purchase made by a state of lands selected by the state in lieu of the sixteenth and thirty-sixth sections, before the lands thus selected and sold have been surveyed and the survey approved by the United States, confers upon the grantee of the state no title or right of possession. (*Grogan v. Knight*, 27 Cal. 515.)

329. No title to the sixteenth and thirty-sixth sections vests in the state until fully surveyed and marked out as required by law, and one who claims a portion of a thirty-sixth section under a certificate of purchase from the state does not acquire title as against a subsequent holder under a certificate of homestead entry issued by the United States, where it appears that the east half of the section, which includes the land in controversy, had not been fully surveyed and marked out when the state certificate of purchase was issued, though the section had been partially surveyed by the United States. (*Bullock v. Rouse*, 81 Cal. 590.)

330. State may dispose of the land it owns in the present or in expectancy, and a resident may apply to purchase the same in such manner as the legislature may deem proper, the applicant's right to the land being contingent on its acceptance as a part of the grant to the state. (*Oakley v. Stuart*, 52 Cal. 521.) Cited 55 Cal. 398.

331. An application for the purchase of school lands, and approval thereof by the state locating agent, made before the survey of the lands, is void; and the fact that the application for the purchase was on file when the agent of the state made application to the United States land officers to locate the land, one day after the official map of the township had been filed by the surveyor general, did not make the application or location valid, where it appears that prior thereto the lands had been withdrawn from sale by the secretary of the interior as having been granted to the railroad company. (*McLaughlin v. Menotti*, 89 Cal. 354.)

332. An application to purchase a sixteenth or thirty-sixth section of land, filed before the plat of the survey of the township is approved by the United States surveyor general, is unauthorized and void. (*Finney v. Berger*, 50 Cal. 248.) Cited 55 Cal. 399; 74 Cal. 179; 82 Cal. 572.

333. The title to a particular sixteenth or thirty-sixth section does not vest in the state before the plat of the survey of the township has been approved by the United States surveyor general; and an application to purchase such land, made before the approval of the survey, is unauthorized and void. (*Medley v. Robertson*, 65 Cal. 396.) Cited 65 Cal. 14; 68 Cal. 543; 82 Cal. 572.

334. Application to purchase land of the state, and acceptance of the location by the register of the United States land-office, are not contemporaneous acts; and the rights of applicants will remain in abeyance until the recognition of title in the state, when the right to a certificate will attach in favor of the applicant first in time after the survey. (*Oakley v. Stuart*, 52 Cal. 521.)

335. At any time after an authorized survey in the field of land included in a federal grant to the state, an application in due form, by a person competent to make it, to purchase such land, may be made and filed in the state land-office; but the issuance of a certificate of purchase to the applicant will be subject to the acceptance of the land applied for by the register of the United States land-office as a part of such grant. (*Oakley v. Stuart*, 52 Cal. 521.)

336. Under the amendatory act of April 4, 1870 (Stats. 1869-70, p. 875), an application to purchase a portion of a thirty-sixth section will be valid, if it appear that at the time it is made the township and other lines have been established, so as to clearly show that the land sought to be purchased is included in a thirty-sixth section, and if the applicant in his affidavit shall state that there is no legal claim to the land other than his own, and that the land is not occupied by any bona fide settler. (*Rogers v. Shannon*, 52 Cal. 99.)

337. The surveyor general may approve such location of land within a thirty-sixth section without the acceptance of the register of the United States land-office, and the register of the state land-office may issue a certificate of purchase for the land so located; but no patent shall be issued by the state until the location shall have been approved by the United States. (*Rogers v. Shannon*, 52 Cal. 99.)

338. The purchaser from the state of lieu land, after a survey thereof had been made under the direction of, and had been approved by, the United States surveyor general, and after the plat thereof had been filed in the United States land-office, but before the land had been listed to the state, does not acquire a conclusive right to the specific tract included in his certificate of purchase; and if the survey be subsequently found erroneous, a correct resurvey may be made so as to exclude from the section claimed by the state as lieu a portion of the land included in the certificate of purchase. (*Murphy v. Sumner*, 74 Cal. 316.) Cited 75 Cal. 589.

339. State issuing patent for school land before land was listed to the state by the United States government cannot avoid the patent on the ground that it was prematurely issued. (*People ex rel. Hastings v. Jackson*, 62 Cal. 548, 555.) Cited 63 Cal. 24.

4. *Extent of Land That may be Sold.*

340. Under the act of April 26, 1858, except in certain cases specified therein, a sale of school lands to one person containing more than one hundred and sixty acres is void, and a certificate of purchase therefor issued by the sheriff conveys no title. (*Hicken v. French*, 70 Cal. 430.)

341. Section 4 of the act of April 23, 1858, to provide for the location and sale of certain school lands, which provides that the locating agent shall not locate more than three hundred and twenty acres, either directly or indirectly, for any one person, was not amended or repealed so as to abrogate or dispense with

such limitation until the act of March 28, 1868. (*Chapman v. Buckman*, 39 Cal. 674.)

Extent of land that may be claimed. See ante, VIII, 1; XIV, 10.

5. Sale of Undivided Interest; Land on Which There are Improvements.

342. No provision has been made in the act of March 28, 1868, entitled "An act to provide for the management and sale of the lands belonging to the state," for the sale of an undivided interest held by the state in a tract of land. (*Leet v. Black*, 50 Cal. 84.)

343. There is nothing in the statute of 1868 prohibiting a person from purchasing from the state lieu lands on which there are improvements belonging to another than the applicant. (*Copp v. Harrington*, 47 Cal. 236.)

344. A house and corral are improvements of the character contemplated by the fifth section of the act of April 27, 1863, providing for the sale of certain lands belonging to the state. (*Hildebrand v. Stewart*, 41 Cal. 387.)

6. Withdrawing Land from Sale or Suspending Entry.

345. Congress has the power, at any time after a settler has moved upon and taken the prescribed steps to acquire a pre-emption right to land, but before he has perfected his right by payment, to withdraw the land from the operation of the general pre-emption laws, and deprive the settler of a right to perfect his claim and enter the land, and confer a right of entry upon another. (*Hutton v. Frisbie*, 37 Cal. 475.)

Cited 40 Cal. 298; 41 Cal. 329, 493, 626, 638; 58 Cal. 143; 65 Cal. 13; 67 Cal. 174; 69 Cal. 194; 70 Cal. 304; 84 Cal. 502; 16 Nev. 235; 6 Wash. 395.

346. Congress has full power to withdraw public lands from sale, though in possession of qualified pre-emptors, if they have not paid for the land, and may sell or grant such land to others, as it pleases. (*Southern Pac. Co. v. Burr*, 86 Cal. 279.)

347. Though a qualified pre-emptor enter upon public land, with intention to pre-empt the same, and perform all the acts necessary to perfect his pre-emption right, except the payment of the purchase price, the government may, nevertheless, at any time before the price is actually paid or tendered, devote the land to another purpose, and thereby wholly defeat the right of pre-emption. (*Low v. Hutchings*, 41 Cal. 634.)

Cited 69 Cal. 194.

348. Land in the occupancy of a pre-emptor, and to which a pre-emption right has attached, may be withdrawn from the operation of the pre-emption laws by Congress at any time before payment has been made for the same to the United States. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)

Cited 31 Cal. 268; 33 Cal. 262; 37 Cal. 490, 491, 495, 502, 504; 12 Nev. 114.

349. After public land has been entered and paid for at a United States land-office, and the receiver has given his duplicate receipt therefor, the commissioner of the general land-office has the power to suspend the entry, and

after such suspension, and while it continues in force, the duplicate remains in abeyance, and will not support an action of ejectment. (*Figg v. Hensley*, 52 Cal. 299.)

Cited 84 Cal. 503; 2 Idaho, 797.

350. After a person claiming to be a pre-emptor has filed his declaratory statement, and has been permitted to pay for the land, and has received a certificate of purchase under the ruling of the commissioner of the general land-office, the secretary of the interior may direct the entry to be canceled and annul the purchase, and after his decision the pre-emptor ceases to have any right or title to the premises. (*Hestres v. Brennan*, 50 Cal. 211.)

Cited 2 Idaho, 797.

351. A settler on the public lands which had been withdrawn from sale under an act of Congress to aid the construction of a railroad acquires no rights by his settlement as against the railroad company to which a patent was subsequently issued. (*Southern Pac. R. Co. v. Garcia*, 64 Cal. 515.)

7. Conditions on Sale.

352. The state as owner has the right to prescribe to whom and in what manner the lands are to be sold. (*White v. Douglass*, 71 Cal. 115.)

353. The sovereign power may, in disposing of the national domain, annex such conditions to a grant as it sees fit; and in such case, a restriction against alienation, inserted in a grant and authorized by law, will not be held void on the ground that it is against the policy of law. (*Suñol v. Hepburn*, 1 Cal. 254.)

354. The United States may dispose of the public lands on such terms and conditions, and subject to such restrictions and limitations, as in its judgment will best promote the public welfare, even if the condition is to exempt the land from sale on execution issued on a judgment recovered in a state court for a debt contracted before the patent issues. (*Miller v. Little*, 47 Cal. 348.)

355. When the law, under which public lands are sold, requires certain acts to be performed as a prerequisite to the right to purchase, the courts cannot dispense with the performance of those acts by legalizing an entry made without complying with them. (*Hildebrand v. Stewart*, 41 Cal. 387.)

Purchaser must be citizen. See post, XIV, 8.

8. Purchaser Must be Citizen.

356. In order to show a right to purchase the land of the state, the applicant must prove his citizenship, or that he has filed his intention to become a citizen of the United States. If it appears that the party is an alien by birth, his original status is presumed to continue until the contrary is shown; and his naturalization must be proved by record evidence, showing the action of the court, and cannot be proved by parol evidence of the party that he is a citizen, or has been naturalized. Nor is the great register of the county, showing the registration of the party by another name, in connection with parol evidence that he had voted under that name,

admissible to prove his citizenship, or the filing of an intention to become a citizen. (*Bode v. Trimmer*, 82 Cal. 513.)
Cited 82 Cal. 575; 89 Cal. 78.

357. Applicant to purchase school lands must be a citizen of the United States, or have declared his intention to become such; and while the amendment of 1880 to section 3945 of the Political Code was in force, he must have been an actual settler upon the land, whether it was suitable for cultivation or not, and must have so stated in his affidavit to purchase. If the qualifications of citizenship and actual settlement, or either of them, be wanting in fact, the application, and a certificate of purchase issued thereunder, are void, and a mere possessor of the land can assail the certificate of purchase in an action of ejectment on these grounds. At all events, the defendant in ejectment is in a condition to attack the plaintiff's certificate of purchase on these grounds, if such defendant possesses the requisite qualifications and has applied to purchase the same land from the state. (*Trimmer v. Bode*, 82 Cal. 647.)

Pre-emptor must be a citizen. See ante, IX, 2.

Oath of allegiance on sale, necessity of. See *Swamp and Overflowed Lands*, VIII.

9. County Surveyor, Right to Purchase.

358. County surveyor is prohibited, by considerations of public policy, from becoming the purchaser from the state of public lands which his official duties require him to survey. (*Yoakum v. Brower*, 52 Cal. 373.)

10. Actual Settlement, Necessity of; Who are Actual Settlers.

359. The policy of the state, as declared by sections 2 and 3 of article XVII of the state constitution, is against the holding of large tracts of land uncultivated, and against selling any lands suitable for cultivation in tracts in extent exceeding three hundred and twenty acres, or to other than actual settlers. (*Fulton v. Brannan*, 88 Cal. 454.)

360. A person who has never settled upon, occupied, or improved university land, cannot acquire a right of purchasing it, as against an applicant to purchase, who is an actual settler upon the land, and has improved it, and resided thereon with his family. (*White v. Douglass*, 71 Cal. 115.)

361. Under section 3495 of the Political Code, as it existed in January, 1884, an applicant for the purchase of school land, who was not an actual settler thereon, could acquire no right of purchase. (*Harbin v. Burghart*, 76 Cal. 119.)

362. Under section 3 of article XVII of the constitution, and section 3495 of the Political Code, a claimant to purchase from the state a tract of its land which is suitable for cultivation must be, at the time of filing his application, an actual settler thereon. (*Gavitt v. Mohr*, 68 Cal. 506.)

363. The provisions of the constitution and of the Political Code requiring actual settlement upon lands belonging to the state which are fit for cultivation are imperative; and an

applicant for such land must not only state the requisite facts as to such settlement in his affidavit, but the facts as stated must be true, or he can acquire no rights under his application. (*Davidson v. Cucamonga Fruit etc. Co.*, 78 Cal. 4.)

364. Under section 3500 of the Political Code as it stood between 1880 and 1885, the applicant for lieu land was required to be an actual settler upon the land, whether it was suitable for cultivation or not. This provision was not unconstitutional. (*Taylor v. Weston*, 77 Cal. 534.)
Cited 82 Cal. 140.

One must be actual settler. See ante, XIV, 8.

365. Section 3 of article XVII of the constitution, providing that lands belonging to the state which are suitable for cultivation can only be sold to actual settlers thereon, operates as well on applications to purchase made before as after the constitution took effect. (*Mosely v. Torrence*, 71 Cal. 318; *Johnson v. Squires*, 55 Cal. 103, cited 60 Cal. 547, 68 Cal. 270, 71 Cal. 321; *Manley v. Cunningham*, 72 Cal. 236, cited 88 Cal. 456, 91 Cal. 118.)

366. An application to purchase state lands suitable for cultivation, made prior to the adoption of the new constitution, by one not an actual settler, and who had made no payment thereon, conferred no right to purchase such lands after the adoption of the constitution. Such application and all rights under it are made nugatory by section 3 of article XVII of the constitution. (*Urton v. Wilson*, 65 Cal. 11.)
Cited 68 Cal. 270; 72 Cal. 242.

367. Article XVII, section 3, of the constitution, providing that lands belonging to the state, which are suitable for cultivation, shall be granted only to actual settlers, prohibits a sale to one who is not an actual settler, even though his application to purchase was made before the adoption of the constitution; but it does not prohibit the sale of land to an actual settler thereon, although the fact of his settlement was not stated in the affidavit accompanying his application; nor does it prevent or in any way affect the sale of lands not suitable for cultivation. (*Dillon v. Saloude*, 68 Cal. 267.)
Cited 71 Cal. 321; 77 Cal. 540; distinguished 90 Cal. 156.

368. An actual settler upon land belonging to the state is one who establishes himself upon the land, or fixes his residence upon it, to take possession for his exclusive occupancy and use, with a view of acquiring title to it by purchase from the state. For that purpose, an actual entry upon the land, followed by the making of improvements, or building a house thereon in which to reside, and occupation of the land while doing such acts, are evidence of such a settlement as gives to the occupant, if he possesses the qualifications prescribed by law, an inchoate right to purchase the land, and operates as notice to all the world of the right. (*Gavitt v. Mohr*, 68 Cal. 506.)
Cited 76 Cal. 120; 89 Cal. 45.

369. The actual settlement required of a purchaser of land suitable for cultivation must

be bona fide, and must not consist of occasional visits or casual acts not done in good faith to make a home, but simply to secure cheap land; yet if a home is actually established, motives cannot be further questioned. (*Belcher v. Farren*, 89 Cal. 73.)

370. The action was brought to determine a contest as to the right to purchase from the state part of a sixteenth section of land suitable for cultivation. The application of the defendant in proper form was made in June, 1879, at which time he had the land inclosed, except a small piece on which the plaintiff afterwards made his settlement. He has ever since kept up his inclosure, cultivated and improved portions of the land, and been in the actual occupation of it, except the small piece before mentioned, by his servants and employees, but has never personally resided on it. The plaintiff applied to purchase the land in August, 1882. Before making his application he settled upon the small piece outside of the defendant's inclosure, and has ever since been residing there with his family. In the affidavit accompanying his application he stated, among other things, that there was no occupation of the land adverse to his. Held, that neither party was entitled to purchase the land, the defendant because he was not an actual settler thereon, and the plaintiff because his affidavit was defective in not stating that the land was in the adverse occupancy of the defendant. (*Mosely v. Torrence*, 71 Cal. 318.)

Cited 74 Cal. 178; 76 Cal. 120; 82 Cal. 141; 90 Cal. 46.

371. Findings that defendant was not actual settler upon the land at the time of filing his application to purchase, and that the land was unoccupied at the time the plaintiff filed his application, held, not supported by the evidence. (*Gavitt v. Mohr*, 68 Cal. 506.)

Actual settlers. See *Swamp and Overflowed Lands*, VI.

11. Application and Affidavit; Approval of Application.

Purchase of swamp lands, application for. See *Swamp and Overflowed Lands*, VIII.

Application to purchase before land surveyed or listed. See *ante*, XIV, 3.

372. Application must conform to statute, or it is invalid. (*Woods v. Sawtelle*, 46 Cal. 389.)

Cited 65 Cal. 93; 67 Cal. 7; 71 Cal. 211; 76 Cal. 189.

373. The applicant must state in his application that there is no claim to the land for which he applies, other than his own, as required by section 3408 of the Political Code. (*Vance v. Evans*, 52 Cal. 93.)

Cited 98 Cal. 402.

374. Under section 3495 of the Political Code, an application for the purchase of school land, which falsely states that there is no occupation of the land adverse to that of the applicant, is invalid, and confers no right of purchase on the applicant. (*Harbin v. Burghart*, 76 Cal. 119.)

Cited 78 Cal. 8; 82 Cal. 140; 90 Cal. 46, 47.

375. An application to purchase state school

land, made under the act of 1868, must, if there is an adverse occupation of the land under a settlement made more than six months after the passage of the act, state that fact, and that the adverse occupant has been in such occupation more than sixty days, and that the township has been sectionized and subject to pre-emption three months or over. (*Woods v. Sawtelle*, 46 Cal. 389.)

Cited 51 Cal. 536; 56 Cal. 124; 68 Cal. 542, 543; 71 Cal. 211; 82 Cal. 573; 83 Cal. 300.

376. Action arising out of a contest certified to the district court, by the surveyor general of the state, involving the right of the parties respectively to purchase a portion of a thirty-sixth section, under the act of 1868, as amended in 1870. There being no allegation in the complaint that at the time of defendants' application the township and other lines had not been established, so as to clearly show that the land sought to be purchased was included in a thirty-sixth section, said application being assailed solely on the ground of its failure to state that there has not been for more than sixty days and is not any occupation of the land adverse to that of the applicant, and that the township has been sectionized for three months and over, held, that for the particular reasons assigned in the complaint defendants' application is not invalid. (*Rogers v. Shannon*, 52 Cal. 99.)

Cited 82 Cal. 572.

377. The location and entry of any portion of a sixteenth or thirty-sixth section is invalid, if the affidavit of the locator, on his application to locate and purchase, does not state that he is desirous to purchase the land, and does not give a description thereof by legal subdivisions. A statement, signed by the applicant and not sworn to, containing the same matters required in the affidavit, and accompanying the affidavit, does not render the entry valid. (*Hildebrand v. Stewart*, 41 Cal. 387.)

Cited 55 Cal. 104; 56 Cal. 223; 65 Cal. 93; 67 Cal. 7; 83 Cal. 105.

378. Where there is only one application to purchase school land belonging to the state, and no contest, it is the duty of the surveyor general, under section 3798 of the Political Code, to approve the application, without further demand for approval than that contained in the application, and the penalty of nullity, after the lapse of six months from the date of filing without demand for approval or reference of a contest, does not apply to the case of such single application. (*Barnum v. Bridges*, 81 Cal. 604.)

379. The approval by the surveyor general of an application to purchase state lands does not raise the presumption that the application conformed to the statute. (*Woods v. Sawtelle*, 46 Cal. 389.)

Cited 76 Cal. 177.

380. The approval by the surveyor general of an ex parte application for the purchase of state land, if brought about by the fraudulent representations of the applicant, who had never been an actual settler upon the land, or entitled to purchase it, does not bar a subsequent applicant of his statutory right to have the contest between him and the prior appli-

cant referred to the proper court for adjudication. (*Gould v. Lanterman*, 70 Cal. 247.) Cited 77 Cal. 541; 96 Cal. 402.

381. An application to purchase state lands, made in accordance with law, gives the applicant, as against the state, so long as the statute remains in force, a privilege to purchase the land applied for; and as against the officers of the state, and subsequent applicants, it gives him a right to purchase, which can only be lost by his own failure to pursue the subsequent steps prescribed by the statute, and of which he cannot be deprived by the malfeasance or misfeasance of any of the officers. Accordingly, in an action upon a reference by the surveyor general, under section 3414 of the Political Code, of a contest between applicants to purchase state lands, where it appeared that the application of the defendant was regular, and prior to that of the plaintiff, but that the surveyor general had approved the application and issued the certificate of purchase before the expiration of the sixty days required by section 3498 of the Political Code, held, admitting that the approval and certificate were void, that the validity of defendant's application was not affected thereby. (*Pollard v. Putnam*, 54 Cal. 630.) Cited 65 Cal. 14.

382. A party who has only filed an application with the surveyor general to purchase state land has acquired no right in the land which he can transfer to another. (*Cadierque v. Duran*, 49 Cal. 366.)

383. The question being which of several applicants is entitled to a certificate, the answer is, he who filed first after the actual survey in the field, approved by the surveyor general. (*Oakley v. Stuart*, 52 Cal. 521.)

Successive applications. See post, XVII, 3.

Application to purchase pending contest. See post, XVII, 11.

384. A court of equity will not prevent an applicant to purchase public land from the United States from proceeding with his application, or decree that he has no right on which to base his application. (*Brandt v. Wheaton*, 52 Cal. 430.)

385. An application to purchase state lands by the location of school land warrants, made subsequent to the act of April 27, 1863, is not invalid for want of the affidavits required by that act, such applications being expressly excepted from the operations of the act by the proviso in the second section. (*Wright v. Laugenour*, 55 Cal. 280.) Cited 57 Cal. 77; 59 Cal. 626; 78 Cal. 516.

386. No rights will attach in favor of an applicant to purchase school land from the state, under the act of April 27, 1863, until he files the affidavit prescribed by sections 28 and 29 of that act, indorsed on a description of the land in the office of the county recorder. (*Hogan v. Winslow*, 45 Cal. 588.)

387. Upon an application, certain affidavits required by the act of April 23, 1858 (as amended by section 7 of the act of April 22, 1861), were made before a person signing the jurat as "Deputy Locating Agent." Held, that the administration of an oath is a func-

tion ministerial in its nature, and the state locating agent, as a ministerial officer, had power to appoint deputies. (*Wright v. Laugenour*, 55 Cal. 280.)

388. The statute does not require that the affidavit shall not be filed before or at the time of the other proceedings. It is only necessary that it be filed within a reasonable time before or after, and for the purposes of the intended purchase. (*Hogan v. Winslow*, 45 Cal. 588.)

389. The affidavit accompanying an application for the purchase of state lands, other than a sixteenth or thirty-sixth section, must state the facts required by section 3500 of the Political Code; otherwise the applicant acquires no right to purchase. (*Millidge v. Hyde*, 67 Cal. 5.) Cited 71 Cal. 211; 76 Cal. 189; 78 Cal. 117; 91 Cal. 32.

390. An applicant for the purchase of state land must truthfully state in his affidavit all the facts required by law to be stated therein; and in an action to determine the right of purchase between adverse claimants, each party must allege in his pleadings and prove that he has strictly complied with the law. (*McKenzie v. Brandon*, 71 Cal. 209, cited 71 Cal. 321, 76 Cal. 121, 189, 77 Cal. 535, 78 Cal. 8, 82 Cal. 140, 83 Cal. 110, 90 Cal. 146, 147; *Jacobs v. Walker*, 90 Cal. 43.)

391. An applicant for the purchase of land from the state must set out in his affidavit the facts required by the statute to be stated therein, and unless such facts are proved at the trial of a contest to determine the right of purchase, no right accrues to the party alleging the same. (*Harbin v. Burghart*, 76 Cal. 119.) Cited 77 Cal. 535; 78 Cal. 8; 83 Cal. 110.

392. Prior to the amendment of March 1, 1885, to section 3495 of the Political Code, an affidavit for the purchase of state land not forming a part of a sixteenth or thirty-sixth section was required to state the facts made requisite by section 3500 of the Political Code; and an affidavit which stated the facts made requisite by section 3495 for the purchase of a portion of a sixteenth or thirty-sixth section was insufficient, and gave no right of purchase to the applicant. (*McEntee v. Cook*, 76 Cal. 187.)

393. One seeking to purchase land from the state must state in his affidavit all the facts which the law makes requisite for such a purchase, and, failing to do that, his application fails. (*McEntee v. Cook*, 76 Cal. 187.)

394. An applicant for the purchase of state lands must set out in his affidavit the facts required by the statute to be stated therein; and, among other things, he must state whether there are or are not settlers upon the land which he seeks to purchase. (*McCoy v. Byrd*, 65 Cal. 92.) Cited 71 Cal. 211.

395. An applicant for the purchase of school lands acquires no right in the land which can be enforced in the courts, if the statement in his affidavit for the purchase, that there was no adverse occupation of the land, is found

to be untrue. (*Jacobs v. Walker*, 90 Cal. 43.) Cited 98 Cal. 402.

396. If the affidavit be false in regard to the actual settlement, the proceedings are void. (*Taylor v. Weston*, 77 Cal. 534.) Cited 82 Cal. 140.

397. Under the act of the 13th of March, 1874, the affidavit accompanying an application for the purchase of university land, forming part of the congressional grant for the use of an agricultural college, need not state that there is no occupation of nor settlement upon the land other than that of the applicant. (*White v. Douglass*, 71 Cal. 115.)

398. In February, 1884, the plaintiff applied to purchase from the state the land in controversy, being the west half of a thirty-sixth section. His affidavit accompanying the application stated that there was no occupation of the land adverse to his. In June, 1876, the defendant, Brandon, applied to purchase the same land. At that time he owned an adjoining quarter section, which, with about eighteen acres of the half section in controversy, he had inclosed with a fence, which he has since kept up. The defendant never resided on the land in controversy, but usually cultivated a portion of it lying within his inclosure in connection with the cultivation of his other land, and used the balance of the half section as pasturage. Held, that the defendant was in the adverse occupation of the land within the meaning of section 3495 of the Political Code as amended in 1880. (*McKenzie v. Brandon*, 71 Cal. 209.) Cited 82 Cal. 143.

399. Under section 3495 of the Political Code, an applicant for the purchase of school land in the adverse occupation of another must state in his affidavit the fact of such adverse occupation, together with the further facts that the township in which the land is situated has been sectionized three months, and that the adverse occupant has been in the occupation more than sixty days since the plat was filed in the United States land-office. An affidavit which states that there is no occupation thereof adverse to the applicant is insufficient to confer a right to purchase. (*Plumber v. Woodruff*, 72 Cal. 29.) Cited 71 Cal. 211; 74 Cal. 178; 76 Cal. 121; 77 Cal. 535; 82 Cal. 140; 83 Cal. 110; 90 Cal. 46.

400. Under section 12 of the act of March 28, 1868, as amended in 1870, an applicant for the purchase of state lands situated in a township which has not been subdivided, but the exterior lines of which have been established so as to clearly show that the land applied for is included in a thirty-sixth section, must state in his affidavit that there is no legal claim to the land other than his own, and that the land is not occupied by any bona fide settler. (*Gilson v. Robinson*, 88 Cal. 539.) Cited 71 Cal. 211; 74 Cal. 178; 76 Cal. 176; 77 Cal. 541; 82 Cal. 573; 98 Cal. 402.

Affidavit, statement that one was actual settler. See ante, XIV, 8.

Failure to state fact of actual settlement, effect of. See ante, 367.

Statements as to adverse possession of others. See ante, 370.

401. The amendment of 1880 to section 3495 of the Political Code, requiring that a person desiring to purchase any portion of a sixteenth or thirty-sixth section shall state in his affidavit that he is an actual settler thereon, does not operate retroactively to invalidate an application previously filed in which no such statement is contained. (*Dillon v. Saloude*, 68 Cal. 287.) Cited 72 Cal. 242.

402. An application to purchase lieu lands of the state under the act of March 28, 1868, containing no description of the land by legal subdivisions, in an affidavit, as required by that act, is void, though such description be contained in an unverified statement accompanying the affidavit; and a certificate of purchase issued thereunder is void if the application has never been cured, and may be attacked by a mere possessor of the land. The curative acts of 1870 and 1872 cannot apply to such an application, if the land did not then belong to the state, though afterwards confirmed to the state by the Booth Act. Per *Thornton, J., Works, J., and Sharpstein, J.; Paterson, J., and McFarland, J.*, dissenting. (*Cucamonga Fruit Land Co. v. Moir*, 83 Cal. 101.) Cited 98 Cal. 411; 99 Cal. 461.

403. Unintentional mistake or misrepresentation in affidavit made by an applicant to purchase land of this state as a portion of the seventy-two sections granted by Congress to this state for a seminary of learning does not render the certificate of purchase void, so that it may be attacked collaterally by one who brings an action against the purchaser to recover possession of the same, and does not connect himself with the title of the government. (*Combs v. Jelly*, 28 Cal. 498.)

404. An application to purchase state lands, made under the statute of 1863, must have been accompanied by the affidavits of three disinterested persons, stating that the applicant was a resident of this state, and that the lands were not occupied by any person except the applicant. (*Cunningham v. Crowley*, 51 Cal. 128.) Cited 55 Cal. 104; 56 Cal. 60; 76 Cal. 177; 98 Cal. 402.

405. It was improper to issue a certificate of purchase under said act, unless such affidavit accompanied the application to purchase. (*Cunningham v. Crowley*, 51 Cal. 128.)

Affidavit in application to purchase swamp lands. See *Swamp and Overflowed Lands*, VIII.

12. Desert Land, Sale of.

406. Desert land duly entered under the act of Congress of March 3, 1877, and on which twenty-five cents per acre has been paid, is reserved from entry under other laws, and the intended purchaser has the right of possession for three years from the date of his entry. (*Sallee v. Corder*, 67 Cal. 174.)

13. Certificate of Purchase or of Location.

407. To constitute a certificate of purchase, within the meaning of section 1925 of the Code of Civil Procedure, it is not necessary

that it should contain the word "certify." (*Witcher v. Conklin*, 84 Cal. 499.) Cited 91 Cal. 544.

408. The validity of a certificate of purchase of state lands is to be determined by the law in force at the time of its issuance, and the obligation of the contract of purchase cannot be affected by subsequent legislation. (*Miller v. Byrd*, 90 Cal. 150.)

409. A certificate of purchase of land, issued by the register of state lands before the land has been surveyed by the United States, is void. (*Young v. Shinn*, 48 Cal. 26.)

Issuance of before expiration of sixty days. See ante, 381.

410. The issuance of a certificate of purchase of school land is presumptive evidence of the fact that the proper officers have performed every act required of them by law in order to vest in the state the legal title to the land at the time of the issuance of the certificate. (*Watkins v. Lynch*, 71 Cal. 21.)

411. Certificate of purchase issued by the state for land which is not public land is void. (*Aurrescochea v. Sinclair*, 60 Cal. 532, 549.)

412. The question discussed in the opinion whether a certificate of purchase of land, being a contract between the government and the purchaser, will be declared void for fraud, unless under similar circumstances a contract between two private persons would be held void. (*Combs v. Jelly*, 28 Cal. 498.)

413. Void certificate of purchase issued by a state is not evidence that the purchasers were bona fide purchasers. (*Aurrescochea v. Sinclair*, 60 Cal. 532, 549.)

414. A location and entry of any portion of a sixteenth or thirty-sixth section, made under the act of April 27, 1863, is invalid, and fails to vest any title in the locator, provided there was a settlement, by occupation or improvement, on any part of the section owned by another, who had acquired no pre-emption right to a specific part of the section, and the locating agent did not give the occupant or claimant of such improvement the notice of sixty days required by the fifth section of said act. (*Hildebrand v. Stewart*, 41 Cal. 387.)

Cited 46 Cal. 391; 47 Cal. 240.

When invalid. See ante, XIV, 8.

415. Question discussed in opinion whether a state certificate of purchase of land, if not absolutely void, may be attacked collaterally. (*Combs v. Jelly*, 28 Cal. 498.)

Void certificate, collateral attack on. See ante, 402.

416. A certificate of purchase of land issued by the United States, and introduced in evidence by the plaintiff in ejectment, makes out a prima facie case for him. (*Sacramento Savings Bank v. Hynes*, 50 Cal. 195.)

417. A certificate of purchase of land from the state is prima facie evidence of legal title in the purchaser. (*Combs v. Jelly*, 28 Cal. 498.)

418. In an action to recover possession by the locator of a land warrant, the certificate of purchase from the state is prima facie evidence that the locator is a purchaser in good

faith, and the burden of proof is on the defendant to show that the land is within the exceptions contained in section 1 of the act of Congress of July 23, 1866, to quiet land titles in California. (*Hodapp v. Sharp*, 40 Cal. 69.)

Cited 47 Cal. 440.

419. By section 1925 of the Code of Civil Procedure the certificate is made primary evidence that the holder is owner of the land described therein. (*Laugenour v. Hennagin*, 59 Cal. 625.)

420. Prima facie, the sixteenth sections of the public lands belong to the state, by virtue of the grant made by Congress, and the person holding the state's certificate of purchase is entitled to recover in ejectment, unless the defendant shows that the land was excepted from the grant. (*Figg v. Handley*, 52 Cal. 244.)

Cited 87 Cal. 229.

421. Certificates of purchase issued by the state register for school lands and certificates of location issued by the state locating agent are, under the statute of April 13, 1859, prima facie proof of legal title in the holder, and are admissible as evidence in his favor in an action of ejectment. (*Richter v. Riley*, 22 Cal. 639.)

Cited 16 Or. 554.

422. A certificate of purchase of state land is prima facie evidence of title; but prima facie evidence can be contradicted and overcome by other evidence, and it may be shown that the holder of such certificate was not entitled to receive it. (*Davidson v. Cucamonga Fruit etc. Co.*, 78 Cal. 4.)

423. Section 1925 of the Code of Civil Procedure, making certificates of the sale of public lands prima facie evidence of ownership, and providing that such evidence may be overcome by proof that at the time of the location of the land upon which the certificate issued the land was in the adverse possession of the other party, applies to a certificate of sale of mineral land. (*McTarnahan v. Pike*, 91 Cal. 540.)

424. The act of March 28, 1868, which provides that state certificates of purchase of land shall be received as prima facie evidence of title, applies to all certificates of purchase issued after the act took effect, whether issued upon a location made before or after the passage of the act. (*Young v. Shinn*, 48 Cal. 26.) Cited 57 Cal. 527; 60 Cal. 549; 69 Cal. 194; 83 Cal. 110.

425. Under the act of April 27, 1863, for the sale of certain lands belonging to the state (Stats. 1863, p. 591), the register's certificate of purchase of school or lieu land is the only prima facie evidence of legal title prior to a patent. (*True v. Thompson*, 42 Cal. 293.)

426. A certificate of purchase of state school lands is only prima facie evidence of title, and may be impeached, in an action of ejectment, by a defendant who is in the actual occupation of the premises, by proving that the land is fit for cultivation, and that the plaintiff was never an actual settler upon it, or that he is not a citizen of the United States,

or that his affidavit of intention to purchase was defective in not stating whether the land was or was not suitable for cultivation, as required by the code, or by proving in any manner that plaintiff could not legally purchase the land. The occupant may show under the denials of his answer that his assailant has no title or rights of possession in and to the premises. (*Miller v. Prentice*, 82 Cal. 104.)

427. In an action of ejectment, brought by one holding a certificate of purchase from the United States, against one in adverse possession, the effect of the certificate as evidence being statutory, the inquiry as to adverse possession to overcome it is one which has no relation to any judgment or action of any of the officers of the land department, by virtue of which the certificate was issued. Adverse possession is a fact to be determined by the state courts. (*Haven v. Haws*, 63 Cal. 452.) Cited 91 Cal. 544.

428. A certificate of purchase of school land issued by the register of the state land-office is not conclusive of the right of purchase as against a subsequent applicant; and the latter, even after the certificate has issued, may institute a contest to determine the right of purchase. (*Jacobs v. Walker*, 76 Cal. 175.) Cited 77 Cal. 541; 98 Cal. 402.

429. In ejectment the plaintiff relied upon a certificate of purchase issued to him by the register of the land-office, in pursuance of the judgment in the case of *Laugenour v. Shanklin*, 57 Cal. 70, and the defendant, upon a junior application to purchase the land in controversy. Held, upon the facts appearing, the right of the plaintiff to the certificate of purchase for the land in dispute is no longer open to controversy. (*Laugenour v. Hennagin*, 59 Cal. 625.) Cited 75 Cal. 587; 83 Cal. 110; 84 Cal. 502.

430. One who has a certificate of purchase from the state for a sixteenth section is not estopped from claiming that the state owned the land, as against one who is a mere trespasser, and has no privity with the title of the United States, by the fact that the state had, before issuing the certificate, selected other land in its place, and sold the same, and the purchaser had received therefor a patent from the United States. (*Figg v. Handley*, 52 Cal. 244.)

431. The holder of a state certificate of purchase of public land, listed over to the state, can recover in ejectment, as against one who filed a homestead claim on the same in the United States land-office, after the holder of the certificate located it. (*Young v. Shinn*, 48 Cal. 28.)

432. The holder of a certificate of purchase of school lands, having the prima facie legal title, has power to dedicate the land to public use for the purposes of a highway. (*Watkins v. Lynch*, 71 Cal. 21.)

433. The conveyance of the land preempted, and delivery of the certificate of purchase is sufficient evidence of an assignment of the certificate, and all rights acquired thereby. (*Witcher v. Conklin*, 84 Cal. 499.)

434. Under the statutes of 1859, the assignee of a certificate of purchase of school lands

acquires a prima facie legal title thereto, which passes by a quitclaim deed of the land to his grantee; and a patent for the land subsequently issued to the assignee inures to the benefit of the grantee. (*Watkins v. Lynch*, 71 Cal. 21.)

435. The assignee of the holder of a certificate of purchase is not protected by the rule as to bona fide purchasers, because he is not the purchaser of the legal title, but acquires an equity merely. (*Taylor v. Weston*, 77 Cal. 534.) Cited 79 Cal. 331; 88 Cal. 327.

436. Assignee of a certificate issued by the state after a contest in the land-office relative to the land in question takes with notice, and is not a bona fide purchaser, within the meaning of the act of July 23, 1866, to quiet titles to land in California. (*Aurrecoechea v. Sinclair*, 60 Cal. 532, 550.)

437. An assignment of a certificate of purchase of land issued by the state, by way of security for a debt due by the assignor to the assignee, operates as an equitable mortgage on the interest in the land which the assignor acquired by virtue of the certificate, and if the assignee pays money due the state on the certificate, in order to prevent a forfeiture of the assignor's title, the money so paid becomes a portion of the mortgage debt, and the court will enforce an equitable lien for the whole sum. (*Hill v. Eldred*, 49 Cal. 398.)

438. An assignee of a certificate of purchase of state lands, who took with actual notice of an unrecorded mortgage by his assignor, remains affected as a purchaser with notice of the mortgage, and is not protected by the fact that he assigned his title to a bona fide purchaser for value without notice of the mortgage, who reconveyed the land to him after obtaining a state patent therefor; and the mortgage may be enforced against a subsequent grantee of such assignee, who took a conveyance after record of the mortgage, and who does not appear to have paid any money on his purchase. (*Huling v. Abbott*, 86 Cal. 423.)

Assignee of certificate, rights against holder of tax title. See post, XVI.

Certificate of purchase does not bar right to contest. See post, XVII, 2.

439. The act of March 27, 1872, was not repealed by implication by the amendment of 1874 to section 3518 of the Political Code, permitting the owner of a certificate of purchase which is lost, destroyed, or beyond his control to make proof thereof as provided in such section, and procure a duplicate certificate. (*Cerf v. Reichert*, 73 Cal. 360.)

440. A duplicate, dated in 1873, of a certificate of purchase of lieu lands, issued by the register of the state land-office in 1861, is not evidence sufficient to show that the state had sold the land in 1861, as against the holder of a United States patent for the same land, dated prior to the time the duplicate certificate was issued. (*Laughlin v. McGarvey*, 50 Cal. 169.)

Cited 60 Cal. 549.

441. The party in such case should prove the series of acts required by law to entitle

him to the certificate of purchase, and produce the certificate of purchase, or, having accounted for its absence, prove its contents. (*Laughlin v. McGarvey*, 50 Cal. 169.)

442. The indorsement by the officer upon the certificate that a patent has been issued for a portion of the tract described in the certificate is a mere memorandum of subsequent action, and does not amount to a cancellation of the certificate. (*Wright v. Roseberry*, 81 Cal. 87.)

443. No notice of issuance of certificate of location of school lands by the officer is required to be given to the applicant. (*Bachelor v. Willey*, 64 Cal. 44.)

444. A certificate of location of state school lands, in the hands of the person to whom it is issued or his vendee, is prima facie evidence of legal title upon which they are entitled to recover in ejectment, as against one who does not show a better title. (*Stanway v. Rubio*, 51 Cal. 41.)
Cited 84 Cal. 502.

445. A certificate of location of school or lieu land, issued under the act of April 27, 1863 (Stats. 1863, p. 591), is not evidence of legal title, and will not support ejectment. (*True v. Thompson*, 42 Cal. 293.)

446. The act of April 13, 1859 (Stats. 1859, p. 227), in so far as it made a certificate of location of school or lieu lands prima facie evidence of title, was superseded and repealed by the act of April 27, 1863 (Stats. 1863, p. 591), which inaugurated a new system of land law, intended to be complete in itself. (*True v. Thompson*, 42 Cal. 293.)

Surrender of certificate of purchase on issuance of patent. See post, XX, 1.

447. If a person who has received a certificate of location of school lands, and has paid for the same, conveys all his right and title to the same, and to the school location of the same, the deed conveys all the right which the purchaser from the state has acquired by the certificate of location and the payment of the purchase money. (*Stanway v. Rubio*, 51 Cal. 41.)

448. If an applicant for the purchase of school lands from the state, who has received a certificate of location or of purchase, while such certificates are by statute declared to be prima facie evidence of title, conveys all his interest in the lands described in the certificate, the conveyance vests in the grantee all the right which the grantor may afterwards acquire from the state by virtue of a patent issued to him. (*Stanway v. Rubio*, 51 Cal. 41.)
Cited 84 Cal. 614; 88 Cal. 136.

449. The right to purchase state lands is a personal privilege, which cannot be transferred by direct assignment or otherwise. So held, in a case where the assignor had made his application and received his certificate of location before making the assignment. (*Churchill v. Anderson*, 56 Cal. 55.)
Cited 67 Cal. 150.

Action to annul certificate of purchase. See post, XIV, 15.

Location of school land warrants on lands reserved from sale. See post, 780.

Payment pending application. See post, 601.

Certificate of purchase. See *Swamp and Overflowed Lands*, IX.

Mandamus to compel register to issue certificate. See *Mandamus*, 165.

Illegal certificate by register of United States land-office is not admissible. See *Evidence*, 205.

Suit by holder of certificate of purchase to quiet title, laches, what is not. See *Quieting Title*, 81.

Judgment foreclosing certificate of purchase, motion by successor to vacate. See *Judgments*, 646, et seq.

14. Location of State Land Warrants.

450. When the state issues her land warrant and receives the sum of money required to be paid therefor, she thereby sells the amount of land specified in the warrant out of the five hundred thousand acres granted by the act of Congress, and authorizes the holder, as her agent, to locate the same upon any vacant lands belonging to the United States subject to such location. When this location is made, the locator thenceforth becomes the owner of the entire beneficial interest in the particular tract of land selected, and until the issuing of the patent the state holds the legal title in trust for the locator who has become the purchaser. (*Bludworth v. Lake*, 33 Cal. 255.)

Cited 57 Cal. 76; distinguished 72 Cal. 262; 16 Nev. 234.

451. Where S. made a valid location of such a land warrant on a certain three hundred and twenty acre tract of land, which was subject to such location, he thereby became the owner of the entire beneficial estate therein, and thereafter the state, until a patent issued, held the legal title in trust for him. (*Bludworth v. Lake*, 33 Cal. 255.)

452. The public lands of this state were, previous to their survey by the general government, subject to location by the holders of school warrants issued under the act of May 3, 1852. (*Van Valkenburg v. McCloud*, 21 Cal. 330.)
Cited 25 Cal. 255; 45 Cal. 668.

453. Under the act of May 3, 1852, "to provide for the disposal of the five hundred thousand acres of land granted to this state by act of Congress," school land warrants can only be located on lands belonging to the United States subject to such location. (*Farish v. Coon*, 40 Cal. 33.)

454. When school land warrants are located on lands belonging to the state not subject to such location, the state is not estopped from asserting title to such lands by the fact that the purchase money for the warrants was paid into the state treasury, and has never been refunded, or offered to be refunded. (*Farish v. Coon*, 40 Cal. 33.)

455. The purchaser of school land warrants was bound in law to know that they could only be located on lands belonging to the United States. (*Farish v. Coon*, 40 Cal. 33.)

456. Where such warrants were, through mistake, located on other lands not subject to

location, the only remedy was to float the warrants and locate on other lands. (*Farish v. Coon*, 40 Cal. 33.)

457. The location of a school land warrant issued under the act of May 3, 1852, upon unsurveyed lands of the United States, is void, and confers no right whatever upon the locator. (*Hastings v. Devlin*, 40 Cal. 358.) Cited 46 Cal. 239, 244; 62 Cal. 553; 63 Cal. 24.

458. The location of a state school land warrant on unsurveyed public land is void. (*Smith v. Athern*, 34 Cal. 506.) Cited 48 Cal. 28; 49 Cal. 217; 63 Cal. 24; 69 Cal. 433.

459. Lands covered by the ebb and flow of the tide are not subject to location with school land warrants; nor does the location of such lands with school land warrants confer on the locator a right to the possession as against the true owner, or amount to a color of title. (*Farish v. Coon*, 40 Cal. 33.)

460. Neither the United States register for California, nor the surveyor general of the state, have authority to approve the location of school land warrants on tide lands belonging to the state. (*Farish v. Coon*, 40 Cal. 33.)

461. The act of May 3, 1852, makes no reservation of mineral lands, and there is no prohibition against locating school land warrants on any of the mineral lands in the state. (*Nims v. Johnson*, 7 Cal. 110.)

462. Location of school land warrants, prior to the survey of the land on which they are located by the United States, is void. (*Collins v. Bartlett*, 44 Cal. 371.)

Cited 49 Cal. 217, 218; 89 Cal. 361; distinguished 76 Cal. 505.

463. C., being the holder of two school warrants issued under the state act of May 3, 1852, located with them, in November of that year, three hundred and twenty acres of public land, of which no survey had at that time been made by the general government, took possession of the same and occupied it until 1857, when he conveyed the premises with the warrants to M., and he subsequently to the defendant, who took and has since retained the possession. The original selection was not strictly in conformity with the lines of the subsequently made survey of the United States, but after such survey the defendant caused its boundaries to be changed so as to conform with the lines of the sectional divisions established by the survey, and deposited his warrants in the United States land-office of the district. The plaintiff claims under a location of other school warrants made by him upon the same land after the survey by the United States. In ejectment by plaintiff to recover the land of defendant, held, that the location by C. before the government survey was valid, and that the title of defendant should prevail. (*Van Valkenburg v. McCloud*, 21 Cal. 330.)

464. Validity of the location of school land warrants is not affected by failure to publish a notice of the locator's application to the register for a certificate of location. The state certainly was in no way prejudiced by the failure to publish such notice, and no one can take advantage of the omission without show-

ing that he was in some way prejudiced by it. (*People ex rel. Hastings v. Jackson*, 62 Cal. 548, 554.)

465. The object of the law, requiring the record of entry on lands under school land warrants, was to give notice of subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void, as to a subsequent locator with actual notice. (*Watson v. Robey*, 9 Cal. 52.)

466. Provision requiring record of entry on lands under school warrants is like that of the act concerning conveyances, which requires the record of certain instruments. A party cannot forfeit his rights by a mistake which injures no one. A party cannot complain that he was injured by a failure to record in the proper office, when he knew the fact without the record. (*Watson v. Robey*, 9 Cal. 52.)

467. In awarding certificate upon located land warrant, the register of the state land-office does not exceed his authority, under the fifty-ninth section of the act of 1868, if he is satisfied the location made is ineffectual or useless, and that the lands located would not, by reason of such location, be lost to the state. (*Stuart v. Haight*, 39 Cal. 87.)

468. The determination and judgment of the register upon these matters are not the subject of review either by the executive or the courts. (*Stuart v. Haight*, 39 Cal. 87.) Cited 39 Cal. 210.

469. When location not available, in consequence of prior claims of persons holding preemption rights upon the lands located, the owner of the warrants will be entitled to duplicate land warrants, in accordance with the provisions of the act of 1868, "to provide for the management and sale of the lands belonging to the state." (*Stuart v. Haight*, 39 Cal. 87.)

470. A settler upon and in possession of public lands of the United States, intending to locate the same under the State School Warrant Act of April 23, 1858, will lose his rights, as against one subsequently locating the land under the act, and receiving the register's certificate of purchase, if such settler has taken no steps to acquire the title. (*Mott v. Hawthorn*, 17 Cal. 58.) Cited 89 Cal. 365.)

471. The action was brought to recover land claimed by the plaintiff under a state patent issued in September, 1875, upon an application made in December, 1874. The only defense set up in the answer was a general denial. In October, 1853, the defendant located upon the land a school land warrant issued under an act of the legislature passed on the 3d of May, 1853, to provide for the disposition of the five hundred thousand acres of land donated to the state by the United States. At the time of the location the land was a part of the public domain of the United States, and had not been surveyed. The survey was made in 1866, and thereupon the state selected certain lands, including the demanded premises, in part satisfaction of the five hundred thousand acre grant. In 1870 the lands so selected were listed to the state by the commissioner of the general land-office,

with the approval of the secretary of the interior. Held, that the location was valid as between the state and the defendant, that as soon as the land was listed to the state the title passed to the defendant, and that proof of the facts on which the title rested was admissible under a general denial. (*Roberts v. Columbet*, 63 Cal. 22.) Cited 88 Cal. 481; 91 Cal. 481.

472. Where S., after location of his warrant, and before the issue of patent from the state to him, conveyed all his right, title, and interest in the located land, he thereby not only conveyed his beneficial interest in the land, but his right to a conveyance of the legal title. (*Bludworth v. Lake*, 33 Cal. 255.)

15. Payment.

473. When a purchase of part of the unsold portion of the five hundred thousand acres granted to the state for school purposes is initiated by a gold coin payment, under section 3494 of the Political Code, before the certificate of purchase is issued, the purchase cannot be completed by the surrender of school land warrants, under section 3502 of said code, and a patent issued upon such final payment is without lawful authority. But such payment being made and accepted in good faith without fraud, the state cannot set aside the patent without restoring the warrants paid under an erroneous view of the law, and the holder of the certificate of purchase is entitled to conclude the purchase by a gold coin payment under section 3494, in the absence of a preventing statute. (*People ex rel. Wallen v. Morris*, 77 Cal. 204.)

474. Under the provisions of section 3494 of the Political Code, the payment of twenty per cent of the required purchase money must be made within fifty days from the date of the certificate, or the right to purchase becomes forfeited. (*Bachelder v. Willey*, 64 Cal. 44.)

475. The provisions of the act of April 4, 1870, amendatory of the act of 1868, to the effect that, in case of failure to make the first payment for the land purchased, within fifty days from the approval of the survey, the land shall revert to the state, and the survey and location become null and void, is merely declaratory of the true sense of the statute. (*Rowell v. Perkins*, 58 Cal. 219.)

476. An applicant for the purchase of lands belonging to the state, under the provisions of the act of March 28, 1868, who has obtained a certificate of location from the surveyor general, but has failed to pay the installment of twenty per cent of the purchase money within fifty days from the date of the certificate, will be considered as having abandoned his exclusive right to purchase, and the surveyor general may issue a new certificate to another applicant for the purchase of the same lands. (*Eckart v. Campbell*, 39 Cal. 256.) Cited 51 Cal. 6, 7; 56 Cal. 223; 74 Cal. 111.

477. In an action to annul a certificate of purchase of school lands for nonpayment of interest, the service of summons by publication must be made in accordance with the provisions of the Code of Civil Procedure. (*People v. Applegarth*, 64 Cal. 229.) Cited 73 Cal. 259; 76 Cal. 401.

478. A certified copy of a judgment purporting to foreclose and annul the interest of a purchaser in a certificate of purchase of state land, upon being filed with the register of the state land-office, as provided in the act of 1868, is not conclusive evidence of the validity of the judgment so as to protect subsequent purchasers from the state of the land included in the certificates. (*Hyde v. Redding*, 74 Cal. 493.)

479. In an action to annul a certificate of purchase of land sold on credit by the state for nonpayment of the purchase money, if the holder of the certificate is known, the action must be brought against him by his real name, and there must be a personal service of summons. In such case the summons cannot be served by publication. (*People v. Herman*, 45 Cal. 689.)

480. In an action brought by the state, under the act of 1868, for the sale of lands belonging to the state, to annul a certificate of purchase for failure to make payment, if summons is published, the cost of publishing the same must be taxed in the costs, and a judgment rendered against the defendant therefor. (*Lawrence v. Booth*, 46 Cal. 187.)

481. If such judgment cannot be collected by execution out of the defendant's property, and if the lands are school lands, the cost of publication must be paid by the state out of the general fund. (*Lawrence v. Booth*, 46 Cal. 187.)

482. In such case, the board of examiners must audit the claim for publishing summons at the amount taxed by the district court, even if no specific appropriation has been made by the legislature therefor. (*Lawrence v. Booth*, 46 Cal. 187.)

Payment on purchase of swamp lands. See *Swamp and Overflowed Lands*, XI.

Surveyor general, duty of to collect fees. See *Surveyor General*, 2.

16. Proceeds of Sale, How Applied.

483. Provisions of the Amendatory School Land Act of April 22, 1861, requiring that the proceeds of sales of the sixteenth and thirty-sixth sections shall constitute a state fund, instead of being applied for the benefit of the townships in which the lands are situated, is constitutional and valid. It is not in violation of the grant made by Congress, nor, in requiring the interest upon previous sales made under the act of 1858 to be transferred to the state fund, does it impair the obligation of a contract. (*Wyman v. Banvard*, 22 Cal. 524.)

484. School Land Act of 1858 is not a grant of the interest money to the several townships, but merely a provision as to the manner in which a certain fund shall be appropriated, and subject, therefore, to the future control of the legislature. (*Wyman v. Banvard*, 22 Cal. 524.)

XV. Contracts Relating to Purchase of Lands for Others.

485. An executory contract, made by a pre-emptor before proof and payment, to convey the land after he receives a patent, is null and void. (*Huston v. Walker*, 47 Cal. 484.)

486. An agreement between settlers upon unsurveyed public lands of the United States, to the effect that, after their respective lands should be surveyed and patents obtained therefor, each would convey to the other such land embraced in the patent to him as was in the possession of the other at the time of the agreement, is void under section 2263 of the United States Revised Statutes, unless the parties are settlers and have their improvements upon the same legal subdivision. (*Turner v. Donnelly*, 70 Cal. 597.) Cited 19 Cal. 103.

487. One Ensey, an applicant for the purchase of a tract of government land, made an agreement in writing with the defendant, who was in possession of a part of the land, that Ensey should procure a patent from the United States to the whole tract, and would then convey to the defendant the land possessed by him, on payment of his proportion of the purchase money and expenses. Held, (1) that the agreement was binding upon Ensey, and any purchaser from him with notice; (2) that it was the duty of Ensey to notify the defendant of the issuance of the patent, and the proportion of the purchase money to be paid by him. (*Peasley v. Hart*, 65 Cal. 522.)

488. There is nothing in the Political Code which prohibits the sale of a sixteenth or thirty-sixth section to one who has contracted to convey to another a part of the land. (*Thompson v. Hancock*, 51 Cal. 110.)

489. An agreement by a pre-emptor of public land to convey the same when he should thereafter procure a patent is void, and cannot be enforced at law or in equity. (*Thompson v. Doaksum*, 68 Cal. 593.)

490. An agreement between two persons, to the effect that if either shall succeed in establishing a pre-emption claim to a tract of land, he shall divide the land with the other, is in contravention of the Pre-emption Act, and cannot be enforced. (*Damrell v. Meyer*, 40 Cal. 166.)

Cited 68 Cal. 598; 70 Cal. 604; 81 Cal. 63; 84 Cal. 415; 91 Cal. 117.

491. In ejectment brought by a pre-emptor, based on the patent issued to him, the defendant cannot set up, nor will a court of equity enforce, an executory contract to convey the land, entered into by the plaintiff before making proof and payment as a pre-emptor. (*Huston v. Walker*, 47 Cal. 484.)

Cited 68 Cal. 598; 81 Cal. 63; 84 Cal. 415.

492. An agreement to file a homestead claim upon public land under the laws of the United States, and to obtain title thereto for the benefit of a partnership to which the applicant belongs, is in contravention of the spirit and policy of the law, and is illegal and void. (*Estate of Groome*, 94 Cal. 69.)

493. A parol agreement by such applicant, after having acquired the title to the homestead upon a settlement of his accounts with the partnership, "that the land belonged to the partnership," does not create any trust, or vest in his partners any estate in the land. (*Estate of Groome*, 94 Cal. 69.)

494. An agreement to procure the title of

the United States to land, and then execute a deed to the other contracting party, is complied with by procuring a patent of the United States to the other party. (*Snow v. Ferrea*, 45 Cal. 195.)

Contracts violating public land laws. See Contracts, III, 3, b.

Agreement to purchase swamp lands for another. See Swamp and Overflowed Lands, VII.

Contract to purchase school land warrants, legality of. See Payment, 121.

Sham locations, agreement to share. See Contracts, 194.

Illegal contract relating to timber, note for. See Bills and Notes, 40.

Contract with county surveyor, when void. See Contracts, 173.

Illegal contract concerning, objection to cannot be first taken on appeal. See Appeals, 2413.

Rescission of contract relating to public land to qualify one as witness, effect of and renewal of. See Witnesses, V, 8, c, L.

Contracts in contravention of land laws not enforced. See Specific Performance, IV, 6.

Agreement to convey. See Specific Performance, 189.

XVI. Tax Deed or Sheriff's Deed of Interest in, Rights of Holder.

495. A tax deed to school land sold for delinquent taxes assessed to the holder of a certificate of purchase therefor passes only the equitable title of the applicant. (*Dorn v. Baker*, 96 Cal. 206.)

496. Where the holder of a tax title to school land for which a certificate of purchase has been issued has not perfected his equitable title by paying the balance of the purchase money due the state, with interest, an assignee of the applicant for purchase, who afterwards makes such payment and obtains a patent for the land, acquires the legal title thereto, which will prevail against the equitable title of the holder of the tax title, in an action of ejectment by the patentee, if no equitable defense is pleaded by the holder of the tax title. (*Dorn v. Baker*, 96 Cal. 206.)

497. Under the act of March 27, 1872, where land has been sold by the state, and a certificate of purchase issued upon part payment of the purchase money, and afterwards the land has been sold under execution, and a sheriff's deed issued therefor, the grantee named in such deed is entitled to receive a patent for the land upon producing and surrendering the sheriff's deed and making full payment. In such a case, the provisions of section 3519 of the Political Code, requiring the surrender of the certificate of purchase before the issuance of the patent, do not apply, as the act of March 27, 1872, having been passed at the same session of the legislature as the Political Code, prevails over any provisions of the code which are inconsistent therewith. (*Cerf v. Reichert*, 73 Cal. 360.)

Taxation, public land is not subject of. See Taxation, 93.

Exemption from taxation. See Taxation, 189.

Claim to and possession of public land, power to tax. See Taxation, IV, 5.

Tax title to school land, statute, when begins to run in favor of. See Statute of Limitations, 57.

XVII. Contest.

1. Nature of; Contest Assumes State's Title.

498. An action brought to determine a contest as to the right to purchase state lands is purely statutory, and not an action in equity. (Campbell v. Coburn, 77 Cal. 36.)

499. A contest of a right to purchase land from the state is a proceeding in which, from its very nature, the order for a reference of the contest, and all proceedings prior and subsequent thereto, assume the title of the land to be in the state, certainly so far as the plaintiff and defendant are concerned. (Bode v. Trimmer, 82 Cal. 513.)

2. Right to Contest.

500. A contest cannot be made before the surveyor general in respect to the right to purchase land for which a patent has been issued to one of the parties. (Somo v. Oliver, 52 Cal. 378.)

Cited 98 Cal. 402; distinguished 68 Cal. 542.

501. If, in an action for damages for a trespass on land, the plaintiff relies for title upon certificates of purchase issued by the state, and the defendant puts in issue the plaintiff's title, and the plaintiff recovers judgment, the judgment is not a bar to an action brought by the defendant against the plaintiff to determine which of the parties has the better right to purchase the land from the state. (Bosquett v. Crane, 51 Cal. 505.)

502. Whether the fraud of the holder of the certificate of purchase, in obtaining the certificate, is an injury to a subsequent applicant or not cannot affect his statutory right to contest the certificate. (McFaul v. Pfankuch, 98 Cal. 400.)

503. In an action upon a reference from the land-office to determine the right to purchase, the certificate of purchase is not of itself a bar to inquiry as to the rights of the person to whom the certificate was issued. (Taylor v. Weston, 77 Cal. 534.)

Cited 82 Cal. 516.

504. A contest as to the right to purchase state lands may be made after a certificate of purchase has been issued to one of the claimants. (Gilson v. Robinson, 68 Cal. 539.)

Cited 98 Cal. 402.

505. If a certificate of purchase of state lands is improperly issued by the register, a subsequent applicant to buy the same land may raise a contest in the office of the register as to the right to purchase the land, and the register may refer it to the court for trial, and the court may annul the certificate and grant the right to purchase to the subsequent applicant. (Cunningham v. Crowley, 51 Cal. 128.)

Cited 54 Cal. 633; 68 Cal. 542; 77 Cal. 101; 91 Cal. 33; 98 Cal. 402.

506. An applicant for the purchase of school lands is entitled, upon an order of the surveyor general referring his contest to the

superior court, to maintain an action for the determination of his right to purchase such land, as against one to whom a certificate of purchase has been issued, if the state is not barred by the statute of limitations from canceling the certificate of purchase upon sufficient grounds, and no other statute of limitations is applicable to such a contest, if no patent has issued under the certificate. (McFaul v. Pfankuch, 98 Cal. 400.)

507. The right of an applicant to purchase school lands to contest the right of a holder of a certificate of purchase is statutory, and it is immaterial whether he has any priority with the state, which is the paramount source of title; nor is he concluded by the certificate of purchase in such a contest, although the certificate is made prima facie evidence of title in a collateral proceeding as against an intruder. (McFaul v. Pfankuch, 98 Cal. 400.)

508. The statute does not make it the duty of the contestant to refund the money paid by the purchaser for his certificate of purchase, nor to offer to credit the purchaser with such payment, and he need not allege in his complaint an offer to return the purchase money so paid. (McFaul v. Pfankuch, 98 Cal. 400.)

Person making application to purchase pending contest cannot contest. See post, 565, 566.

Contest of right to purchase swamp lands. See Swamp and Overflowed Lands, X.

Trustee may compel surveyor to allow him to contest. See Trusts and Trustees, 118.

3. Time for Commencement of.

509. A suit concerning the right to purchase lieu lands cannot be commenced in the courts until the surveyor general has made an application to the register of the proper land-office to have the land accepted in part satisfaction of the grant under which it is sought to locate them. (Berry v. Cammet, 44 Cal. 347.)

510. Under section 3417 of the Political Code, the failure of a party applying for the purchase of certain state lands to commence an action to determine a contest between himself and a prior claimant as to the right to purchase, within sixty days after an order referring the contest for trial is made, does not deprive him of the right to make a second application for the same land, and on the latter application to contest the right of the prior claimant to purchase. (Greenwade v. De Camp, 72 Cal. 448.)

Cited 79 Cal. 4.

Failure to bring action in time, effect of. See post, 558.

4. Publication of Summons.

511. In an action to determine the right of conflicting claimants to purchase certain state land, brought in pursuance of an order of reference made by the surveyor general, the superior court acquires jurisdiction of the person of a nonresident defendant by the service of summons upon him by publication. By applying to purchase the land, the defendant must be held to consent to this mode

of service in advance. (*Lobree v. Mullan*, 70 Cal. 150.)
Cited 82 Cal. 516.

5. Surveyor General's Duty to Hear; Reference of and Jurisdiction of Courts.

512. It is duty of surveyor general to hear and determine all contests which may be brought before him by any person touching the right of the state to sell lands, or of the applicant to purchase the same even though the contestant does not seek to purchase. (*Tyler v. Houghton*, 25 Cal. 26.)
Cited 25 Cal. 259; 30 Cal. 608; 48 Cal. 609; 68 Cal. 476; 74 Cal. 177.

513. The surveyor general is to determine only those contests about the purchase of lands in which the survey, "or purely a question of fact," is involved. (*Hinckley v. Fowler*, 43 Cal. 56.)

514. When a question of law only is involved, or one of law and fact, in relation to purchase of tide lands, the parties are to be referred to the courts for the settlement of such questions. (*Hinckley v. Fowler*, 43 Cal. 56.)

515. The demand for reference of a contest of the right to purchase state lands need not be made in writing. (*Espinosa v. Phelan*, 77 Cal. 100.)

516. The action was brought to determine a contest as to the right to purchase certain state lands. The order of the surveyor general referring the contest for trial, after reciting what had been done by and for each of the parties to give him a right to purchase, and that the plaintiff had filed a demand that the contest be referred to the proper court, read as follows: "It is therefore ordered and directed that the said parties be and they are hereby referred to the district court of the twentieth judicial district in and for Monterey county for a final determination of said conflicting claims." Held, that the order was sufficient to refer the contest, and to give the court jurisdiction of the case. (*Gilson v. Robinson*, 68 Cal. 539.)
Cited 82 Cal. 573; 83 Cal. 300; 90 Cal. 47; 98 Cal. 402.

517. A clerical error in the order of reference of a contest of the right to purchase state lands, by an evident omission in the recital of the demand for reference, should be disregarded, and will not affect the jurisdiction of the superior court to determine the contest. (*Espinosa v. Phelan*, 77 Cal. 100.)

518. Whether the contest is initiated by the protest and demand in the office of the register or surveyor general, under section 3414 of the Political Code, does not affect the validity of an order of reference made by a deputy who acted in that capacity, and signed and sealed the order for both register and surveyor general, the surveyor general being ex officio register. (*Espinosa v. Phelan*, 77 Cal. 100.)

519. The certificate of the surveyor general to the copy of the order referring the contest for trial need not expressly state that the order had been entered in a record book in his office. (*Jacobs v. Walker*, 76 Cal. 175.)

520. Under sections 3414 and 3415 of the Political Code, the superior court obtains jurisdiction of an action to determine a contest between conflicting claimants of the right to purchase state lands, which has been referred to it for trial, although the certified copy of the order for trial does not affirmatively show that the order was entered in a record book in the office of the surveyor general. If the surveyor general certifies that the copy of the order is a copy of a document on file in his office, it will be presumed that the order was regularly entered in a record book. (*Eads v. Clarke*, 68 Cal. 481, cited 70 Cal. 248, 76 Cal. 177; *Gould v. Lanterman*, 70 Cal. 247.)

521. The judicial department of the state has no jurisdiction of controversies arising between applicants for the purchase of state lands, except in cases where such jurisdiction is expressly conferred by statute. (*Berry v. Cammet*, 44 Cal. 347.)
Cited 55 Cal. 43.

522. The only contest in respect to the right to purchase state lands of which the district courts have jurisdiction are those which arise in the surveyor general's or register's office. (*Vance v. Evans*, 52 Cal. 93.)
Cited 98 Cal. 402.

523. The district court has no jurisdiction to try the right of a party to purchase state lands, under the act of 1863, unless a contest has been set on foot in the register's office by a demand made by one of the parties that a trial be had in the proper court, or unless, in the judgment of the register, a question of law is involved. (*Keema v. Doherty*, 51 Cal. 3.)
Cited 98 Cal. 402.

524. The judicial department of the state has no jurisdiction of a contest between opposing applicants for the purchase of state lands, unless it has been specially referred to a court by the surveyor general or register of the state land-office, under section 1314 of the Political Code; and, as a jurisdictional fact, the order must be proffered or averred in the complaint and proved. (*Danielwitz v. Temple*, 55 Cal. 42.)
Cited 74 Cal. 582; 98 Cal. 402.

525. In an action to try the rights of contestants to purchase state lands, the jurisdiction of the district court (under the late constitution) depended upon the fact that the surveyor general had made an offer referring the contest; and it was therefore necessary for the plaintiff to allege and prove the making of the order, but not necessary for him to allege that a certified copy of the order was filed in the district court before the commencement of the action. (*Lane v. Pfedner*, 56 Cal. 122, cited 57 Cal. 134, 68 Cal. 484, 543, 74 Cal. 178, 82 Cal. 573; *Lane v. Pfedner*, 57 Cal. 134.)

526. If an application is made to the register of the state land-office to purchase land, and a protest is filed on the ground that the state has no title, and that the title is in the protestant, and that he has the better right to purchase, and a contest arises before the state register, which he refers to the district court for trial, and an action is commenced

in the district court, it has jurisdiction to determine the question whether the state has title to the land. (*Thompson v. True*, 48 Cal. 602.)

Cited 74 Cal. 177.

Jurisdiction of supreme court of United States over contest. See Appeals, 3372.

6. Parties; State as Party.

527. In a contest over a right to purchase land from the state, an applicant to purchase, and one who protested against the approval of his application, should not be joined in the same answer. (*Cadierque v. Duran*, 49 Cal. 356.)

528. The state is not a necessary party to an action to determine whether the holder of the certificate of purchase was not entitled to purchase; but the order of the surveyor general referring the rights of the parties to the superior court upon a proper contest, without which that court has no jurisdiction to act, is in the nature of a bill of interpleader and binds the state by the result of the action. (*McFaul v. Pfankuch*, 98 Cal. 400.)

529. Where a controversy arises before the surveyor general of the state as to conflicting claims regarding the purchase of state lands, and is referred to the court for determination, the validity of a certificate of purchase issued to the defendant will not be adjudicated, when the state is not a party to the proceeding, and the plaintiff fails to show any right in himself. (*Urton v. Wilson*, 65 Cal. 11.)

7. Pleadings and Evidence.

530. Ordinary rules of pleadings and of evidence are to be observed, and judgment is to be rendered as in ordinary adversary proceedings. (*Hinckley v. Fowler*, 43 Cal. 56.)

531. In an action to determine a contest arising in the surveyor general's or register's office, each party must allege facts sufficient to show that he is entitled to the issue of a certificate to him. (*Wright v. Laugenour*, 55 Cal. 280.)

532. In an action brought to determine a contest arising in the office of the surveyor general as to the right of the contestants to purchase state lands, each party is an actor, and must allege in his pleadings all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of such right; and, failing to do so, he has no standing in court. (*Dillon v. Saloude*, 68 Cal. 287.)
Cited 68 Cal. 477; 74 Cal. 178; 83 Cal. 300.

533. When a contest in the surveyor general's office, in relation to the right to purchase land from the state, is referred to the proper court for determination, the parties who are applicants to purchase must each state, in his pleading, all the facts upon which he relies as showing his right to become a purchaser, and the steps which he has taken to secure his right to purchase. (*Cadierque v. Duran*, 49 Cal. 358.)
Cited 56 Cal. 124; 60 Cal. 549; 68 Cal. 270, 477, 542; 78 Cal. 117; 82 Cal. 573; 83 Cal. 300; 84 Cal. 614; 94 Cal. 228.

534. In an action to determine a contest re-

specting the right to locate university lands, each party is an actor, and must allege and prove all the facts upon which he relies as showing his right to become a purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase. (*Cushing v. Keslar*, 68 Cal. 478.)

Each party must allege and prove strict compliance with the law. See ante, 525.

535. In an action to determine a contest as to the right to purchase certain state lands, the plaintiff, not having shown a right to purchase in himself, is not entitled to recover because of the insufficiency of the allegations or proof of the defendant. (*Manley v. Cunningham*, 72 Cal. 236.)

536. In an action to determine a contest arising in the surveyor general's office in respect to the right to purchase lands from the state, the defendant is not entitled to a judgment awarding him the right to purchase because the plaintiff has failed to make out a case; nor is he entitled to such judgment unless the answer and complaint state facts which show he has a right to purchase. (*Christman v. Brainard*, 51 Cal. 534.)
Cited 68 Cal. 542; 78 Cal. 516.

537. When a controversy between applicants for the purchase of state lands is referred to the courts for decision, the complaint in the action must state not only that the parties are contesting claimants for the purchase of the land, but also all the facts conferring jurisdiction on the court, such as the proceedings before the surveyor general, and the order made by him referring it to the courts. (*Berry v. Cammet*, 44 Cal. 347.)
Cited 56 Cal. 123.

538. A complaint in an action between contesting applicants to buy lieu lands must aver that the surveyor general has made application to the register to have the land accepted in part satisfaction of the grant under which it is sought to locate them. (*Berry v. Cammet*, 44 Cal. 347.)

539. A complaint in an action to determine a contest as to the right to purchase state lands must allege the facts, so that the court may see whether the application was made in due form or not. An allegation that the plaintiff filed his "affidavit and application in due form" is the statement of a mere conclusion, and is insufficient. (*McEntee v. Cook*, 76 Cal. 187.)

540. The complaint in the action to determine a contest of a right to purchase school land need not allege the grounds of the plaintiff's protest in the office of the surveyor general. (*Jacobs v. Walker*, 76 Cal. 175.)

541. In an action to determine a contest in respect to the right to purchase lands from the state, it is not sufficient to plead a certificate of purchase, but facts must be stated which authorize the certificate to issue. (*Christman v. Brainard*, 51 Cal. 534.)
Cited 55 Cal. 282; 56 Cal. 124; 68 Cal. 543; 76 Cal. 77; 82 Cal. 573; 83 Cal. 300.

542. A complaint, which seeks to obtain equitable relief on the ground of the superior claims of the plaintiff to the right of pre-

emption of the land in controversy, must show that plaintiff was qualified to acquire a pre-emption right, and that all the steps necessary under the act of Congress to acquire one were taken. (*Quinn v. Kenyon*, 38 Cal. 499.)

Cited 68 Cal. 186; 87 Cal. 298.

543. In such case, a complaint which fails to show that the plaintiff ever contemplated acquiring a pre-emption right, or that he would have done so, or that he in any way lost any thing by the acts of the defendant, is fatally defective. (*Quinn v. Kenyon*, 38 Cal. 499.)

544. The complaint in an action to determine a contest as to the right to purchase state lands sufficiently avers, as against a general demurrer, that an order of reference had been made, when it alleges that on a particular day the surveyor general referred the contest to the superior court for adjudication, and that the order of reference was on the same day filed with the clerk. (*Riddell v. Mullan*, 77 Cal. 577.)

545. In such an action, where the defendant claims to be a preferred purchaser of swamp land under the act of April 4, 1870, on the ground of settlement prior to the survey, he must allege in his answer that the land was "occupied for the purposes of tillage or grazing," and (if the plat has been filed) that, within ninety days after the filing, he filed an application to have his possessory claim surveyed. (*Ramsey v. Flournoy*, 58 Cal. 260.)

546. Where the complaint of the applicant alleged the contents of his affidavit and application to purchase, which stated that he was an actual settler upon the land, and that he desired to purchase the land for his own use and benefit, and had made no contract or agreement to sell the same, and further alleged that "at the time of making said affidavit and application, all the matters and things therein stated were, ever since have been, and now are true," an objection that the complaint does not show that at the day of the commencement of the action the plaintiff was an actual settler upon the land, or that he then desired to purchase it for his own use and benefit, cannot be urged upon general demurrer. (*McFaul v. Pfankuch*, 98 Cal. 400.)

Allegation of making of order. See ante, 390, 391.

547. It is an abuse of discretion, in action to determine a contest as to the right to purchase state land, for the court not to allow the complaint to be amended by alleging that a demand for an order of reference had been made by the plaintiff, and the time when such demand was made, so as to show that he had complied with the provisions of section 3498 of the Political Code, as amended on March 14, 1885. (*Riddell v. Mullan*, 77 Cal. 577.)

548. In an action by an applicant for the purchase of state school land, to contest the applications of the defendants to purchase the same lands, and to have them declared invalid and of no effect, an answer by one of the defendants, showing that his application was filed in the office of the surveyor general

upon a certain date, more than one year previous to the commencement of the action, but failing to aver that within six months thereafter he demanded an approval of his application, or made demand of an order of reference, or that a reference to a court had been made as provided by section 3498 of the Political Code, is insufficient and fatally defective. The application to purchase became void at the expiration of six months unless the action indicated was taken, and it was necessary to aver it to have been so taken. (*Burns v. Scooffy*, 98 Cal. 271.)

549. The trial court erred in ordering such answer to be stricken from the files on the ground of its insufficiency, and in refusing to allow the defendant to file an amendment thereto to cure the defects therein, it appearing from the affidavits in support of the motion that the omission of the necessary allegations from the answer were in all probability an oversight on the part of the attorney who drew the pleading. (*Burns v. Scooffy*, 98 Cal. 271.)

550. In an action to determine conflicting claims to purchase state land upon a contest referred to the court by the surveyor general, it is necessary for the defendant to show in his answer that he is entitled to purchase the land claimed by the plaintiff, in order to give him a standing in court; the mere denial of the plaintiff's right, without the allegation of facts showing a right in the defendant, will not raise any contest between the defendant and plaintiff. (*Ramsey v. Flournoy*, 58 Cal. 260.)

Cited 68 Cal. 270, 477; 83 Cal. 300.

551. An averment in the answer of one who protested against the approval of the application of another, that his protest was filed under a mistake, is not equivalent to a withdrawal of the protest, and until his protest is withdrawn, he is to be regarded as protesting. (*Cadierque v. Duran*, 49 Cal. 356.)

552. If one party merely protests against the approval of an application of another, he must state the facts constituting the ground of his opposition. (*Cadierque v. Duran*, 49 Cal. 356.)

553. The action was brought to determine a contest which had arisen in the land-office of the university of the state between two opposing applicants to locate and purchase the land in question. The plaintiff was the first applicant, and the court rendered judgment in his favor on the pleadings without hearing any evidence. The answer denied the allegation of the complaint that the land had been selected by the land agent of the university as a part of the one hundred and fifty thousand acres of land granted to the state for an agricultural college, and also the allegation that there were no improvements on the land when the plaintiff filed his application to purchase. Held, that the judgment was erroneous, and that the denials were sufficient to put the plaintiff to proof of his allegations as to the selection of the land and his right to purchase it. (*Cushing v. Keslar*, 68 Cal. 473.)

554. The burden rests upon either party to establish his own right; and the fact that

the complaint anticipates the case of the defendant by negative averments as to his qualifications and right to purchase does not alter the rule or shift the burden. (*Lane v. Ferdner*, 56 Cal. 122.)

555. The rule that each party to a contest of the right to purchase state lands is an actor, and must set forth in his pleadings and show by his proofs that he has strictly complied with the law, does not change the rule of the Code of Civil Procedure that material allegations which are not denied must be taken as true. (*Prentice v. Miller*, 82 Cal. 570.)

556. It is necessary for each contestant to allege and prove that the land applied for was surveyed by the United States at the time they severally sought to purchase it. But if the pleadings on both sides allege the fact of such survey, a recital in a certified copy of the order of reference by the state surveyor general, introduced in evidence without objection, setting forth that the register of the United States land-office had certified to the state that there was no valid claim to the land adverse to that of the state, sufficiently tends to prove the filing of an approved survey by the United States surveyor general in the United States land-office, and a listing of the land to the state by the register of the United States land-office, to sustain findings of such facts. (*Prentice v. Miller*, 82 Cal. 570.)

557. In an action to determine the right to purchase school land from the state as timber land, it is not error to permit a witness to be asked what it would cost, in his judgment, to clear off the land in question, where it appears that the witness had an ordinary knowledge, as a farmer and logger, of land and its qualities. It is for the trial court to determine the weight to be given to such evidence. (*Barnum v. Bridges*, 81 Cal. 604.)

558. The failure of an applicant for the purchase of state lands to bring his action to determine a contest as to the right to purchase within sixty days after the order of reference was made, as required by section 3417 of the Political Code, does not prevent him, in an action instituted under a subsequent application and order of reference, from introducing evidence of acts of actual settlement upon the land, which had been performed by him prior to the date when the sixty days expired within which he should have instituted his action under the first order of reference. (*Greenwade v. Decamp*, 79 Cal. 1.)

Issuance of subpoena to appear before United States land officials. See *Mandamus*, 85.

Perjury before land-office, state court has no jurisdiction. See *Criminal Law*, 2524.

8. Submission on the Pleadings.

559. In an action to decide a contest concerning the rights of parties to purchase state lands, wherein the complaint is insufficient to authorize a judgment for plaintiff, and the answer sets up affirmative matter requiring proof, and the cause is submitted on the pleadings without the introduction of any evidence, held, that the cause stands as

though it had been submitted on the complaint alone, which, though insufficient to entitle the plaintiff to relief, cannot, of itself, be made the basis of affirmative relief to the defendant. (*Rogers v. Shannon*, 52 Cal. 99.)

560. The defendant in such case may have judgment for costs. (*Rogers v. Shannon*, 52 Cal. 99.)

9. Intervention; Disclaimer.

561. Although the petition in intervention filed by an actual settler may not show his right to intervene in the contest, the court, having the duty cast upon it to inquire whether either party to the contest is entitled to purchase the land, and to adjudge accordingly, may, in its discretion, allow the intervenor, as an *amicus curiæ*, to show that neither of the contestants was qualified to purchase the land; and if the intervenor takes nothing by the judgment, and it does not appear that the party appealing was injured, the judgment will not be reversed because the court refused to strike out the petition and overruled a demurrer thereto. (*McNee v. Lynch*, 88 Cal. 519.)

562. Disclaimer in an answer, in a contest in relation to the right to purchase land from the state, cannot be regarded, if the one who disclaimed afterwards answers. (*Cadierque v. Duran*, 49 Cal. 356.)

10. Preferred Right on Cancellation of Entry.

563. Person who has successfully contested and procured cancellation of an entry made by another under the desert land law does not acquire a preferred right of entry on the land embraced in the contest. Under the act of Congress for the relief of settlers on public lands (21 U. S. Stats. at Large, 140, 141), such a preference is only given to contestants who have procured the cancellation of pre-emption, homestead, or timber-culture entries. (*Gray v. Dixon*, 83 Cal. 33.)

11. Sale Pending Contest.

564. District court has no jurisdiction of an application to purchase lands filed after the order referring the contest to such court for determination. (*Vance v. Evans*, 52 Cal. 93.)

565. Rule forbidding the receiving or filing by the register and receiver of a declaratory statement for a tract of land, after the inauguration of a contest between other parties for the same land, is not so unreasonable as to justify an interference by the courts; and a party, who, by reason of such rule, has been prevented by the register and receiver from filing a declaratory statement and from making proofs of his claim of pre-emption, is not in a position to contest the right of another pre-emptor to whom a patent has been issued. (*Chapman v. Quinn*, 56 Cal. 286.)

566. State and its officers are estopped from selling same land to an applicant who filed his claim pending the action or subsequent thereto; and the reception and filing of such an application does not create such a contest as to authorize a reference to the court under section 3314 of the Political Code. (*Cunningham v. Shanklin*, 60 Cal. 118.)

12. Judgment in; Priority Prevails Where Rights Equal.

567. In an action to determine the right of purchase of school lands between adverse claimants, where one of the parties applied for more land than the other, and there is no contest as to the additional land, the court has no jurisdiction to determine the applicant's right to it, and the judgment must be limited to the land in contest. (*Jacobs v. Walker*, 90 Cal. 43.)

568. If a party makes an application to the register of the state land-office to purchase a sixteenth or thirty-sixth section of public land, and one who has obtained a patent to the land from the United States files a protest claiming that the title is not in the state and that he has the better right to purchase, and the contest is referred to the district court for trial, and the district court adjudges that the title to the land is not in the state, and that neither party has a right to purchase the land from the state, and the applicant afterwards obtains a patent from the state, the applicant is estopped by the judgment from averring that the patent from the state vested in him the title to the land, and from denying that the patent issued by the United States transferred to the patentee the title to the land, and the patent issued by the state is void. (*Thompson v. True*, 48 Cal. 602.)

569. When two parties have each an equal right to acquire public land, the one by location and purchase from the state, and the other by locating as a homestead under the laws of the United States, the party who first commences his proceedings to acquire the title has the better right. (*Young v. Shinn*, 48 Cal. 26.)

Duty of surveyor to obey judgment. See post, XVII, 13.

Default in land contest, effect of. See post, 858.

Judgment on the pleadings. See ante, XVII, 7.

Decree in contest, who bound by. See *Mexican Lands*, 155, et seq.

Judgment, conclusiveness of. See *Judgments*, 346, et seq.

Judgment in contest does not affect new title. See *Judgments*, 327.

13. Duty of Surveyor General to Obey Judgment.

570. After the appropriate court has made its judgment, the surveyor general cannot be permitted to call in question the evidence on which the judgment was based, nor the rulings of the court on matters of law. (*Laugenour v. Shanklin*, 57 Cal. 70.) Cited 77 Cal. 207.

571. After judgment has been entered in an action upon a reference of a contest by the surveyor general to determine the right of contestants to purchase state lands, it is the duty of the surveyor general to obey the judgment, and mandamus will lie to compel him. So held in a case where the jurisdiction of the district court was called in question, on the ground that the amendatory act of April, 1870, under which the plaintiff's application

was made, was void. (*Cunningham v. Shanklin*, 60 Cal. 118.) Distinguished 74 Cal. 581.

572. The statute does not contemplate that the surveyor general should be a party to the action; it is his duty to act in accordance with the judgment which may be made therein, and his compliance therewith may be compelled by mandamus. (*Laugenour v. Shanklin*, 57 Cal. 70.)

573. When a contested application for the purchase of school lands has been determined by the judgment of a competent court, and a copy of the final judgment has been filed with the surveyor general or register, as provided in section 3416 of the Political Code, it becomes the duty of such officer to approve the survey or location, and to issue a certificate of purchase to the successful party. The copy of the judgment may be filed by any person. (*Bachelor v. Willey*, 64 Cal. 44.) Cited 77 Cal. 207.

XVIII. Land-office and Officers of.

1. Control of Land Department by Treaty-making Power.

574. The treaty-making power cannot confer upon the land department any authority, nor enjoin upon it any duty in respect to the sale, conveyance, or disposal of the public lands of the United States, except with the consent of Congress. (*Parker v. Duff*, 47 Cal. 554.)

2. Sale by; Rules and Regulations; Receiving Entries.

575. Action of land department, within scope of its authority, is binding and conclusive as to the disposition of public lands within its jurisdiction. (*Grant v. Oliver*, 91 Cal. 158.)

576. Land department of United States cannot grant land; and it is not within its power to award to one person land which by an act of Congress has been previously granted to another, and its decision so awarding it is a nullity, and passes no title. (*Shanklin v. McNamara*, 87 Cal. 371.)

577. The commissioner of the general land-office has authority to make regulations respecting the disposal of the public lands, and such regulations, when not repugnant to the acts of Congress, have the force and effect of laws. Per *Rhodes, J.*, *Niles, J.*, concurring. (*Poppe v. Athearn*, 42 Cal. 607.) Cited 73 Cal. 388.

Supervision over sales by secretary of the interior or commissioner of the general land-office. See post, XVIII, 3.

578. The commissioner of the general land-office, subject to the supervision of the secretary of the interior, may make rules and regulations, not inconsistent with law, for the government of the various officers in the sale and disposal of the public lands, including rules for the making of the required proof and the trial of pre-emption contests; and such rules and regulations (at least where they are reasonable) will not be interfered with by the courts. (*Chapman v. Quinn*, 56 Cal. 266.)

579. The head of the land department of the United States has no authority to direct or permit entries of land to be made in the local offices, unless in cases authorized by some act of Congress. (*Parker v. Duff*, 47 Cal. 554.)
Cited 4 N. Mex. 299.

580. The registers and receivers of the United States land-offices, in permitting entries of public lands to be made, must look only to the acts of Congress and to such regulations of the general land-office as have been made in pursuance of law. They have no powers except such as are derived from these sources. (*Parker v. Duff*, 47 Cal. 554.)
Cited 56 Cal. 292; disapproved 6 Utah, 190.

3. *Secretary of the Interior or Commissioner of the General Land-office; Register.*

Power of commissioner of general land-office to make regulations for sale. See ante, XVIII, 2.

Power to direct or permit entries in local land-offices. See ante, XVIII, 2.

Secretary of interior is to approve selection of seminary land. See ante, 57.

Neither secretary of the interior nor land-office can determine regularity of state selection. See ante, 40.

581. Secretary of the interior is at the head of the land department, and is clothed with supervisory power over all the rulings and acts of the commissioner. (*Hays v. Steiger*, 76 Cal. 555.)

582. The commissioner of the general land-office and the secretary of the interior have power to set aside and annul the action of the register and receiver in allowing a pre-emptor to prove up and pay for land, and in issuing to him a certificate of purchase therefor. (*Vance v. Kohlberg*, 50 Cal. 346.)
Cited 5 Dak. 226; 2 Idaho, 794.

583. The acts of the United States register and receiver, in permitting the entry of a parcel of public land by a pre-emptor, are subject to the supervision and control of the commissioner of the general land-office, whether the matter is brought to his attention by appeal or otherwise. (*Hosmer v. Wallace*, 47 Cal. 461.)
Cited 2 Idaho, 797.

584. In such case the commissioner, and, on appeal from him, the secretary of the interior, may set aside the entry if erroneous. (*Hosmer v. Wallace*, 47 Cal. 461.)

585. The secretary of the interior, in reviewing the decisions of the commissioner of the general land-office in relation to the sale of public lands, exercises a supervisory, rather than an appellate, power, in the sense in which the term appellate is employed in defining the powers of courts of justice. (*Hestres v. Brennan*, 50 Cal. 211.)
Cited 50 Cal. 349, 362; 5 Dak. 225; 2 Idaho, 797.

586. In the exercise of such supervisory power, the secretary of the interior may approve, modify, or annul the acts, proceedings, and decisions of the commissioner of the general land-office whenever certified to him, without the formality of an appeal. (*Hestres v. Brennan*, 50 Cal. 211.)

587. But even if the power of the secretary of the interior over the decisions of the commissioner is to be regarded as appellate, the statute has not provided the machinery for taking an appeal, and consequently that matter is subject to such rules and regulations as the department may prescribe, and if the commissioner of the general land-office transmits the papers to the secretary of the interior, the presumption is that they were regularly and properly transmitted. (*Hestres v. Brennan*, 50 Cal. 211.)

588. The commissioner of the general land-office being authorized to perform executive duties relative to the public lands, under the direction of the secretary of the interior, when it appears that he has withdrawn railroad land from pre-emption, it will be presumed that it was withdrawn by the direction of the secretary of the interior. (*Weaver v. Fairchild*, 50 Cal. 360.)

589. The register of state lands is not a judicial, but a ministerial, officer. (*Middleton v. Low*, 30 Cal. 596.)

Testimony of ex-register to prove filing of list of indemnity school selections. See ante, 30.

Certificate of land officer as evidence of listing. See ante, 31.

Surveyor general. See Surveyor General.

Mandamus against register of land-office. See *Mandamus*, II, 12, i.

Land-office, certified copies of. See Evidence, II, 7, c.

Proceedings of land commissioners, notice of. See Specific Performance, 154.

4. *Conclusiveness of Construction of Land Laws by.*

590. Courts should not depart from a construction of legislative acts relating to the public lands of the state, by those immediately charged with their administration, if it accords with the natural meaning of the acts construed, unless it has proved to be productive of confusion or promotive of litigation, or otherwise in conflict with the policy of the law. (*Oakley v. Stuart*, 52 Cal. 521.)

5. *Contest Before.*

a. *Jurisdiction Over.*

591. As between conflicting claimants to lands, under the five hundred thousand acre grant, under the state, neither the commissioner of the general land-office nor the secretary of the interior has the power to decide. (*Hastings v. Jackson*, 46 Cal. 234.)

Order of reference. See ante, XVII, 5.

b. *Judgments on; Conclusiveness of; Appeal from; Review by Courts; Collateral Attack.*

592. Decrees of board of land commissioners, and of the district court, are not indispensable to a recovery in ejectment on a grant, but are admissible, and conclusive against the government and against those holding by its license or permission. (*Gregory v. McPherson*, 13 Cal. 562.)

593. In a pre-emption contest before the land department of the United States, a decision in favor of one of the claimants does not invest him with the legal title prior to

the issuing of the patent. (*Conlan v. Quinby*, 51 Cal. 412.)
Cited 87 Cal. 290.

594. Where the land department has jurisdiction of the subject matter and the persons, its adjudication upon a contest of the question as to whether the continuous possession of a pre-emption claimant from a date prior to the filing of a homestead claim by another prevented the acquisition of any homestead claim is final and conclusive. (*Grant v. Oliver*, 91 Cal. 158.)

595. The decision of the land department of the United States upon questions of fact coming before it upon a contest of the right to enter and purchase lands from the United States is conclusive upon the parties before it and those claiming under them, if the decision is free from fraud and fraudulent imposition. (*Shanklin v. McNamara*, 87 Cal. 371.)

596. It is the duty of the proper officers in the land-offices of the United States to ascertain whether parties possess the requisite qualifications to entitle them to pre-empt lands, and their decision upon questions arising as to such qualifications is binding upon the parties, unless some question of fraud or trust intervenes. (*Burrell v. Haw*, 40 Cal. 373.)

597. The recital, in an opinion of the secretary of the interior, given in a contest as to a pre-emption right, of the facts upon which the right to a pre-emption was based, is not evidence of the facts recited. (*Megerle v. Ashe*, 33 Cal. 74.)
Cited 37 Cal. 389.

598. The decision of the secretary of the interior, that a pre-emption claim is valid, is not an estoppel as to one who contested the same, not as a pre-emption claimant, but claimed under an act of Congress donating land to a state, even if binding upon contesting claimants of the right to a pre-emption. (*Megerle v. Ashe*, 33 Cal. 74.)

599. In a contest before the land department of the United States, involving the land in controversy—the plaintiff claiming as a pre-emptor, and the defendant claiming the right to purchase under the act of Congress of July 23, 1866, “to quiet land titles in California,” by virtue of the location of a school land warrant on the land prior to survey—the decision was adverse to the plaintiff, and the land was listed to the state. Pending the decision of the contest before the secretary of the interior, and before the listing, the plaintiff made application to purchase the land from the state, and the contest arising was referred by the surveyor general to the district court. In an action to determine the same, held (affirming *Wilkinson v. Merrill*, 52 Cal. 424), that the decision of the land department of the United States, to which “all the questions of law and fact pertaining to the proceeding were especially confided,” is conclusive against the United States and against plaintiff, in subsequently attempting to acquire the title from the state. (*Mace v. Merrill*, 56 Cal. 554.)
Cited 63 Cal. 250.

600. Pending appeal to commissioner of general land-office, from the decision of a

United States land register, in a contest between a person at whose request the state locating agent has made a selection in the United States land-office, in conformity with the School Land Act of April 23, 1853, and a person who, before the issuance of a certificate of purchase, had interposed before the register a claim as pre-emptor, the rights of the applicant for location are suspended and preserved, and until the final decision no other location of the same land can be made to his prejudice. (*Dolhequy v. Tabor*, 22 Cal. 279.)

601. In the case above stated, no payment of the twenty per cent of the purchase money to the treasurer of the county need be made by the applicant until the appeal is determined, and the result known at the register's office. (*Dolhequy v. Tabor*, 22 Cal. 279.)

602. Where, pending the appeal in the above case, a third person, with full knowledge of its pendency and the rights of the first applicant, procures the issuance to himself of a certificate of purchase under the same act, he will be deemed to hold the certificate in trust for the former applicant in whose favor the appeal is decided, and may be compelled by bill in equity to transfer it to him upon being reimbursed his expenses. (*Dolhequy v. Tabor*, 22 Cal. 279.)

603. Have the courts of a state the jurisdiction to review the action of the federal land department in deciding upon contested claims to the right of pre-emption, when the subject matter of the investigation, and upon which the preference depends, were transactions that occurred before the contest, query? (*Quinn v. Kenyon*, 38 Cal. 499.)
Cited 51 Cal. 494.

604. The decisions of the land department upon questions of fact are not subject to review by the courts. (*Powers v. Leith*, 53 Cal. 711.)
Cited 56 Cal. 287.

605. The courts cannot review the action of the land department of the United States, so far as their decisions are based upon questions of fact. They can only review and correct the errors of law committed by the land officers in their rulings upon the facts found by them to be true; and in order to justify such review, the facts on which the errors were based must be fully stated in the pleadings. (*Hays v. Steiger*, 76 Cal. 555.)

606. If the commissioner of the general land-office and secretary of the interior are correct in their decision on a question of law applicable to the facts concerning a contest about the right of a pre-emptor to purchase land, the courts will not review their findings on the facts, nor will they intervene to declare the patentee a trustee for the one who claimed the pre-emption right. (*Rutledge v. Murphy*, 51 Cal. 388.)
Cited 51 Cal. 388, 494; 56 Cal. 287; 86 Cal. 600.

607. In the absence of fraud or imposition, the decision by the registers and receivers of the United States land-office of controverted questions of fact which they have jurisdiction to pass on will not be reviewed by the courts; but an error committed by those

officers in a matter of law may be corrected, and the proper relief granted by the courts. (*Hess v. Bolinger*, 48 Cal. 349.) Cited 56 Cal. 287, 288.

608. In the absence of fraud on their part, or of fraudulent imposition on the officers of the United States land department, their determination on matters of fact relating to the entry of lands cannot be reviewed by the courts, but their decisions on questions of law may be. (*Hosmer v. Wallace*, 47 Cal. 461.)

Cited 48 Cal. 353; 51 Cal. 391, et seq; 52 Cal. 301; 86 Cal. 600; 87 Cal. 378; 2 Idaho, 797.

609. The finding of any fact involved in a contest before the land department of the United States is conclusive upon the courts of this state, in an action to hold the successful party as a trustee for the other, or to deprive him of the benefit of his success in the department, except, perhaps, in cases of fraud. (*Haven v. Haws*, 63 Cal. 452.)

610. In a contest between two persons claiming the right to enter a tract of land under the pre-emption laws of the United States, the question whether one of the parties continuously resided upon the land from his settlement thereon up to the date of the contest is a question of fact; and the decision of the question by the land department is conclusive, and not subject to review by the courts. (*Dilla v. Bohall*, 53 Cal. 709, cited 56 Cal. 287; *Dilla v. Bohall*, 62 Cal. 610.)

611. In order to present a case in relation to the entry of lands under which courts of equity will take cognizance, it must distinctly appear that the land officers were mistaken, not in the facts, but in the law of the case. (*Hosmer v. Wallace*, 47 Cal. 461.) Cited 56 Cal. 287, 288; 2 Wash. 432.

612. If a register and receiver of a land-office refused to hear the evidence of a pre-emption claimant, and allowed another pre-emption claimant to the land to introduce his testimony and enter the same, the remedy of the first party is by appeal to the commissioner of the general land-office. He cannot obtain relief in equity. (*Sacramento Sav. Bank v. Hynes*, 50 Cal. 195.) Cited 77 Cal. 261.

613. Where an inferior tribunal, as the board of United States land commissioners, has once acquired jurisdiction of a matter, its subsequent proceedings therein cannot be collaterally questioned for mere error or irregularity. (*Bernal v. Lynch*, 36 Cal. 135.)

614. In hearing and determining a contest between rival claimants of the right to purchase public lands of the United States, the officers of the land department act judicially; and their judgments cannot be collaterally assailed in an action at law. (*Plummer v. Brown*, 70 Cal. 544.) Cited 86 Cal. 600, 601.

Conclusiveness of decrees on collateral attack. See post, XX, 11, d.

Conclusiveness of decisions of land officers. See post, XX, 11, a.

XIX. Confirmation.

1. Statutes, Effect of as a Grant; to What Cases or Lands Applies; Amendment.

615. The act of Congress of 1866, "to quiet land titles in the state of California," operated as a grant in presenti as to lands which had been surveyed under the authority of the United States at the passage of the act. It is not decided whether this applies to unsurveyed lands. (*McNee v. Donahue*, 76 Cal. 499.)

616. Act of March 27, 1872, for the relief of purchasers of state lands, was retrospective in its operation, and did not apply to future cases. Held, accordingly, where a defective application for the purchase of state lands was made before, but the certificate of purchase was issued and payment for the land made, after the passage of the act, the application was not cured by the act. (*Johnson v. Squires*, 55 Cal. 103, cited 55 Cal. 478, 62 Cal. 259, 65 Cal. 13, 72 Cal. 242; *Johnson v. Wright*, 55 Cal. 478.)

617. The confirmatory act of July 23, 1866, does not apply to lands withdrawn from sale; but, conceding that it does, it would be a nullity as to the lands granted and withdrawn from sale under the Pacific railroad acts. Congress could not, after the company had accepted the terms of the acts of 1862 and 1864, and acted upon them, divest it of its right in the lands. (*McLaughlin v. Menotti*, 89 Cal. 354.)

618. The operation of the act, with reference to cases in which payments had been made, and certificates issued at the date of its passage, was not affected by the amendatory act of April 1, 1878; but with reference to such cases the original act continued in force. (*Rowell v. Perkins*, 56 Cal. 219.)

State as trustee of lands granted by confirmatory statute. See post, XIX, 2.

Acts to quiet title, effect on swamp lands. See *Swamp and Overflowed Lands*, XIV.

Curative act of 1872, presumptions as to acts of officer. See *Offices and Officers*, 88.

2. Power of State to Convey Land Granted by Confirmatory Statute.

619. The title to land granted by the act of 1866, passed to the state in trust for the beneficiaries mentioned in the act, viz., those who had purchased from the state in good faith under her laws, and the state has no power to dispose of said land to other parties. (*McNee v. Donahue*, 76 Cal. 499.)

620. It is unnecessary to decide in this case whether a grant from the state to persons not beneficiaries under the act is absolutely void or not; if not absolutely void, the grantee takes the title in trust for those entitled under the act; if absolutely void, the patent constitutes a cloud upon the right of the beneficiary, who is entitled to relief upon that ground. (*McNee v. Donahue*, 76 Cal. 499.)

3. Extent of Land Which may be Claimed Under Confirmatory Statute.

621. The proviso in the first section of the act of 1872, "that the act shall not apply to

school lands except to the amount of three hundred and twenty acres to any one purchaser," did not except from the operation of the act cases in which the applicant had previously applied to purchase more than three hundred and twenty acres of land; but simply provided that no person should acquire title to more than that quantity by virtue of the act. Held, accordingly, where it appeared that an applicant had made previous applications for more than the designated quantity, but did not appear that any of such applications came within the terms of the act, that the proviso did apply. (*Rowell v. Perkins*, 56 Cal. 219.)

4. What Selections or Locations were Confirmed, and Effect of.

What claims were validated under curative act. See post, XIX, 5.

622. The act of Congress approved March 1, 1877 (19 U. S. Stats., p. 267), commonly known as the "Booth Act," was a full and complete ratification by Congress, according to its terms, of the list of indemnity school selections which had been, before that time, certified to the state by the United States as indemnity school selections, no matter how defective or insufficient such school certificates might originally have been, if the lands included in the lists were not of the character of any of those mentioned in section 4, and if they had not been taken up in good faith by a homestead or pre-emption settler prior to the date of the certificate. (*People ex rel. Eadie v. Noyo Lumber Co.*, 99 Cal. 456.)

623. The defect in the selection of the lands as indemnity school lands was cured by section 2 of the act of Congress of 1877, commonly called the Booth Act. (*Hambleton v. Duhaime*, 71 Cal. 136.)
Cited 77 Cal. 303.

624. The act of Congress of July 23, 1866, confirming sales of public lands made by the state of California, does not confirm selections of lands made by the state which, at the time of the passage of the act, were claimed under a valid Mexican grant, but which were afterwards excluded from the rancho by the finally confirmed survey. (*Huff v. Doyle*, 50 Cal. 16.)

625. A selection of land made by the state in lieu of a sixteenth or thirty-sixth section, such land having been certified over to the state prior to the passage of the act of Congress of March 1, 1877, commonly known as the Booth Act, is confirmed by that act, although the land in lieu of which the selection was made was at the time of the selection included within the final survey of a Mexican grant, and the land selected was at the same time within what was claimed to be the limits of a Mexican grant, but finally excluded therefrom. (*Martin v. Durand*, 63 Cal. 39.)
Cited 70 Cal. 280; 71 Cal. 142; 99 Cal. 461.

626. The act of Congress of July 23, 1866, to quiet land titles in California, did not confirm to the state lands selected by the state as lieu lands, unless such lands had not only been selected as lieu lands before the passage of the act, but had also been sold by the state

before said date. (*Laughlin v. McGarvey*, 50 Cal. 169.)

627. The act of Congress of July 23, 1866, confirming selections of public land made by or on behalf of this state under grants of Congress, which selections were void when the act passed, did not have the effect of confirming the title of the state to a selection of an odd section within the belt granted by Congress to the Central Pacific Railroad Company of California, by the acts of July 1, 1862, and July 2, 1864. (*Central Pac. R. R. Co. v. Robinson*, 49 Cal. 446.)

628. The ratification by the United States of the listing of indemnity school selections was equivalent to a grant of those lands to the state as of the date of the listing, and the title thus ratified was within the curative act of March 24, 1870, and was thereby validated as though the lands had belonged to the state at the time of the passage of the act. (*People ex rel. Eadie v. Noyo Lumber Co.*, 99 Cal. 456.)

629. Under the third section of the act of Congress of July 22, 1866, the state selections confirmed by the act "have the same force and effect as the pre-emption rights of a settler on the unsurveyed land." (*Pratt v. Crane*, 58 Cal. 53.)

630. Under the act of Congress of 1877, commonly called the Booth Act, indemnity school selections, which failed by reason of any defect or invalidity, were confirmed; and a state patent issued after the passage of said act, for such a selection, made before its passage, is valid and conveys title; and a patent subsequently issued for the same land by the government of the United States is void. (*Daniels v. Gualala Mill Co.*, 77 Cal. 300.)

5. What Claims Validated Under Curative Act.

631. An act curing defective applications to purchase lands does not supply defects in the applications, but legalizes the applications with their defects. (*Copp v. Harrington*, 47 Cal. 236.)
Cited 49 Cal. 5; 56 Cal. 223; 99 Cal. 460.

632. Under the act of Congress of the 23d of July, 1866, the holder of a state location upon unsurveyed public land, bought by him in good faith, under state laws, may maintain ejectment if ousted. (*Toland v. Mandell*, 38 Cal. 30.)
Cited 40 Cal. 70, 73; 84 Cal. 502; 16 Nev. 234; 5 Utah, 214; distinguished 76 Cal. 505.

633. It had the effect to legalize the possession of locators upon unsurveyed lands until they have an opportunity to present their claims for determination by the officers of the United States, as therein provided, and to enable them to maintain actions in the courts in relation thereto. (*Toland v. Mandell*, 38 Cal. 30.)
Cited 47 Cal. 440.

634. Under the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California," the holders of state selections of unsurveyed public lands, which had been made in good faith under the laws of this state, and surveyed, marked off, and designated in the field before said date, acquired

the rights of pre-emptioners on unsurveyed land, unless, at the time of the passage of said act, some pre-emption, homestead, or other right, under the laws of the United States, had attached to the land, or unless it was within some of the reservations specified in the act. (*Foscalina v. Doyle*, 47 Cal. 437.) Cited 60 Cal. 547.

635. Said act of Congress had also the effect to legalize the possession of locators under the state laws upon unsurveyed public lands, and to enable them to maintain ejectment and other actions in respect to the possession, during the interval which elapsed prior to the time when they were afforded an opportunity under the act to present their claims for adjudication by the proper officers of the United States. (*Foscalina v. Doyle*, 47 Cal. 437.)

636. If a person, prior to the passage of the act of Congress of July 23, 1866, had purchased from the state, in good faith, unsurveyed public land, and in proper time, after the passage of the act, had made application to the proper officers of the United States to prove up his claim, and had entered into and remained in possession, the land was not subject to be pre-empted under the laws of the United States, and the person who, after the passage of the act, entered on such land as a pre-emptor became a trespasser, and the locator under the state could recover the land by virtue of his prior possession. (*Foscalina v. Doyle*, 47 Cal. 437.) Cited 49 Cal. 217, 335.

637. The holders of state selections, made upon public lands not then surveyed by authority of the United States, under the act of Congress of the 23d of July, 1866, to quiet land titles in California, have acquired the rights of a pre-emptioner upon unsurveyed public land if their selections have been surveyed and marked off, and designated in the field and bought in good faith, under the laws of the state, unless, at the date of that act, some pre-emption, homestead, or other right, under the laws of the United States, had attached to the land, or the land was within some reservation. (*Toland v. Mandell*, 38 Cal. 30.) Cited 60 Cal. 546; 11 Nev. 455.

638. In ejectment upon a state patent, the defenses were, the statute of limitations, that the lands were a part of a Mexican grant, that the lands in lieu of which the lands in controversy were taken were not lost to the state, and that at the time of the application for the location of the lands patented the same had not been surveyed. Held, upon the last point, upon the facts stated in the opinion, that under section 3 of the act of Congress of July 23, 1866, the title vested in the plaintiff, and upon the other points, that the findings of the court in favor of the plaintiff were sustained by the evidence. (*Tewksbury v. Derosier*, 59 Cal. 100.)

639. If a selection of more than one hundred and sixty acres of public land is made, as lieu land, under the statute of this state, passed April 22, 1861, and the land thus selected is reduced to forty acres by a grant made to a railroad company, and by allotments to pre-emptioners prior to the con-

firmatory act of Congress, passed July 23, 1866, the fact of such reduction does not prevent the confirmatory act from taking effect on the land. (*Mastick v. Cave*, 52 Cal. 67.) Cited 63 Cal. 249.

640. If public land in this state was selected as lieu land, in accordance with the statutes of this state in force at the time of the selection, and prior to the passage of the act of Congress passed in July, 1866, to quiet land titles in this state, and the register of the land-office was notified of the selection, the title of the state to the same was confirmed by said act of Congress, although made of unsurveyed land, and void by reason thereof. (*Mastick v. Cave*, 52 Cal. 67.)

641. In ejectment under a patent from the United States, where the defense was that the land was swamp and overflowed land, the court rightly refused an instruction that the sale of the land by the state, the defendant's grantor, if made in good faith, was confirmed by section 1 of the act of Congress of July 23, 1866, "to quiet land titles in California," as the certificate was for the southeast quarter of section 6, which did not include the land in controversy. (*Hogaboom v. Ehrhardt*, 58 Cal. 231.)

642. The act of March 24, 1870, "to legalize certain applications for the purchase of lands belonging to the state," had the effect to validate the defective applications covered thereby. (*Wanzer v. Somers*, 53 Cal. 90.) Cited 56 Cal. 223.

643. Said act deals only with applications to purchase land, and does not have the effect of offering for sale lands which were not subject to sale under the general law. (*Rooker v. Johnston*, 49 Cal. 3.) Cited 99 Cal. 460.

644. Neither does said act make an application for the purchase of land, which had not been offered for sale when the application was filed, good and valid. (*Rooker v. Johnston*, 49 Cal. 3.)

645. The act of March 24, 1870, to legalize entries of state lands which were void by reason of a defect in the form or substance of the application, did not have the effect of inserting in the defective application the matter required to make it valid, but made the application good and valid as it was, and legalized the entry. (*Copp v. Harrington*, 47 Cal. 236.) Cited 99 Cal. 460.

646. If an application to enter state land under the act of 1868 was void because it failed to state that there were no improvements on the land except the applicant's, the curative act of March 24, 1870, legalized the application, provided no proper application had been filed at the time of its passage, even if at the time it was filed there were improvements on the land belonging to a person other than the applicant. (*Copp v. Harrington*, 47 Cal. 236.)

647. The affidavit accompanying an application to purchase state lands, under the act of March 20, 1868, did not state that the applicant desired to purchase the land, or contain a description of the land. Held, that it was insufficient, and the location therefore

void; but that the defect was cured by the curative act of March 24, 1870. (Rowell v. Perkins, 56 Cal. 219.)
Cited 88 Cal. 544; 83 Cal. 110.

648. Where an application for the purchase of school lands was made prior to the passage of the curative act of March 24, 1870, any defects therein were cured by such act, and the application having been once validated, it was not within the power of the legislature to place other limitations to the title thus conferred, and the provision in the act of March 27, 1872, limiting the effect of the curative act of March 24, 1870, in the matter of school lands, to the amount of three hundred and twenty acres for any one purchaser, has no application to such a case. (People ex rel. Eadie v. Noyo Lumber Co., 99 Cal. 456.)

649. If there was an application made to purchase state land before it had been surveyed, and a second application, which was defective, to purchase after it had been surveyed and before the passage of the curative act of March 24, 1870, and a third application, good in form, after the passage of said curative act, the one who filed the second application has the right to purchase. (Rooker v. Johnston, 49 Cal. 3.)
Cited 99 Cal. 460.

650. The act of March 24, 1870, to legalize applications for the purchase of state lands, which were void by reason of a defect in the form or substance of the application, made such applications good and valid, unless there were, at the time of the passage of the act, two or more applications for the purchase of the same land, or conflicts between claimants. (Rooker v. Johnston, 49 Cal. 3.)
Cited 56 Cal. 227; distinguished 52 Cal. 534.

651. The curative act of March 27, 1872, validated every application to purchase land from the state where payment had been made in whole or in part to the treasurer of the proper county, and a certificate of purchase had been issued; and in all such cases, the applicant, by virtue of the act, acquired a right to complete his purchase, even if, when the application was made, there was an entire failure on the part of the applicant to comply with the existing laws, or the state did not own the land, or had adopted no legislation for the disposition of it. (Rowell v. Perkins, 56 Cal. 219.)
Cited 58 Cal. 542; 62 Cal. 250; 83 Cal. 106; 85 Cal. 534.

652. The act of March 27, 1872, entitled "An act for the relief of purchasers of state lands," is retroactive, and legalizes purchases of state lands made by county surveyors before its passage, provided payment had been made in whole or in part, and a certificate of purchase had been issued to the applicant before any other application had been made to purchase the same land. (Yoakum v. Brower, 52 Cal. 373.)
Cited 56 Cal. 225; 58 Cal. 542; 85 Cal. 534.

653. Said act validates the certificate of purchase, but the title does not pass until full payment has been made. Whether the title passes upon payment without patent is not decided. (Yoakum v. Brower, 52 Cal. 373.)

654. Said act does not prescribe the time within which the balance of the purchase money must be paid, and it must, therefore, be paid as prescribed by the general law. (Yoakum v. Brower, 52 Cal. 373.)

655. The act of March 27, 1872, for the relief of purchasers of state lands is operative not only upon applications which were defective in form, but upon those which were defective in substance, and the proviso in the act refers only to valid applications. (Muller v. Carey, 58 Cal. 538.)
Cited 62 Cal. 259.

656. Where material facts are omitted from the affidavit, the defect is not cured by the act of March 27, 1872, if the applicant did not make any payment on the land or receive his certificate of purchase until after the passage of the act, nor is it cured by the act of April 1, 1878, amendatory thereof. (Gilson v. Robinson, 68 Cal. 539.)

657. An application to purchase lieu lands was made by C. September 9, 1870; and an application to purchase the same land by Myers October 14, 1871. The application of the latter being approved, he paid the twenty per cent in interest required by law, and received his certificate December 18, 1871, and paid in full for the land November 28, 1877. No further steps were taken by C. after the filing of his application till January 30, 1877, when he filed his protest against the issuance of any further evidence of title to Myers. On November 4, 1878, the plaintiff filed an application to purchase the same land, and the case having been referred to the proper court on his demand, and an action commenced by him therein, the court, upon the above facts, gave judgment in his favor. Upon appeal it was claimed by counsel on both sides that from the time of the passage of the act of April 4, 1870, amending that of March 28, 1868, there was no law under which lieu lands could be disposed of by the state. Held, by the court (assuming this to be the case) that the application of Myers was validated by the act of March 27, 1872, and that he was entitled to purchase the land. (Muller v. Carey, 58 Cal. 538.)

Bona fide purchasers under the curative act. See post, XIX, 6.

6. Bona Fide Purchasers.

658. Both bona fide purchasers from the state and pre-emption claimants under the United States were placed by the act of Congress of July 23, 1866, on the same footing as to acquisition of title. (Aurrecoechea v. Sinclair, 60 Cal. 532, 546.)

659. Under the act of Congress of March 1, 1877, confirming to the state the title to indemnity school lands the selections of which were defective or invalid, but excepting from the confirmation lands on which a bona fide pre-emption or homestead settlement had been made previous to the certification to the state, the question of the bona fides of such a previous settlement is one of fact, or of mixed law and fact, and the decision of the department of the interior thereon in a case involving the question is final. (Green v. Hayes, 70 Cal. 276.)

660. Selection and location are necessary to claim of a bona fide purchaser from the state under the act of Congress of July 23, 1866, to quiet title to lands in California. (*Aur-r-coechea v. Sinclair*, 60 Cal. 532, 547.)

661. Certificate of purchase, issued by state, was prima facie evidence that the land had been purchased from the state in good faith. (*Foscalina v. Doyle*, 47 Cal. 437.)

662. The holder of a state selection upon unsurveyed public land, in an action to recover the possession, makes a prima facie case by exhibiting a certificate of purchase from the state. If the land be within any of the exceptions stated in the act of Congress, the burden of proof is upon him that contests it. (*Toland v. Mandell*, 38 Cal. 30.)

663. By the words "sold to purchasers in good faith, under the laws of the state," occurring in the act of Congress of the 23d of July, 1866, is meant such selections as have been made, according to the conditions of the state laws under which they purport to have been made, and which have been sold in a manner which would have passed the title had it then been in the state. (*Toland v. Mandell*, 38 Cal. 30.)

664. An error in the selection of lands in lieu of those lands which are in fact in place, or in the selection of unsurveyed lands, is the error of the state officials; and, in the absence of any evidence that the purchaser was cognizant of such error, it will not deprive him of the position of a purchaser in good faith, within the meaning of the act of Congress. (*Hodapp v. Sharp*, 40 Cal. 69.) Cited 49 Cal. 217, 218.

7. Presentation of Claim for Confirmation.

665. If one holding public land under an invalid location of state school land warrants, made before the passage of the confirmatory act of Congress of July, 1866, fails to present and prove up his claim under said act, and another, after the passage of said act, pre-empt the land and obtains a patent therefor, he acquires the legal title. (*Collins v. Bartlett*, 44 Cal. 371.)

666. The act of Congress of July, 1866, to quiet land titles in California, provides the means by which an invalid location of a state school land warrant on unsurveyed lands may be confirmed, but in order to obtain such confirmation the purchaser must present and prove up his purchase and claim within the time allowed to pre-emptioners under existing laws. The land will not be certified to the state until the claim is presented and proved up. (*Collins v. Bartlett*, 44 Cal. 371.)

667. The land in controversy was listed to the state in lieu of a thirty-sixth section, lying within a Mexican grant, of which the final survey had not been made. The defendant, a qualified pre-emptor, settled upon the land after the selection by the state, but before the listing and in due time filed his declaratory statement, and offered to prove up and pay for the land, but his offer was refused by the register and receiver, and was not renewed after the passage of the act of Congress of March 1, 1877 ("relating to indemnity school selections in the state of Cali-

fornia"). In an action of ejectment, the plaintiffs deraining title under the state selection, held, that the defendant, having failed to present his claim and proofs to the district land officers within twelve months after the passage of the act, did not come within the saving clause contained in the third section of the act referred to, and that therefore the title of the state, though originally void, was confirmed by the act, and the plaintiffs entitled to recover. (*Hellman v. Jones*, 56 Cal. 462.)

Presentation of claim for confirmation, when within time. See ante, 85.

8. Intervening Rights.

Rights of third persons whose rights have intervened. See ante, XIX, 5.

668. The rights of claimants under the pre-emption and homestead laws of the United States are not affected by the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California." (*Keernan v. Allen*, 33 Cal. 542.)

669. The confirmation of titles, provided for in the first section of the act of Congress, "to quiet land titles in California," passed July 23, 1866, does not extend to lands as to which an adverse pre-emption, homestead, or other right had been acquired at the date of the passage of that act by any settler under the laws of the United States. Whether or not said section is applicable to titles to any swamp and overflowed lands is not decided. (*Keernan v. Griffith*, 34 Cal. 580.)

670. The act of Congress cannot be so construed as to affect a valid location made prior to its passage. It would cure the invalidity of a location if no intervening right had accrued in the mean time, but a valid location was afterwards made before the passage of the act. It is clearly not the intention of Congress to interfere with such valid location. (*People ex rel. Hastings v. Jackson*, 62 Cal. 548.)

671. Under the act of Congress of July 23, 1866, validating selections of public land made by the state of California in satisfaction of grants made by Congress to said state, it became a question for the land department to decide whether the selections were made as required by the act, and whether the state had sold the same in good faith, and whether the purchaser had properly proved his claim; and if the land department, in the case of a purchaser from the state, decides in favor of the regularity and validity of these proceedings, and lists the land over to the state before another person applies to purchase the land from the state, the decision is conclusive as against the United States and such other person; and although the first application was defective, it cannot be attacked. (*Wilkinson v. Merrill*, 52 Cal. 424.) Cited 56 Cal. 555, 556, 560; 63 Cal. 250.

9. Title Under Curative Act, When Passes.

672. Land selected by state prior to July 23, 1866, as a portion of the grants of public land made by Congress, does not become the property of the state under the curative act of

Congress of July 23, 1866, until the selection has been certified over to the state by the commissioner of the general land-office. (*Buhne v. Chism*, 48 Cal. 467.)

673. No title passes from the United States to state or to purchaser from the state, until the same are certified over to the state by the commissioner of the general land-office at Washington. (*Collins v. Bartlett*, 44 Cal. 371.)

674. A purchaser from the state, whose selection falls within the second section of the act of July 23, 1866, cannot maintain an action for the possession of the land before it is certified over to the state, unless the defendant has intruded upon his actual possession. (*Hodapp v. Sharp*, 40 Cal. 69.)

Right to maintain ejectment under curative act. See ante, 632.

XX. Patents.

1. Issuance and Signature; Surrender of Certificate; Issuance to Purchaser at Execution.

675. Neither the president nor any officer of the government has any power to dispose of the public domain, or to sign or cause the seal of the United States to be affixed to a patent, except such as is conferred by a statute of the United States. (*McGarrahan v. New Idria Min. Co.*, 49 Cal. 331.)
Cited 4 N. Mex. 299.

676. The laws of the United States allow the president to appoint a secretary, whose duty it shall be to sign, in the president's name, all patents for land granted or sold by the United States. (*Bonds v. Hickman*, 29 Cal. 460.)

Issuance of patent to executors. See post, XX, 5.

677. The signing of a patent by the governor, to give effect to a sale of lands of the state made by other state officers, is purely a ministerial act. (*Middleton v. Low*, 30 Cal. 596.)

678. If land sold by state officers belonged to the state, and all the acts required to be done prior to the issuing of the patent have been duly performed, and the purchaser is competent to purchase, it is the duty of the governor to execute the patent, unless the law has vested him with discretionary powers in that respect. (*Middleton v. Low*, 30 Cal. 596.)

679. The governor may refuse to sign a patent presented to him by the register for land sold by the state embraced within the sixteenth or thirty-sixth section, if the land has not been surveyed by the United States, or lies within the limits of a Mexican or Spanish grant. (*Middleton v. Low*, 30 Cal. 596.)

680. The certificate of the register of the state lands, accompanying a patent for land in a sixteenth or thirty-sixth section, which he presents to the governor for his signature, stating that the same have been surveyed by the United States, and are the property of the state, is not conclusive upon the question of title; and when it appears that the title is not in the state, the governor is justified in

refusing and should refuse to execute the patent. (*Middleton v. Low*, 30 Cal. 596.)

Signature of governor to patent, mandamus to compel. See *Mandamus*, 125, et seq.

681. The register of the state land-office must not issue a patent for state lands until the applicant for the patent surrenders the certificate of purchase. (*Duncan v. Gardner*, 46 Cal. 24.)

Cited 73 Cal. 362; 81 Cal. 89.

682. When a judgment debtor has a state certificate of purchase of a tract of land sold him by the state, one who purchases at sheriff's sale a part only of the tract, and obtains a sheriff's deed therefor, is not entitled to a patent from the state for the land by him so purchased. (*Duncan v. Gardner*, 46 Cal. 24.)

Issuance pending contest. See post, XX, 2.

Pueblo lands, patent for. See ante, XII.

Time of issuance. See *Mexican Lands*, I, 25, a.

Issuance of patent, enjoining. See *Injunctions*, II, 19.

Patent, office of. See *Swamp and Overflowed Lands*, 148.

2. Contest, Issuance Pending.

683. If two parties each apply to the surveyor general to purchase land belonging to the state, and a contest arises between them in the state land-office as to which has the right to purchase the land, and the surveyor general, under the statute, orders the contest to be referred to a district court for trial, and one of the parties brings suit in the court to obtain its judgment as to which has the best right to purchase the land, the state officers have no power to issue a patent for the land to either of the parties until the proceedings in the court have terminated, and a copy of the judgment is filed in the state land-office. (*People v. Carrick*, 51 Cal. 325.)

684. An applicant for the purchase of state land, whose right to purchase has been sustained in an action brought to determine a contest between himself and an adverse applicant for a particular portion of the land, is not entitled to have a patent issued to him for the entire tract claimed by him, while an action to determine another contest, affecting a different portion of the land, is pending between himself and another applicant. (*Byrd v. Reichert*, 74 Cal. 579.)

Patent issued pending appeal, validity. See *Mexican Lands*, 390.

3. Delivery, Acceptance, and Recording.

685. Delivery as applied to private conveyances has no application to grants made by the government, evidenced either by an alcalde's grant or a patent. (*Donner v. Palmer*, 31 Cal. 500.)

Cited 51 Cal. 74; 89 Cal. 139.

686. A patent of the United States for land, being duly signed and recorded, passes the legal title without delivery. (*Cruz v. Martinez*, 53 Cal. 239.)

Cited 89 Cal. 139; 95 Cal. 128.

687. Where a patent to land has been executed by the proper officers of the United States, in accordance with law, the delivery of the patent to the grantee is not essential to

its validity, and an action to compel a delivery will lie against an officer having custody thereof. (*Houghton v. Hardenberg*, 53 Cal. 181.)
Cited 53 Cal. 243.

688. Delivery of a patent, issued under the provisions of the act of Congress of March 3, 1851, for the settlement of private land claims in California, is not essential to its taking effect as a conveyance. (*Miller v. Ellis*, 51 Cal. 73.)
Cited 89 Cal. 139.

Patent, delivery of. See Mexican Lands, I, 25, a.

689. Title to land by a patent from the United States is title by record; and it is not necessary that the patentee should have received and accepted the patent, in order to vest in him title to the land granted. (*Eltzroth v. Ryan*, 89 Cal. 135.)

690. When a United States patent is signed, sealed, and recorded in the records of the land-office, the title to the land therein described is transferred to the grantee, as far as the government is concerned, and its acceptance by the grantee will be conclusively presumed, unless, immediately upon knowledge of its issue, his refusal to accept it is explicitly declared, and such refusal is communicated to the land-office. (*Alvarado v. Nordholt*, 95 Cal. 116.)

Patent, acceptance of. See Mexican Lands, I, 25, a.

691. The fact that the copy of the patent under which the plaintiff, in an action to quiet title, claims title was not recorded until after the action was commenced is immaterial. (*Eltzroth v. Ryan*, 89 Cal. 135.)

4. Mistake in.

692. In an action to quiet title, the plaintiff claiming under a state patent, held, that a mistake made in omitting to insert a course in the patent could not be corrected in this action. (*Brewer v. Houston*, 58 Cal. 345.)
Cited 79 Cal. 448; 84 Cal. 467; 92 Cal. 14; 6 Utah, 453.

5. Death Before Issuance; Issuance to Executors or Heirs.

693. If the patentee to whom a patent is made, under the act of March 3, 1851, to settle private land claims in California, dies before the patent is issued, the title to the lands therein designated becomes vested in the heirs, devisees, or assignees of the deceased patentee, the same as if the patent had issued during his life. (*Chipley v. Farris*, 45 Cal. 527.)

694. The act of Congress (May 20, 1836), vesting the title of public lands, patented to a person dead at the date of the patent, in "the heirs, devisees, or assigns of the deceased patentee," was intended to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though the lands were not strictly public lands. (*Waterman v. Smith*, 13 Cal. 373.)
Cited 45 Cal. 537.

695. A patent of the United States is not

void because it is issued to the administrator of a deceased assignee of a military land warrant for land purchased by the administrator with the warrant. (*Bonds v. Hickman*, 29 Cal. 460.)

Cited 32 Cal. 204; 57 Cal. 512; 58 Cal. 257.

696. A patent for land, issued by the United States to "James Smith, administrator of Robert Smith, deceased," vests the legal title to the land in James Smith, and said James Smith's conveyance of the same transfers the legal title to his grantee, though it does not state that it is made as administrator. (*Bonds v. Hickman*, 32 Cal. 202.)
Cited 77 Cal. 262.

697. In ejectment plaintiff deraigned title under a patent from the United States to H. V. & P. as executors of F. and under a deed of two of the patentees as executors. Held, that the patent was valid and vested the legal title in the patentees; that the conveyance of two of the patentees as executors of F. transferred to their grantees the legal title to an undivided two-thirds of the land included in the deed; that it was immaterial whether they in their deed described themselves as executors or conveyed in their individual capacity, and that it was therefore unnecessary to consider the validity of an order of the probate court for the sale of the land. (*Christy v. Fisher*, 58 Cal. 256.)

698. A patent of the United States cannot be attacked collaterally because it was issued to an administrator of a deceased person for land to which the deceased person had the right of pre-emption. (*Bonds v. Hickman*, 29 Cal. 460.)
Cited 44 Cal. 92.

6. When Take Effect; Relation of.

699. A state has no authority to provide by statute when patents for land issued by the United States for Mexican grants shall take effect. (*Miller v. Ellis*, 51 Cal. 73.)
Cited 53 Cal. 243.

700. A patent takes effect, by relation, at the date of the presentation of the petition of the patentee to the board of land commissioners. And where such petition was presented in March, 1852, at which time the pre-emption laws of the United States were not extended to California, the rights, if any, of parties claiming under those laws are subordinate to the result of the proceedings then pending by the grantees before the tribunals and officers of the United States. (*Moore v. Wilkinson*, 13 Cal. 478.)
Cited 18 Cal. 26, 571; 20 Cal. 160; 34 Cal. 253; 35 Cal. 88.

701. The patent takes effect as the deed of the United States at the date of the presentation of the claim under the grant to the board of land commissioners, in August, 1852. It is the record of the government, that on that day the land it embraces was within the boundaries designated by the grant, and subject to appropriation to satisfy the claim of the heirs of the grantee, and until vacated it imports, as against the government and all parties claiming under the government by title subsequent, absolute verity. It can only be impeached by the government by direct

proceedings for its annulment or limitation, and such proceedings, unless accompanied by injunction from the court in which they are taken, cannot, before decree, impair the rights of the patentees, or those claiming under them; and the institution of the suit of the United States constituted, of itself, no ground for granting the injunction. (*Ely v. Frisbie*, 17 Cal. 250.)
Cited 18 Cal. 26, 571; 20 Cal. 160; 2 Utah, 188.

702. The patent establishes the title of the patentee, from the date of the grant; the character of such title depending, up to the issuance of the patent, upon the nature of the grant, and the proceedings of the former government in relation thereto, whether the grant were of a specific tract segregated from other land by defined boundaries, or whether the grant were of a certain quantity of land lying in a larger tract, and, in the latter case, whether juridical possession had been given to the grantee. (*Stark v. Barrett*, 15 Cal. 361.)
Cited 18 Cal. 26, 571; 20 Cal. 160.

703. The patent is the last act of a series of proceedings taken for the recognition and confirmation of the patentee's right to the land it embraces, the first of which is the petition to the board of land commissioners. With reference to such proceedings, the patent takes effect, by relation, at the date of the first act. As the deed of the United States, it is to be regarded as if it had been executed at that time. It operates as an absolute bar to all claims under the United States arising subsequent to the petition. (*Stark v. Barrett*, 15 Cal. 361.)

704. One having a title to land by a patent from the United States, which he claims extends by relation back of the date of the patent, and had its inception in a pre-emption right, cannot show title back of the patent, as against another also claiming under the United States, but by a different process, unless at the time he filed his declaratory statement as a pre-emptor the plat of the survey of the land had been filed in the local land-office, and approved by the surveyor general. (*Megerle v. Ashe*, 33 Cal. 74.)

Cited 33 Cal. 262; 34 Cal. 514; 56 Cal. 578; 69 Cal. 433, 437.

Relation of title. See post, 811.

Patent, relation of. See Mexican Lands, I, 25, c; Watercourses, 281, et seq.

7. Effect on Anterior Conveyances.

705. Conveyances by the grantee previous to the patent pass only his right under the grant. But the patent establishes the validity of all properly executed intermediate transfers of the grantee's interest. (*Stark v. Barrett*, 15 Cal. 361.)
Cited 44 Cal. 355; 16 Nev. 235.

8. Patents as Evidence; Recitals in.

706. A patent from the United States proves itself. Courts take judicial notice of the signature of the president and of the seal of the government. (*Yount v. Howell*, 14 Cal. 465.)
Cited 6 Mont. 387, 389.

707. Where the plaintiff in ejectment seeks to establish a prior possession under a land warrant location, the patent issued to him in pursuance of the location after the commencement of the action is admissible as evidence in his favor to show the date and location of the warrant, and that his right of possession thereunder has since ripened into a perfect title. (*Gallup v. Armstrong*, 22 Cal. 480.)

708. While the recitals of fact contained in a patent are binding on all concerned, an opinion of the executive officers as to matters of law, indicated either by the act of issuing the patent, or by the recitals contained therein, is not conclusive. (*McGarrahan v. New Idria Min. Co.*, 49 Cal. 331.)
Cited 4 N. Mex. 299.

709. The recitation in a patent issued by the United States to one as heir of a homestead claimant, that such person is the heir of the homestead claimant, and has performed the necessary conditions to perfect the homestead claim, is sufficient proof of the facts recited in an action of ejectment brought by the patentee. (*Chant v. Reynolds*, 49 Cal. 213.)

710. A recital in a patent to a homestead claimant that his claim thereto was established "pursuant to the act of Congress approved the twentieth day of May, 1862, to secure homesteads to actual settlers upon the public domain and the acts supplemental thereto" is broad enough to include section 2306 of the Revised Statutes, allowing additional homesteads to discharged soldiers without actual occupation thereof; but such patent does not cast upon the patentee or his grantee the burden of showing that the homestead was initiated under that section, and was not initiated and acquired under the laws requiring actual settlement and residence. (*Grant v. Oliver*, 91 Cal. 158.)
Cited 93 Cal. 275.

711. Though mere trespassers on land within the calls of a patent are strangers to the proceedings of the former or present government, still they are strangers against whom the recitals in the patent are conclusive. They are strangers to the premises. To entitle themselves to any consideration, they must show some title or color and claim of title, and having in this way connected themselves with the premises, they would be strangers against whom the recitals could not operate, according as their title is derived from a paramount source, or is anterior in time from the same grantor, or has been the foundation of an adverse possession. (*Stark v. Barrett*, 15 Cal. 361.)

712. Even if it were necessary, as against the trespassers, to establish the existence and validity of the grant, the recitals in the patent are of themselves sufficient evidence for that purpose. (*Stark v. Barrett*, 15 Cal. 361.)

Introduction of patent in evidence, enjoining. See Injunctions, II, 19.

Recitals in patent as evidence. See Ejectment, 336.

Patent is admissible without proof of its execution. See Evidence, 129.

Record of patent as evidence. See Evidence, 228.

Exemplified copy of patent as evidence. See Evidence, 90.

9. Construction of; Interest Passing by; Description and Boundaries; Limitation of Actions on.

Description in patents, how construed. See Boundaries, 39.

Limitation of actions for patented land. See Statute of Limitations, VI, 3, d.

Statute limiting time to sue on patent. See Constitutional Law, 368.

Patent, construction and extent of. See Mexican Lands, I, 25, d.

Patentee takes subject to easement of highway over. See Highways, 89.

713. The United States occupy, with reference to their real property within the limits of a state, only the position of a private proprietor, with the exception of exemption from state taxation, and their patent of such property is subject to the same general rules of construction which apply to conveyances of individuals. (Moore v. Smaw, Fremont v. Flower, 17 Cal. 199.)

714. If there is evidence tending to show that title to public lands has passed out of the government, it is a question for the court, and not for the jury, to determine whether the conveyances were operative to divest the title of the government and vest it in the party claiming it. (Whitman v. Steiger, 46 Cal. 256.)

715. A patent of land from the United States passes to the patentee all the interest of the United States, whatever it may be, in every thing connected with the soil, or forming any portion of its bed or fixed to its surface; in short, in every thing embraced within the term "land." (Moore v. Smaw, Fremont v. Flower, 17 Cal. 199.)

716. Courts give effect to every part of the description of land in a deed or patent if possible, but if this cannot be done, they reject that which is repugnant to the general intent of the instrument. (More v. Massini, 37 Cal. 432.)

717. To ascertain the boundaries of land granted in a patent, the several portions of the patent must be read and construed together. (More v. Massini, 37 Cal. 432.) Cited 63 Cal. 128.

718. In determining the location of a line designated in a patent, the plat of a survey which is made a part of the patent is often entitled to as much and perhaps more weight than the courses and distances. (Serrano v. Rawson, 47 Cal. 52.) Cited 70 Cal. 495.

719. Certain questions asked with a view to show that the lands in question were not within the calls of a patent reviewed, and held properly ruled out, because of uncertainty, and for the further reason that they were misleading and confusing. (Mott v. Smith, 16 Cal. 533.)

720. Evidence tending to show that a patentee had acquired a pre-emption right, and that the patent was issued in confirmation of such right, does not tend to contradict

the patent, when the patent does not recite that it was executed for lands to which the patentee held a right of pre-emption. (Megler v. Ashe, 33 Cal. 74.) Cited 68 Cal. 186, 188.

10. Reservations and Conditions in.

721. An unauthorized reservation or condition in a United States patent to land is void. (Clary v. Hazlitt, 67 Cal. 286.)

Land excepted from grant. See post, XX, 11, d.

11. Conclusiveness.

a. As to Character of Land or Existence and Validity of Grant.

722. When a law of Congress provides for the disposal and patenting of certain public lands, upon the ascertainment of certain facts, the officers of the land department have jurisdiction to inquire into and determine those facts, and the patent issued thereupon is a conclusive declaration that the facts have been found in favor of the patentee. And this rule applies to the determination of the particular character of the land which is the subject of the patent. (Gale v. Best, 78 Cal. 235.)

723. When a patent issues under a law which provides for the disposal of public land as agricultural, and there is no reservation in the law, except a general reservation of mineral lands, and no reservation at all in the patent, the patent is a conclusive determination by the government that the land is agricultural, and it is not competent thereafter in an action in a court of law to reopen the question as to the character of the land. (Gale v. Best, 78 Cal. 235.)

Conclusiveness of patent where issued for land which state had no authority to dispose of. See post, XX, 11, d.

724. In an action of ejectment upon a state patent for land, of which it appeared the patentees had never been in possession, and upon which the defendant, subsequently to the issue of the patent, had settled as a pre-emptor, the defense was, that the patent was issued without authority, and especially that the land, at the date of the state selection, and until after the issue of the patent, was within the limits of a Mexican claim, still pending and undetermined, and was therefore not public land within the meaning of the acts of Congress granting school lands or school indemnity lands to the state. Held, that the questions, whether the land was or was not public land within the meaning of the acts referred to, or whether the survey thereof was with or without authority of law, were questions which it was the duty of the land officers to determine, and if they made a mistake in their judgment, their action was erroneous, and not a mere nullity, and that the patent could, therefore, not be attacked. (O'Connor v. Flasher, 56 Cal. 499; O'Connor v. Good, O'Connor v. Hazard, 60 Cal. 622.)

725. Patent is conclusive evidence of existence, validity, and confirmation of grant which it recites, as against the United States, and persons claiming under the United States

by title subsequent. (*Stark v. Barrett*, 15 Cal. 361.)

Patent, conclusiveness of. See Injunctions, 260; Mexican Lands, I, 25, b; Swamp and Overflowed Lands, XIII.

San Francisco, patent for, conclusiveness of. See San Francisco, III.

School land patent, effect of. See Mines and Mining, 13, 14.

b. As Against Legislative Grant.

726. A patent is not conclusive as evidence of title as against a grant made by the legislative department prior to the patent. (*Megierie v. Ashe*, 27 Cal. 322.)

c. As Against Government or State.

727. The state of California is not a "third person," within the meaning of section 15 of the act of March 3, 1851, providing that any patent issued under the act shall be conclusive between the United States and claimants only, and "shall not affect the interest of third persons." (*People v. City and County of San Francisco*, 75 Cal. 388.)

728. Patent is in itself, as against government, evidence of the existence and validity of the grant recited in it, as well as of the relinquishment of all claim of the United States to the land it embraces. (*Yount v. Howell*, 14 Cal. 465.)

Cited 15 Cal. 366; 18 Cal. 26, 571; 20 Cal. 160.

Granted by state before lands are listed, state bound by. See ante, 339.

d. Conclusiveness Against Third Persons.

Recitals in patent, on whom conclusive. See ante, XX, 8.

729. The judiciary must determine whether the prior rights of third persons have been interfered with by the survey and patent, but it cannot correct the one nor the other. The survey and patent are conclusive in actions of ejectment. (*Moore v. Wilkinson*, 13 Cal. 473.)

Cited 14 Cal. 361; 15 Cal. 366; 20 Cal. 424; 75 Cal. 397; 85 Cal. 315, 458, 464, 483; 5 Mont. 424; 6 Mont. 106.

730. Validity of a patent, regular on its face, cannot be attacked in an action of ejectment. (*Cruz v. Martinez*, 53 Cal. 239.)

Cited 95 Cal. 128.

731. Patent not void upon its face cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title. (*Doll v. Meador*, 16 Cal. 295.)

Cited 25 Cal. 251; 29 Cal. 312; 32 Cal. 338; 56 Cal. 278; 92 Cal. 158; 15 Nev. 405.

732. The defendants in this case stand in no privity with the United States, and possess no claim, legal or equitable, to the lands upon which they are settled, inasmuch as they failed to accept the proffered offer of the general government to invest them with title through the action of certain officers, and therefore cannot be heard in opposition to the patent which the plaintiff holds from the state of California. (*Doll v. Meador*, 16 Cal. 295.)

Cited 28 Cal. 101; 75 Cal. 296.

733. For errors, irregularities, or fraud, committed in any of the steps preliminary to its issuance, inquisition can only be had in a proceeding taken directly for that purpose. (*Yount v. Howell*, 14 Cal. 465.)

734. Where a contest has arisen, and been referred to the district court, as to the right of the parties to purchase state land, it has been held that certain omissions in the application or affidavits render the application so defective that the applicant cannot base a claim to purchase upon it, but such omissions do not destroy the effect of a patent, as evidence of title, against a mere trespasser or occupant. (*Churchill v. Anderson*, 56 Cal. 55.)

735. Fraud or fraudulent imposition upon the land department in the obtaining of a patent cannot be set up by way of collateral attack upon the patent in an action of ejectment brought by the patentee, and the patent can only be assailed on these grounds by a proceeding in equity. (*Shanklin v. McNamara*, 87 Cal. 371.)

736. A patent cannot be attacked collaterally, even for fraud, whether charged to have existed in the procurement of the original grant, or in the proof of its execution, or in the making of the survey. For these matters the right of interference rests only with the government. Individuals can resist the conclusiveness of the patent only by showing that it conflicts with prior rights vested in them. (*Moore v. Wilkinson*, 13 Cal. 478.)

Cited 14 Cal. 469; 20 Cal. 424; 22 Cal. 111; 70 Cal. 604.

737. A patent for public lands of the United States issued to a pre-emptor cannot be collaterally attacked on account of the false oath of the patentee in making his application to pre-empt the land. (*Turner v. Donnelly*, 70 Cal. 597.)

Cited 19 Cal. 103.

738. A patent is a record of the government which cannot be assailed on the ground that it was obtained by false or fraudulent evidence, in a collateral action in which it is used as evidence as a source of title. (*Miller v. Dale*, 44 Cal. 562.)

739. In ejectment, an answer states no defense which admits the patent, and avers that the plaintiff had procured the certificate of location upon which said patent was based, to be issued to him by exhibiting a false affidavit to the surveyor general; that the defendant had made application for the same land, and the said officer had been induced to reject his application by reason of fraud and imposition of the plaintiff. (*Kentfield v. Hayes*, 57 Cal. 409.)

Cited 69 Cal. 138; 70 Cal. 546.

740. H. settled on the land in controversy in 1853, as public land, and afterward died, leaving a widow and children; and in 1868, his administrator (the land having been surveyed, and the plat filed in the land-office) filed a declaratory statement on behalf of the heirs; and after a contest with one B., a patent was issued to the heirs. Subsequent to the inauguration of the contest referred to, the defendant settled upon and improved the land, then unoccupied, and offered to file his declaratory statement; but his offer was re-

fused. In an action upon the patent by a grantee of the heirs to recover the land, the defendant, in his cross-complaint, set up the facts above stated, and further alleged that the land in question was within the claimed limits of a Mexican grant until the final survey thereof some years after the alleged settlement and the death of H., the original pre-emptor; that the land was fraudulently entered in the name of the heirs of H., for the benefit of the plaintiff; and that the testimony upon which the patent was issued was false, and was fraudulently introduced by the plaintiff in pursuance of his fraudulent design to obtain the land for himself. Held, that the facts stated showed no right in the defendant to contest the right of the patentees or their assigns, or to compel a conveyance. (*Chapman v. Quinn*, 56 Cal. 266.) Cited 63 Cal. 214, 216; 70 Cal. 546; 83 Cal. 110.

741. In such case the defendant, being a qualified pre-emptor, and having settled upon land open to pre-emption, had a right under the pre-emption law to file his declaratory statement, and the register and receiver had no right to refuse to receive the same; the rule under which they justified their action was in derogation to the act, and therefore void; the offer of defendant to file his declaratory statement placed him in a condition to demand his rights under the law; and therefore the facts stated in his cross-complaint stated a good cause of action. (*Thornton, J.*, dissenting. (*Chapman v. Quinn*, 56 Cal. 266.)

742. A patent for state lands was issued to the plaintiff as the assignee of a certificate of purchase issued to one C.; and in an action of ejectment by the patentee against an occupant of the land, the defendant offered to prove that C. made the application (under the act of April 27, 1863) for the plaintiff's use and benefit (having been hired by the plaintiff to do so), and further offered to prove that the plaintiff never took the loyalty oath required by the statute. Held, upon the first point, that the defendant could not take advantage of the fraud claimed to have been practiced upon the state or its officers; and upon the second, that C. was the only person with whom the state officers could treat as the person for whose benefit the proceeding was taken; and that to say that the officers were deceived, and the state thereby defrauded, is but a restatement of the point first considered. (*Churchill v. Anderson*, 56 Cal. 55.)

743. If authority to issue patent depends upon the existence of particular facts in reference to the condition or location of the property, or to the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them and given their judgment, then the patent, though the judgment of the officers be in fact erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases the parties without title cannot be heard at all, and the parties with subsequent title must

seek their remedy by *scire facias*, or bill or information to revoke the first patent or limit its operation. (*O'Connor v. Frasher*, 56 Cal. 499, cited 57 Cal. 410, 60 Cal. 622, 63 Cal. 32; *Doll v. Meador*, 16 Cal. 295, cited 21 Cal. 423, 24 Cal. 629, 32 Cal. 362, 56 Cal. 60; *Churchill v. Anderson*, 56 Cal. 55, cited 57 Cal. 69, 63 Cal. 216; *O'Connor v. Good*, *O'Connor v. Hazard*, 60 Cal. 622.)

744. If patent for land shows upon its face that it is void, it may be attacked, either directly or collaterally, by any party interested in disputing its validity. (*Rondell v. Fay*, 32 Cal. 354; *Doll v. Meador*, 16 Cal. 295, cited 21 Cal. 423, 24 Cal. 629, 32 Cal. 362, 56 Cal. 60.)

745. If a patent be void on its face or was issued without authority or was prohibited by law, or if the government in whose name it is issued had no title, it may be attacked collaterally. (*Durfee v. Plaisted*, 38 Cal. 80.) Cited 44 Cal. 92; 48 Cal. 610.

746. If patent be issued in absence of legislation directing a disposition of the property described, or by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally. (*Doll v. Meador*, 16 Cal. 295.) Cited 21 Cal. 423; 24 Cal. 629; 32 Cal. 362; 56 Cal. 60.

747. Where the plaintiff in ejectment claims title under a state patent issued upon a school warrant location, the invalidity of the location cannot be interposed as a defense to the action, nor the efficacy of the patent be contested by one in possession, who admits that the premises are a part of the public lands of the United States, and traces no title from the United States to himself. (*Rhodes v. Craig*, 21 Cal. 419.) Cited 56 Cal. 278.

748. State patent issued for land which state has no authority to dispose of is void, and may be collaterally attacked in any action, and its operation as a conveyance defeated by a party in mere possession of the land, though not connected with the source of title. (*Edwards v. Rolley*, 96 Cal. 408.)

749. The courts have the right, even in actions of ejectment, when the parties present and rely upon a patent from the United States, to inquire as to whether or not the description given in the patent includes land which the government or its officers had no power to convey. (*United Land Assn. v. Knight*, 85 Cal. 448.)

750. In an action of ejectment based on a patent purporting to have been issued in pursuance of a grant by Congress, it is competent for the defendant to attack the validity of the patent on the ground that the land was excepted from the grant. (*McLaughlin v. Heid*, 63 Cal. 208.) Cited 64 Cal. 517; 67 Cal. 68; 73 Cal. 161; 79 Cal. 131; 85 Cal. 486.

751. The fifteenth section of the act of Congress of 1851 provides that the final decrees of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the interest of third

persons. If conclusive between the United States and the claimants it must be equally so between persons holding under either of those parties. (*Moore v. Wilkinson*, 13 Cal. 478; *Moore v. Roff*, 13 Cal. 489.)

752. In ejectment a patent from the state, appearing to be valid on its face, and conveying land subject to disposition by the state, is conclusive evidence of title against a defendant who shows no connection with the common or paramount source of title. (*Kentfield v. Hayes*, 57 Cal. 409.)
Cited 77 Cal. 261; 83 Cal. 109.

753. A patent from the United States to public land is conclusive evidence of title in the patentee, in any collateral attack thereon, as against those not connecting themselves with the government title. (*Thompson v. Doaksum*, 68 Cal. 593.)

754. Defendant, not having shown any privity with the state, could not attack the patent from it. (*Schieffery v. Tapia*, 68 Cal. 184.)

755. Party who was homestead claimant of public land, and, as such claimant, received a patent for it from the United States, is in such privity with the paramount source of title as enables him to attack a patent for it issued to another person by the state, as land selected in part satisfaction of a Congressional grant. (*Chant v. Reynolds*, 49 Cal. 213.)

756. Only one in privity with the paramount title of the United States can attack collaterally a patent issued for lands listed to the state as in lieu of school lands; and a cross-complaint in an ejectment suit brought by a plaintiff claiming under such patent states no ground of relief when it shows merely that defendant once offered to enter the land under the homestead laws, and was prevented from prosecuting his homestead claim at that time by a statement of the register that the land was not subject to entry under the homestead laws, without showing any excuse for a failure to appeal from the decision of the register, or for a delay of fifteen years thereafter in the prosecution of his homestead claim. (*Burling v. Thompkins*, 77 Cal. 257.)

757. Before a person will be permitted to call in question the proceedings through which another has obtained a patent to public lands, he must show in himself all the conditions necessary to enable him to pre-empt. (*Burrell v. Haw*, 40 Cal. 373.)
Cited 56 Cal. 278; 68 Cal. 186; 77 Cal. 186; 78 Cal. 516; 91 Cal. 377.

758. One who is a qualified pre-emptor, and is living on public land, and has filed his application to purchase, and has offered to prove up his claim, and has tendered the purchase money, has such a privity with the title of the United States as will enable him, in an action at law, to attack a patent for the same which is void as having been issued without authority of law, but is not void on its face. (*Rosecrans v. Douglass*, 52 Cal. 213.)

759. A settlement and possession by a pre-emptor in compliance with the laws of the United States, upon land subject to settlement and pre-emption, gives to the pre-

emptor such privity with the government of the United States that he may attack a void patent for the land. (*Foss v. Hinkell*, 78 Cal. 158.)
Cited 92 Cal. 158.

760. Equitable rights of persons claiming under the pre-emption laws have been protected by the courts against a legal title acquired by other parties by means of the introduction by others of false testimony, or other imposition upon the officers of the land department, or by the misconstruction of the law by those officers upon an admitted state of facts. But in all of such cases the party thus protected had connected himself with the title of the government, and thereby acquired some right, which in equity entitled him to protection. (*Chapman v. Quinn*, 56 Cal. 266.)

761. If the state selects, as a part of said five hundred thousand acre grant, land in the possession of a bona fide pre-emptor at the time of the selection, the pre-emptor is in such privity with the common source of title that he can attack a patent granted by the state for the same in an action of ejectment brought by the patentee or his assignee. (*Terry v. Megerle*, 24 Cal. 609.)
Cited 25 Cal. 251; 28 Cal. 101, 403; 29 Cal. 312; 32 Cal. 362.

762. The action was brought to recover the possession of certain land which was listed to the state as lieu land on the 13th of March, 1877, on an application and selection made by it on the 1st of October, 1873. On the 31st of July, 1879, the state conveyed the land by patent to the grantor of the plaintiff. The defendant claimed title under a pre-emption settlement made prior to the inception of any right on the part of the state, but gave no evidence that at such time he was a qualified pre-emptor, or had complied with the requirements of the pre-emption laws. The court instructed the jury that the listing to the state was a nullity, and the patent based upon it void, if, at the time of listing, the land was withdrawn from sale. Held, that the instruction was erroneous because the defendant, not having connected himself with the title of the United States, could not attack the listing or patent to the state. (*Schieffery v. Tapia*, 68 Cal. 184.)

763. The patent is the record of the state that the land was subject to location under the grant of the United States, and has been located, through her officers, in pursuance of the terms of the donation; and, as against parties who have no higher right than that which arises from mere occupation, it imports absolute verity. (*Doll v. Meador*, 16 Cal. 295.)

Cited 21 Cal. 423; 22 Cal. 111; 23 Cal. 442; 24 Cal. 568; 38 Cal. 83; 53 Cal. 243; 56 Cal. 501; 57 Cal. 69, 395, 410; 63 Cal. 214, 216-18; distinguished 23 Cal. 437.

764. Defendants in possession of a sixteenth or thirty-sixth section, which was known to be mineral land prior to 1853, and who are holding it as mining claims under locations recently made in accordance with the law of Congress, and with the local rules and customs of miners, are in privity with the United

States, and may attack a patent of the land from the state to the plaintiff, in an action of ejectment. (*Hermocilla v. Hubbell*, 89 Cal. 5.)

765. Evidence is admissible in favor of such defendants as to the work done by them on their mining claims since the date of their location, for the purpose of showing that the land, which was known to be mineral at the date of the grants, is still valuable for its minerals, and to overcome the theory of the plaintiffs that they were of no value. (*Hermocilla v. Hubbell*, 89 Cal. 5.)

766. A person who, with a state land warrant, locates three hundred and twenty acres of land under the provisions of the act of May 3, 1852, for the disposal of the five hundred thousand acres of land granted to the state, but whose location is void because made before the land is surveyed by the United States, bears no such relation to the land as to enable him to attack a patent made by the state for the same land to a person who makes a subsequent location after the survey. (*Hastings v. Jackson*, 46 Cal. 234.)

Collateral attack because judgment on contest rendered by default. See post, 858.

Fraud cannot be set up in ejectment under patent. See *Mexican Lands*, 368, et seq.

12. Validity of.

767. A patent from the governor, purporting to convey the lands of the state, can have no validity unless expressly authorized by law. (*Summers v. Dickinson*, 9 Cal. 554.) Cited 16 Cal. 330; 23 Cal. 441.

768. If a patent shows that it was issued in the absence of legislation directing a sale of the property described it is void upon its face. (*Rondell v. Fay*, 32 Cal. 354.)

769. A party claiming land under a patent from the United States has the benefit of the presumption that the officers rightly performed all their duties in selling the land and issuing the patent, and it devolves on the party assailing the patent to show that it was issued without authority of law. (*Collins v. Bartlett*, 44 Cal. 371.) Cited 75 Cal. 297.

770. It is not necessary that a patent of the United States to land granted by the Mexican government should contain a recital that the survey had been published. It will be presumed, in support of such patent, regular on its face, that the proper officers of the land department determined, prior to the signature of the patent, that due publication of the survey had been made. (*Cruz v. Martinez*, 53 Cal. 239.) Cited 95 Cal. 128.

771. A patent is *prima facie* evidence of title in the grantee, as the law presumes in favor of the acts of all public officers. (*Summers v. Dickinson*, 9 Cal. 554.)

772. A patent for public land, not void upon its face, is *prima facie* valid; and the burden of showing its invalidity is on the party attacking it. (*Leviston v. Ryan*, 75 Cal. 293.)

Cited 77 Cal. 70; 78 Cal. 381; 82 Cal. 643; 83 Cal. 510; 92 Cal. 158.

773. A United States patent is at least *prima facie* valid, and is presumptive evidence that all preliminary conditions had been fulfilled. (*Southern Pac. R. R. Co. v. Purcell*, 77 Cal. 69.)

774. The presumptions which arise in support of a patent for public land, issued by the state, can have no force in face of the facts that the state selection of the same was originally void, and that the selection has been validated by Congress. (*Chant v. Reynolds*, 49 Cal. 213.)

775. Though a patent be in fact issued without authority of law, because the state had no title to grant, the presumption, in an action of ejectment, is, in the first instance, that the patent is valid and passes the title, and the burden of proof is cast on the one who undertakes to impeach the patent to establish the facts necessary for its overthrow. (*People ex rel. Pixley v. Stratton*, 25 Cal. 242.) Cited 78 Cal. 381.

776. Under section 2 of the act of Congress of March 1, 1877, an innocent purchaser for a valuable consideration from the state of lieu lands, selected by the state, where there is no corresponding sixteenth or thirty-sixth section, has a preferred right to purchase the same from the United States; and when a patent has been issued by the United States to such land, the patentee is not required to support it by proof of the circumstances justifying it, but it devolves upon the party assailing it to allege and prove that under no circumstances were the officers of the land department authorized in issuing the patent to the plaintiff. (*Burling v. Thompson*, 77 Cal. 257.)

777. Whether a state patent to land other than a sixteenth or thirty-sixth section is conclusive or not, it is at least *prima facie* evidence of title, and if a defendant in ejectment can attack it at all, the burden is on him to show its invalidity. (*Hebbron v. Graves*, 78 Cal. 380.) Cited 92 Cal. 158.

778. If a patent to land is issued to a railroad company, under a grant made by Congress of alternate sections along the line of its route, and ejectment is brought on the patent against one who had settled on the land and acquired a pre-emption right before the land had been withdrawn from market, and he depends on the ground that the land officers were misled by false and fraudulent testimony of the agent of the railroad company, the facts that such agent swore that the land was vacant and unappropriated, and that the land officers did not know that the defendant was on the land, tend to show that the land officers were so misled. (*Campbell v. Buckman*, 49 Cal. 362.) Cited 91 Cal. 543.

779. A cross-complaint in an action of ejectment alleging that the officers of the land department, upon appeal, had neglected to read, examine, or weigh the evidence taken before them upon a contest of the application for a homestead of the plaintiff's grantor, to whom a patent was issued, and had filed written opinions adverse to the claim of the defendant as a pre-emptor, which had been

compiled and fabricated by clerks and subordinates, presents no fact entitling the defendant to a judgment that the patent be declared void. (*Grant v. Oliver*, 91 Cal. 158.)

780. Patent under location of school land warrant on lands reserved from entry and sale is unauthorized by law and void. (*Rush v. Casey*, 39 Cal. 339.)

781. A patent of the United States to a tract of land as an additional soldier's homestead is valid, although the entry was made in the name of the soldier by his attorney in fact, acting under an irrevocable power dated two years before the entry, to which was added a relinquishment of dower by the wife, and, after the entry and approval, but before the issuance of the patent, the land was conveyed in the soldier's name; and the title of one claiming under such patent is not only good in law, but it is also secure against a suit in equity to annul the patent. (*Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284.)

782. Assuming that a patent may be attacked under the general issue of ownership in an action of ejectment, yet an offer of the defendant to prove that the property in controversy was within the exterior boundaries of a Mexican grant at the time of the presentation of a declaratory statement of homestead claim by the plaintiff's grantor is too uncertain and indefinite, and is properly rejected, there being no offer to show that the grant was not a floating grant. (*Grant v. Oliver*, 91 Cal. 158.)

783. If the title to a subdivision of public land in this state passed to the state by virtue of the act of July, 23, 1866, entitled "An act to quiet land titles in California," then a patent afterwards issued for the same by the United States is void, and one in possession need not deraign title from the state in order to defend his possession in an action of ejectment brought by the patentee. (*Sutton v. Fassett*, 51 Cal. 12.)

Cited 63 Cal. 255; 83 Cal. 107.

Patent by United States to land to which it had no title. See post, XX, 13.

784. If a patent is good in part and bad in part upon the face, and, in its description of the land, does not separate the good part from the bad, the party relying upon it must show himself within its good call. (*Rondell v. Fay*, 32 Cal. 354.)

785. In an action by a vendor of land for a specific performance of the contract, and the enforcement of his lien, held, that the decision of the cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto such as the parties contemplated at the time they entered into their contract. And held further, the question turning upon the validity of the patent discussed in the opinion, and under which the plaintiff deraigned title, that the patent was valid. (*Fletcher v. Mower*, 55 Cal. 119.)

Verity of patent and impeachment of. See ante, 701.

Cancellation of patents. See post, XX, 13.
Issued after attempted cancellation of list-

ment to state is void and may be collaterally attacked. See ante, 38.

Collateral attack on patent because issued to executor. See ante, 698.

Presumption that officer issuing patent performed his duty. See *Offices and Officers*, 88.

13. Cancellation of; Conflicting Patents.

786. If a patent is issued without authority of law, or the state had no title to grant, a person who owns the lands patented may invoke a court of equity to restrain by perpetual injunction its use as evidence, or may maintain an action in his own name to annul it. (*People ex rel. Pixley v. Stratton*, 25 Cal. 242.)

Cited 28 Cal. 101; 32 Cal. 362; 38 Cal. 83.

787. In order to maintain an action to annul a patent issued by the land department of the state the plaintiff must connect himself with the source of title, and must show that his rights are injuriously affected by the patent. A certificate of purchase issued to one not entitled to receive it confers no rights, and the person holding such certificate is a stranger to the title, and cannot be heard as a plaintiff to question the rights of the defendant under a state patent. (*Davidson v. Cucamonga Fruit and Land Co.*, 78 Cal. 4.)

Cited 83 Cal. 109.

788. The attorney general may file an information in the nature of a bill in chancery to annul a patent for lands granted by this state to an individual, in a case where the matter involved in the suit immediately concerns the rights and interests of the state. (*People ex rel. Pixley v. Stratton*, 25 Cal. 244.)

Cited 66 Cal. 152, 566.

789. An information is, in its substantive characteristics, a bill in equity, and when it concerns only the rights of the government, or those whose rights are under the particular protection of the government, is exhibited in the name of the attorney general as the informant; and in the former case a relator is sometimes, and in the latter case always, named who in reality sustains and directs the suit. (*People ex rel. Pixley v. Stratton*, 25 Cal. 244.)

Cited 78 Cal. 518.

790. If the state has no interest in the subject matter an information on the relation of the attorney general, on behalf of the state, to annul a patent cannot be sustained. (*People ex rel. Pixley v. Stratton*, 25 Cal. 244.)

Cited 78 Cal. 517.

791. If private citizens have an interest in the lands granted by the patent, and are threatened with injury by the patent, the information should be filed in the name of one or more of such persons, provided they are without adequate remedy at law; and in such case, the relator's personal complaint should be joined to and incorporated with the information. (*People ex rel. Pixley v. Stratton*, 25 Cal. 244.)

Cited 68 Cal. 186.

792. An information on the relation of the attorney general, on behalf of the state, to annul a patent, which avers that the state

has no interest in the lands patented, does not state facts sufficient to constitute a cause of action. (*People ex rel. Pixley v. Stratton*, 25 Cal. 244.)
Cited 78 Cal. 7.

793. An action by the state to cancel a patent for school land on the ground of false and fraudulent statements by the applicant is governed by subdivision 4 of section 338 of the Code of Civil Procedure, and is barred if not commenced within three years after the cause of action accrued, and an averment that the false statement was not known to the officers of the state is not sufficient to exempt the action from the provisions of that section; and any defects in the statement, whether fraudulent or not, having been cured by the act of 1870, it is immaterial whether or not they were subsequently ascertained by the land officers of the state. (*People ex rel. Eadie v. Noyo Lumber Co.*, 99 Cal. 456.)

794. Parties who have a common interest in annulling a patent, although they have no joint interest in the land adverse to the patentee, may be joined as plaintiffs in action to procure its cancellation. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)
Cited 31 Cal. 427; 53 Cal. 734.

795. In an action brought to annul a patent for land sold without authority of law, the state, and persons who have a right to mine on the land under the mining laws of this state, may be joined as plaintiffs. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)

796. The proceeding by bill in equity, which an individual is allowed to take to set aside a patent or control its operation, is in the nature of a bill to quiet title—to determine an estate held adversely to him—to remove what would otherwise be a cloud upon his own title; or is in the nature of a bill to enforce a transfer of the interest from the patentee, on the ground that the latter has, by mistake or fraud, acquired a title in his own name, which he should in equity hold for the benefit of the complainant. The individual complainant must therefore possess a title superior to that of his adversary, and, of course, to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name. (*Biddle Boggs v. Merced Min. Co.*, 14 Cal. 279.)
Cited 13 Cal. 53.

797. In action by alleged pre-emptor of indemnity school lands to quiet title as against a patentee from the state the plaintiff cannot question the validity of the patent to the defendant on the ground that his application to purchase was defective or irregular, because he is not seeking to obtain the title of the state. (*Green v. Hayes*, 70 Cal. 276.)

798. In an action brought to vacate a patent for land on the ground that its issuance was procured from the government by false suggestions, fraudulent concealments, and by misrepresentations, the acts of fraud and misrepresentation on which the general charge is based must be specified in the complaint, or it will not state facts sufficient to

constitute a cause of action. (*Semple v. Hagar*, 27 Cal. 163.)
Cited 30 Cal. 674; 82 Cal. 321; 3 Utah, 246.

799. In an action by an alleged pre-emptor of indemnity school land, claiming title under a previous settlement, to quiet his title, as against a patentee from the state, and to have the title of the latter declared void on the ground that his application to purchase the land from the state was fraudulent, the facts constituting the fraud must be specifically alleged in the complaint. (*Green v. Hayes*, 70 Cal. 276.)

800. A complaint in an action in the name of the people, on the relation of a private individual, to cancel a patent for a tract of land issued by the state to the defendant, which merely avers that the relator is seised and possessed of the land, and that his title was derived from the state of California under and by virtue of the location of a school warrant made under and in accordance with the provisions of an act of the legislature, that said location was duly and properly made, and in all respects according to the provisions of said act, does not state facts sufficient to constitute a cause of action. (*People ex rel. Hastings v. Jackson*, 24 Cal. 630.)
Cited 40 Cal. 377.

801. The action was brought to cancel a patent issued on an application made in May, 1880, to purchase lieu land. The plaintiff claimed that the same land had been previously sold to one Mullen, the assignor of the relator, upon his application made in 1869, under the act of March 23, 1868. The land having been accepted by the register, the surveyor general of the state approved the location, and issued to Mullen a certificate of location on the 21st of August, 1869. Mullen did not present his certificate, or make any payment thereon, to the county treasurer within fifty days after the approval. On the 27th of March, 1872, the legislature passed an act for the relief of purchasers of state lands. The complaint contained no allusion to the latter act, and failed to show that Mullen had not already been the beneficiary of the act. Held, that the complaint did not state facts sufficient to constitute a cause of action. (*People ex rel. Lynch v. Marts*, 74 Cal. 110.)

802. Evidence necessary to be produced in a court of equity to justify the setting aside of a patent to state or United States lands must be clear, convincing, and unequivocal; and this rule applies not only to the matter of fraud practiced upon the government, but also to the good faith and innocence of the subsequent grantee, and to the proof that he connived at or had notice of such fraud. The proof must be full and complete, and evidence merely creating a suspicion of fraud, or a suspicion of notice of fraud, however strong, is not sufficient. (*People v. Swift*, 96 Cal. 165.)

803. It is not permissible, in a proceeding to set aside a state patent, to call in question the evidence upon which a judgment was based, in a contest over the right to purchase the land, or the rulings of the court on matters of law. (*People ex rel. Wallen v. Morris*, 77 Cal. 204.)

804. The equitable title of a purchaser of public land from an entryman holding simply a certificate of purchase, before a patent has issued, ripens into a perfect legal title upon the issuance of a patent to the entryman; and the rule that the defense of a bona fide purchase does not apply to the purchase of an equity will not preclude such defense in an action by the government to cancel the patents so issued. (*People v. Swift*, 96 Cal. 165.)

806. In an action by the state to cancel patents for timber land, upon the ground that the grantors of the defendants procured the patents by fraud, an answer that the defendants are bona fide purchasers of the land for value, without notice of the alleged fraud, or of any fraud practiced in procuring the title from the state, presents a perfect defense. (*People v. Swift*, 96 Cal. 165.)

806. A patent issued on a contest as to the right to purchase state lands where the question is referred to the district court, before the proceedings in the court have terminated, is void, and may be annulled at the suit of the state, even if the patentee has conveyed to an innocent purchaser. (*People v. Carrick*, 51 Cal. 325.)

Action to cancel patent. See *Swamp and Overflowed Lands*, XIII.

Patents, validity, impeachment, setting aside. See *Mexican Lands*, I, 25, b, c.

Patent, impeachment of for fraud. See *Mexican Lands*, 393, 394; *Statute of Limitations*, 286.

Restoring price received on setting aside patent. See *ante*, 473.

Action by state to cancel patent, when barred. See *Statute of Limitations*, 23.

Parties in action to set aside patent. See *Mexican Lands*, 393.

Action to cancel patent, issuing injunction pending. See *Injunctions*, 270.

807. H., a state patentee, having recovered judgment against the defendant for recovery of the land included in the patent, and for damages and costs, and having transferred the land and judgment to the plaintiff, the defendant executed to the plaintiff a note and mortgage to secure the money due on the judgment, and at the same time the plaintiff, in writing, agreed that he would not attempt to collect on of the note and mortgage until certain proceedings then pending in the land department of the United States on the part of the defendant should have terminated in a failure on his part to acquire title to said land superior to the title of the plaintiff. The proceedings referred to terminated in the issue to the defendant of the patent involved in the case of *Pratt v. Crane*, 58 Cal. 533, and there held to convey no title. Held, that the plaintiff was entitled to judgment. (*Crane v. Carr*, 59 Cal. 103.)

808. When a state has selected any tract of land as a part of the five hundred thousand acres granted by the act of Congress of September 3, 1841, and that selection has been made of public lands subject to the grant, and the selection has been approved by the United States, then the state, or its grantee, holds the title to the tract selected by a title

superior to that asserted by the holder of a subsequent patent issued by the United States. (*Megerle v. Ashe*, 27 Cal. 322.)

809. If a plaintiff in ejectment offers in evidence a patent of the United States and rests, the defendant is entitled to offer in evidence a state patent of prior date for the same land, accompanied with proof that the land was selected by the state as part of the five hundred thousand acres granted to the state, and that the United States approved of the selection. (*Megerle v. Ashe*, 27 Cal. 322.)

810. Where, in an action of ejectment, plaintiff claimed under a patent from the state of California, dated January 15, 1856, as of swamp and overflowed lands, acquired under the act of Congress of 1850, granting the same to the state, and the defendant claimed the same land under a patent from the United States, dated September 10, 1866, held, (1) that both patents were properly admitted in evidence on the trial of the issue of title, as being necessary links in the respective chains of proof of the parties, but that the question as to which patent conveyed the title depended on the further fact whether or not the lands were swamp and overflowed, within the meaning of said act of Congress; (2) that this question was properly determinable, not from the recitals of either patent or the records of either the state or United States land-office, but upon parol proof as to the real character of the lands. (*Keeran v. Griffith*, 34 Cal. 580.)

811. At common law, and under our mode of procedure, in case of conflicting patents to land from one paramount source, the court, in actions of ejectment, will look behind the patents and ascertain which party had the prior equity; and, when ascertained, it will attach itself to the legal title, which, by relation, takes effect at the time the equity accrued; and thus a junior patent founded on a prior equity will prevail over an elder patent founded on a junior equity. (*Smith v. Athern*, 34 Cal. 506.)
Cited 38 Cal. 65; 42 Cal. 615; 56 Cal. 278; 57 Cal. 528; 69 Cal. 437.

812. In 1855 the congressional township embracing the land in controversy was surveyed by the United States; on the seventh day of March, 1856, one Vance filed application to locate certain California school land warrants on the land, and on the 10th of the same month the register approved the proffered location as a part of the land granted by the United States to this state, and issued the proper certificate to Vance, who assigned the same to defendant. Thereafter, on the 8th of January, 1862, the state issued to defendant her patent. The plaintiff filed in the proper United States land-office his declaratory statement for a pre-emption of said land, April 18, 1856, and he received a United States patent thereto, as a pre-emptor, in November, 1863. Held, (1) that the titles conveyed by said conflicting patents are both derived from the United States as their paramount source; (2) that the equity on which defendant's title is founded dates back to March 10, 1856, when said register approved the location of said school land warrants,

while the equity on which plaintiff's title rests dates back only to April 16, 1856, when his said declaratory statement for pre-emption was filed; (3) that upon this state of facts the defendant's title should prevail. (*Smith v. Athern*, 34 Cal. 506.)

813. The only mode in which the plaintiff can overcome the defendant's older title, coupled with his said equity, is by showing that he has a better equity arising from his occupation and settlement of the land prior to March 10, 1856, followed up by proper proceedings to perfect his pre-emption thereof, and that these proceedings have resulted in his said patent. (*Smith v. Athern*, 34 Cal. 506.)

814. A patent of the United States for land to which it has no title conveys none; so held with reference to a patent of the United States issued after the land was listed to and patented by the state to another. (*Pratt v. Crane*, 58 Cal. 533.)
Cited 59 Cal. 105, 302; 83 Cal. 107, 546.

Priority between state patentee and patentee of lieu land to pre-emptor before the listing to state. See ante, 34.

Patents conflicting, and priority between. See *Swamp and Overflowed Lands*, XIII.

Patents, priority of. See *Swamp and Overflowed Lands*, XIII.

14. Patentee When a Trustee.

Patentee of town lot as trustee. See ante, 284, 286.

815. Equity will decree and enforce trust in favor of party who shows better right to land, a patent for which has been procured by the fraud of the defendant, and through mistake and misconception of the law on the part of the officers of the land department of the government. (*Buckley v. Howe*, 86 Cal. 596.)

816. In such a case it is not enough to show that the defendant was not entitled to have received the patent, but the plaintiff must show that he himself occupies such a status toward the property as entitles him to control the legal title. (*Buckley v. Howe*, 86 Cal. 596.)

817. If one obtaining from the United States a patent to a tract of public land which, in equity and good conscience, and by the laws which Congress has passed on the subject, ought, upon a true construction of those laws, go to another, who establishes a prior right to it, a court of equity will control the patent in favor of the prior equity and compel a conveyance of it to the owner of the equity. (*Aurrecoechea v. Sinclair*, 60 Cal. 532, 545.)
Cited 70 Cal. 546.

818. If a patent to state lands is void no constructive trust can be enforced therein by a third person alleging himself to have been entitled thereto; and, if the patent is valid, no constructive trust can be enforced for fraud in procuring the patent, unless the claimant affirmatively alleges and proves that he possessed the necessary qualifications entitling him to a patent. It is not enough to allege that an application was made contain-

ing such facts. (*Peabody v. Prince*, 78 Cal. 511.)
Cited 83 Cal. 110.

819. M. and C. were both residing on an unsurveyed quarter section of public land, and agreed that it should be purchased from the state in the name of C., and that each should furnish one-half the money to make the purchase, and pay one-half the expense, and own one-half the land, and that, when the purchase was made from the state, C. should convey one-half to M. C. afterwards pre-empted the land, and received a patent for it from the United States. Held, that before M. could have C. declared his trustee, and compel him to convey to him one-half the land, he must show that the land could have been purchased from the state by one of them; that is, that the state had held the title, and would have sold and conveyed it. (*McCreary v. Casey*, 50 Cal. 349.)

820. Person who has neither filed his declaratory statement nor been prevented from so doing by the fraud of another person cannot avail himself of the benefits of an entry made by such other person, and a patent issued in pursuance thereof. (*Damrell v. Myer*, 40 Cal. 166.)

821. Person whose application contains false statements as to the occupation of the land and the improvements thereon, and an adverse claim of title thereto, will not on that ground be held, in equity, to have taken the title in trust for the person who was then in possession of the land and had improvements thereon, claiming title under a Mexican grant, but who did not make application to purchase from the state, but applied, under the act of Congress of July 23, 1866, to purchase the land from the United States. (*Thomas v. Lawlor*, 53 Cal. 405.)
Cited 77 Cal. 261.

822. Where the plaintiff claims priority of right over the defendant to become the purchaser from the government, and to receive a patent for the land in controversy, under a pre-emption claim, it is not enough to allege he had or has such right, as that allegation is a mere conclusion of law; but the plaintiff must show the state of facts conferring such right, and also that he took the legal steps to avail himself thereof. (*Buckley v. Howe*, 86 Cal. 596.)

823. In an action by the unsuccessful claimant to compel a conveyance of the legal title the plaintiff must distinctly allege and clearly prove that he occupies such a status as gives him the right to control the legal title. (*Plummer v. Brown*, 70 Cal. 544.)

824. If a party has acquired, as a pre-emption claimant, the legal title to land from the United States, another pre-emption claimant cannot, in equity, hold him as his trustee, and compel him to make a conveyance of such legal title, unless such other has complied with the provisions of the pre-emption law, or was prevented from so doing by some act, by means of which the holder of the legal title acquired an undue advantage in the proceeding. (*Sacramento Savings Bank v. Hynes*, 50 Cal. 195.)

825. A bona fide purchaser of land lying

within the exterior boundaries of a Mexican grant, and excluded therefrom upon final survey by the United States, has a preferred right to purchase the same from the United States under the act of July 26, 1866, and cannot be charged as trustee of the patent procured by him in favor of a prior pre-emption claimant of such land, or of the heirs of such claimant. (*Hays v. Steiger*, 76 Cal. 555.)

826. In a case where two parties are contesting pre-emption claimants before the United States land officers, and the land is awarded to one and the patent issued to him, and the other then files a bill in equity to have the court adjudge the patentee his trustee, and to compel him to make a conveyance of the legal title, the plaintiff must show (1) that he possessed all the necessary qualifications of a pre-emptor, for without these qualifications he has no standing in court; (2) that the defendant did not possess those qualifications, and that the land officers, in deciding that he did, were imposed upon and deceived by fraudulent practices and false testimony used before them, and procured by the defendant. (*Burrell v. Haw*, 48 Cal. 222.)

Cited 51 Cal. 398, 494; 58 Cal. 287; 70 Cal. 546; 78 Cal. 516; 83 Cal. 124.

827. The courts will not pass on the sufficiency of the evidence upon which the decision of the land officers was based in such case, but it must be shown that their decision was induced by fraudulent practices of the defendant, whereby the plaintiff was deprived of his right to pre-empt. (*Burrell v. Haw*, 48 Cal. 222.)

828. In such case the fact that the patentee was not a citizen, and swore falsely on that point in his declaratory statement, is not sufficient to show fraudulent practices on his part on the question of citizenship; but it must appear that he produced witnesses who swore falsely on that point, and thereby deceived the land officers. (*Burrell v. Haw*, 48 Cal. 222.)

829. If the land officers of the United States allow a person to enter, as a pre-emptor, land not included in his declaratory statement, and he receives a patent therefor, he will be held to have the legal title in trust for another person, who was entitled to pre-empt the same, and who proved and tendered payment, which was refused. (*Hess v. Bolinger*, 48 Cal. 349.)

830. If, through fraud and perjury, a person acquires the title to a tract of public land, upon which another was living, and to which such other had a pre-emption right, a constructive trust arises in favor of the party having such pre-emption right, which the law will fasten upon the conscience of the other, and such other will be compelled to convey the legal title to the pre-emptor upon being refunded the money which he would have been compelled to pay the government if he had been permitted to pre-empt the land. (*Hollinshead v. Simms*, 51 Cal. 158.) Cited 56 Cal. 295; 77 Cal. 260, 261.

831. If, in such case, the pre-emptor uses ordinary care to find when the plat of survey is filed in the land-office he will lose his

rights for want of diligence, even if more than a year expires after the plat of survey is filed before he applies to file his declaratory statement. (*Hollinshead v. Simms*, 51 Cal. 158.)

832. The action was brought by an unsuccessful claimant of the right to purchase certain public land of the United States under the pre-emption and homestead laws, against the successful claimant, to compel the latter to convey the legal title to the plaintiff. The complaint showed that in the contest as to the right to purchase, the land department had decided that the defendant settled upon and occupied the land before the plaintiff entered upon it, and had not abandoned his occupation, and that the plaintiff invaded the occupation of the defendant, and was not a qualified pre-emptor. Held, that the plaintiff was not in a position to control the legal title issued to the defendant. (*Plummer v. Brown*, 70 Cal. 544.)

833. If the successful claimant has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, who may, by a proper proceeding, compel a conveyance to himself of the legal title. (*Plummer v. Brown*, 70 Cal. 544.)

834. Where the application for a homestead entry, under which the plaintiff claims, was rejected, and no appeal was prosecuted from the order of the register and receiver rejecting the same, and no further steps were taken to secure its approval, or to contest the issuance of the patent to the defendant, who proved up and paid for the land as a pre-emption claimant, the plaintiff possesses no right, by virtue of his homestead entry, to control the patent, or to enforce a trust therein. (*Buckley v. Howe*, 86 Cal. 596.)

835. Nor will the fact that the plaintiff claims as an assignee of an actual possessor of the land pre-empted by the defendant avail the plaintiff, it not appearing that such possessor objected to the defendant's entry or possession of a portion of the land included in his inclosures, or resisted his pre-emption claim. (*Buckley v. Howe*, 86 Cal. 596.)

836. Neither naked possession of the public domain nor a rejected application for leave to enter it, under whatever law it may be made, if the rejection is acquiesced in, and not appealed from, will give any such right or title as will enable the claimant successfully to attack or control a patent issued by the government to another claimant. (*Buckley v. Howe*, 86 Cal. 596.)

837. The land department having determined that the defendant's homestead entry, No. 304, was valid, and it not being shown that the determination was based upon an erroneous decision of a matter of law, and entry No. 304 being prior to the initiation of the plaintiff's pre-emption, there is no ground on which the plaintiff can claim that the defendant acquired the title to the land under his homestead entry as his (the plaintiff's) trustee. (*Powers v. Leith*, 53 Cal. 711.) Cited 70 Cal. 546.

838. One who obtains a patent of public

land of the United States as a pre-emptioner, by fraudulently obtaining and forcibly retaining possession thereof from another, who had taken the preliminary steps to enter it as a homestead under the laws of the United States, and by procuring a cancellation of the homestead entry by means of false evidence, holds the title in trust for the homestead claimant. (*Bird v. Wilcox*, 45 Cal. 686.)

839. In such case the grantee of the patentee, who buys with notice, also holds the legal title in trust for the homestead claimant. (*Bird v. Wilcox*, 45 Cal. 686.)

840. Where S., who located a warrant and had conveyed all his interest in the located land to H., and afterwards procured the patent to the same from the state, he thereby acquired no new interest in the land of an adverse character, subsequent to his conveyance to H., but after the patent he held the naked legal title in trust for H. (*Bludworth v. Lake*, 33 Cal. 255.)
Cited 38 Cal. 92; 74 Cal. 440; 86 Cal. 600; 16 Nev. 234.

841. In such a case the law raises a trust in favor of the party holding the beneficial estate, which a court of equity will enforce, and this whether S. intended to commit a fraud in procuring the patent or not. (*Bludworth v. Lake*, 33 Cal. 255.)

842. The failure of the holder of the beneficial estate to appear before the register of the state land-office and contest S's right to a patent, did not conclude him. (*Bludworth v. Lake*, 33 Cal. 255.)

843. Where S. incurred necessary expense in procuring a patent of land to which H. was at the time entitled, a court of equity, when enforcing a trust as to the title so acquired in favor of H. and against S., will, as a condition, adjudge H. to repay to S. such expense; and, if H. was entitled to a part of said lands only, then to repay a proportionate share of such expense. (*Bludworth v. Lake*, 33 Cal. 255.)

844. The purchaser of the parcels of the land granted by Congress to the state for internal improvements, who, before the entire purchase is made, sells portions thereof, by quitclaim deeds, to others, by whom the remainder of the purchase money is paid, and who thereupon receives a patent from the state, becomes, constructively, the trustee of his vendees, and holds the title for their benefit. (*Wasley v. Foreman*, 38 Cal. 90.)

845. A conveyance of land by a grantor holding a certificate of purchase from the state vests the title to the land in the grantee, of which the certificate is merely evidence, and entitles the grantee to an assignment of the certificate; and a subsequent assignee of the certificate of purchase, who had notice of the previous conveyance of the land by his assignor, and who acquires a patent to the land by and through the certificate of purchase, holds the legal title thereto in trust for the grantee of his assignor. (*Jackson v. Hyde*, 91 Cal. 463.)

846. In an action to enforce such trust the judgment in favor of the grantee should properly charge him with the payment to the

subsequent assignee of the grantor of the amount expended by the latter in procuring the patent. (*Jackson v. Hyde*, 91 Cal. 463.)

847. Assignor of void certificate issued by state cannot compel a patentee from the United States to convey him the legal title under the act of July 23, 1866, to quiet title to land in California, where he had never located on the land, never paid or contracted to pay for it to the United States, or the state of California. (*Aurrecochea v. Sinclair*, 60 Cal. 532, 550.)

848. There is no such relation of contract between the party so acquiring a new title and the purchaser at the sheriff's sale as to constitute the former the trustee of the latter, as to such newly acquired title, nor does such title inure to the benefit of the purchaser at the sheriff's sale. (*Montgomery v. Whiting*, 40 Cal. 294.)

849. The judgment in ejectment is no bar to the acquisition of such new title, nor does it operate as an equitable estoppel in pais against the party acquiring such title. (*Montgomery v. Whiting*, 40 Cal. 294.)
Cited 69 Cal. 192.

850. Where Neal, being in possession of public land, made proof and payment therefor under the United States pre-emption laws, and thereafter Tallmadge brought an ejectment suit against him, and recovered judgment on the merits, and was placed in possession, and afterwards Neal obtained the United States patent for the land, held, that the patent did not constitute a new title in Neal, but was merely a formal assurance of the estate he had already acquired by proof and payment, and that the effect of the recovery by Tallmadge was to estop Neal from denying that Tallmadge had the better title. (*Byers v. Neal*, 43 Cal. 210.)
Cited 84 Cal. 603; 16 Nev. 235.

851. One who purchases public land from the state, as a part of the five hundred thousand acres to which it became entitled by the act of Congress of April 4, 1841, cannot claim the benefit of a patent for the same land, issued by the United States to another person as a pre-emption, and make him his trustee holding the legal title. Per Rhodes, J., Niles, J., concurring. (*Poppe v. Athearn*, 42 Cal. 607.)

852. The facts that two parties purchase separate tracts of land from one who had located school land warrants on the same before the land was surveyed by the United States, and which location was consequently void, and that said parties acquired possession of said tracts by virtue of said purchase, do not create the relation of trust or confidence between them, so as to make a subsequent purchase from the United States of all the land, by one of the parties, as a pre-emptioner, inure to the benefit of the other party in equity. (*Collins v. Bartlett*, 44 Cal. 371.)

853. An allegation in a complaint that, in a contest in the United States land-office between two pre-emption claimants, the party in whose favor it was decided procured a decision in his favor by false testimony fraudulently adduced, is a sufficient statement of a cause of action to entitle the plain-

tiff to relief by having the defendant declared his trustee. (*Lynch v. Brigham*, 51 Cal. 491.)

854. Where nothing to the contrary is shown in a complaint by the heirs of a pre-emption claimant to enforce a trust against a patentee who was a bona fide purchaser from a Mexican grantor it will be considered that the land was situated within the exterior boundaries of the grant. (*Hays v. Steiger*, 76 Cal. 555.)

855. In an action to charge a patentee from the United States as trustee for the plaintiff, claiming the land by virtue of the act of Congress of July 23, 1866, to quiet title to lands in California, it is necessary for the complaint to show by proper averments that plaintiff in the assertion of his claim to the land proved that he had purchased it in good faith from the state, that it had been selected and located under the laws of the United States which were subject to be so selected, and that he had complied with the terms and conditions of the act of Congress which ratified the selection. (*Aurrecoechea v. Sinclair*, 60 Cal. 532, 548.)
Cited 86 Cal. 601.

856. Persons claiming to be bona fide purchasers under the act of July 23, 1866, to quiet titles to land in California, as against a patentee of the United States, must allege in their pleading that, in the contest for the land before the land department, they not only produced their certificate of purchase, but also proved and there was "found" the performance of the series of acts required by law to entitle them to the certificate and the steps which had been taken to complete the purchase from the state, so as to entitle them to a purchase from the state. (*Aurrecoechea v. Sinclair*, 60 Cal. 532, 549.)

857. In order to avoid the conclusiveness of the judgment of the land department the complaint alleged in general terms that the judgment was based upon certain false, perjured, incompetent, and irrelevant evidence introduced by the defendant, but did not state what the evidence was. Held, that the complaint was insufficient. (*Plummer v. Brown*, 70 Cal. 544.)

858. Cross-complaint in ejectment, which seeks to enforce constructive trust in a patent held by the plaintiff for fraud in its procurement, does not sufficiently allege fraud by averring that the patent was procured by a fraudulent arrangement of the plaintiff with another claimant of the land whose claim was purchased, and who withdrew from the contest and allowed the plaintiff to take judgment by default. If the claim purchased was valid the defendant here could not have been injured, and, if void, its purchase was unnecessary to the plaintiff's success. Nor can the defendant collaterally assail a patent valid on its face, on the ground that judgment upon the contest was rendered by default. (*Peabody v. Prince*, 78 Cal. 511.)

859. A judgment in favor of the defendant, in an action brought by one who claims to have been a pre-emptor, to have the patentee, whose right he contested in the land-office, declared his trustee, is a bar to another action between the same parties, when no new

facts have arisen which change the legal relations of the parties. (*Hosmer v. Wallace*, 51 Cal. 368.)

Patentee as trustee. See Pleading and Practice, 764.

Patentee, when not a trustee. See Statute of Limitations, 58.

Patentee of mining claim as trustee. See Mines and Mining, VII.

Agreement to procure patent for undivided interest. See Statute of Limitations, 172.

Legal title acquired by partner in public land is not firm property. See Partnership, 112.

Complaint by administrator to establish trust, when insufficient. See Executors and Administrators, 292.

PUBLIC LIBRARIES.

See Law Libraries; State Library.

1. The act of the legislature of 1880 (Stats. 1880, p. 231), entitled "An act to establish free public libraries and reading-rooms," by its terms applies only to such libraries as are established under its provisions, and not to those existing prior to its date, which were established under special laws and municipal charters; and the subjection of municipal charters to general laws by the constitution of 1879 does not apply where there is no general law on a given subject to which the charter relates. (*People ex rel. Willis v. Howard*, 94 Cal. 73.)

2. The free public library of Los Angeles, having been established under the act of the legislature of March 4, 1874 (Stats. 1874, p. 274), providing for the establishment of a public library in the city of Los Angeles, at a time when the constitution allowed special legislation, is controlled by the city charter of Los Angeles, adopted and approved in 1889, repealing the act of 1874, and providing for the management and control of the library; and the trustees appointed under that charter have the right to the control and management thereof, to the exclusion of trustees elected under the general law of 1880, which does not apply thereto. (*People ex rel. Willis v. Howard*, 94 Cal. 73.)

PUBLIC PARKS.

Yosemite Valley. See Yosemite Valley.

Public squares, dedication of. See Dedication, II, 6.

Monument in public park. See Mechanics' Liens, 122.

Compelling municipality to purchase. See Municipal Corporations, 36.

Compensation for. See San Francisco, 140.

City may sue to prevent obstruction. See Municipal Corporations, 184, et seq.

Railroad constructed in as a nuisance. See Nuisances, 4.

Railroad unlawfully constructed in. See Purprestures, 2.

Accusation against commissioners of Golden Gate Park for violating eight-hour law. See Offices and Officers, 263.

Power of city to dispose of. See San Francisco, 48.

1. The word "park," written upon a block

of land designated upon a map of property within the limits of an incorporated city or town, signifies an open space intended for the recreation and enjoyment of the public, and this signification is the same whether the word be used alone or with some qualifying term, as "Central Park." (*Archer v. Salinas City*, 93 Cal. 43.)

2. The city of San Francisco, as successor of the pueblo of that name, had the right to take pueblo lands in the possession of others for public squares without making compensation therefor. (*Sawyer v. San Francisco*, 50 Cal. 370.)

3. The selections of land for public squares in the city of San Francisco made by the commissioners appointed under ordinances Nos. 822 and 845 of the common council, from land lying west of Larkin street and southwest of Johnston street, and designated as squares on the map of the commissioners approved by the board of supervisors on the 16th of October, 1856, were ratified and confirmed by the act of the legislature of March 11, 1858, and are consequently valid, although the selections embraced more than one block, and more than one-twentieth of the land in the possession of one person, and the excess was taken without payment of compensation as provided in ordinance No. 822. (*Hoadley v. City and County of San Francisco*, 70 Cal. 320.)
Cited 80 Cal. 59; 93 Cal. 245, 251.

4. The title to the Golden Gate Park, under the acts of Congress and of the state cited in the opinion, is in the city and county of San Francisco, in trust for the use of the public. (*People ex rel. Britton v. Park and Ocean R. R. Co.*, 76 Cal. 156.)

5. A strip of land in the city of Los Angeles originally forming part of a public plaza, as laid out by the authorities of the pueblo, and subsequently declared to be part of a public square by an ordinance of the city, does not cease to be a part of the square and become a public street by being excluded from an inclosure erected about the rest of the square, and used by the public for the purposes of a street. (*Cohn v. Parcels*, 72 Cal. 368.)

PUBLIC POLICY.

Contracts against. See Contracts, III, 3.
Contracts against, rescission of. See Rescission of Contracts, I.

Agreement not to bid is against public policy. See Executions, 169.

Combination to buy property at sheriff's sale is not against. See Executions, 167, 168.

Instruments void as against, are subject of forgery. See Criminal Law, 1599.

Contracts in restraint of trade. See Restraint of Trade.

Restraining alienation is against. See Landlord and Tenant, 145.

Courts cannot disregard the law for reasons of. See Stare Decisis.

Condition in bequest as to divorce. See Wills, XVI, 15.

Exemption of state from doctrine of respondent superior. See Offices and Officers, 112.

Surveyor cannot purchase state lands on ground of. See Public Lands, XIV, 9.

Rules regulating responsibility of innkeepers and guests are based on. See Inns, 18.

Agreements against not enforced. See Specific Performance, IV, 6.

Belief in spiritualism is not contrary to public policy. See Spiritualism, 1.

Rejection of confession induced by person in authority. See Criminal Law, 720.

Wagers are against. See Gaming, 3, et seq.

Refusal to grant relief for delay is based on. See Equity, 78.

PUBLIC PROPERTY.

Custody, control, and protection of. See Supervisors, V, 3.

Adverse possession of. See Adverse Possession, III, 2.

Right to remove trespassers from. See Trespass, II.

Taxation of. See Taxation, IV, 15.

Taxation of, where property leased. See Taxation, IV, 15.

PUBLIC RECORDS.

See Records; Registration.

PUBLIC SCHOOLS.

See Schools.

PUBLIC SQUARES.

Dedication of. See Dedication, II, 6.

Adverse possession of. See Adverse Possession, III, 2.

San Francisco, public squares in. See San Francisco, IX.

Schoolhouses, erection of in public squares. See Schools, IV.

PUBLIC STREETS.

What are. See Streets, I.

PUBLIC USE.

See Dedication; Eminent Domain.

Transfer on consideration of use for public purpose. See Fraudulent Conveyances, II, 5.

Water company is. See Water Companies, 1.

Railroads are. See Railroads, 5, 6.

PUBLIC WORKS.

See Public Buildings.

Contract for erecting. See Counties, 44, et seq.

Adoption of plans of. See Counties, VII.

1. Any incidental damage which may occur to plaintiff in the prosecution or completion of public work authorized by the state is *damnum absque injuria*. (*Moulton v. Parks*, 64 Cal. 166, 178.)
Distinguished 67 Cal. 50.

Consequential damages, liability for. See State, 8.

2. Contracts for the grading of streets, made with the superintendent of public streets and highways of the city and county of San Francisco, are contracts "by the authority of a municipal government," within the meaning

of the act "to limit the hours of labor." (Drew v. Smith, 38 Cal. 325.) Cited 60 Cal. 213.

3. The manifest intent of the legislature in the enactment of the second section was, in reference to all labor performed for the state government, or any subordinate department thereof, to prohibit any stipulation being made or permitted by the officers having charge or control of such work, by which the hours for a day's labor should be extended beyond the limits fixed by the first clause of the first and second sections; and it is competent and proper that, as a security for the performance of such stipulation on the part of a contractor, a penalty should be prescribed in the contract itself for a failure to comply with the terms of the stipulation. Per Sprague, J. (Drew v. Smith, 38 Cal. 325.)

4. The legislature has seen proper not to prescribe a penalty for a breach of the covenant required by the second section of the act to be incorporated into the contract, but to leave that matter to be determined by the courts, upon the principles of the common law; and it is not competent for a ministerial officer to declare what shall be the consequences of a breach of a covenant exacted by the legislature, but to which the legislature itself has annexed no penalty. By Sanderson, J. (Drew v. Smith, 38 Cal. 325.)

5. By the second section of the act it was the intention of the legislature absolutely to prohibit the officers of the state and subordinate local governments from requiring any one doing public work to work more than eight hours in doing a legal day's work, but it was not the intention to require them to prohibit the laborer from doing extra work for extra pay. By Sanderson, J. (Drew v. Smith, 38 Cal. 325.)

6. It is the right, and it is the duty, of any person making a contract for labor under the authority of the state government, or of any subordinate department thereof, to compel the contractor to stipulate that he would not require any laborer, by means of a contract with him, or otherwise, to labor more than eight hours per day. But they have no authority to require that in case of a violation of the stipulation by the contractor the latter should "not be entitled to any pay for any work done" or that he should not "permit" any person employed on the work to labor more than eight hours per day. By Crockett, J. (Drew v. Smith, 38 Cal. 325.)

7. To require of the contractor not to permit any person to work more than eight hours per day is evidently in excess of the law. By Sprague, J. (Drew v. Smith, 38 Cal. 325.)

Limiting hours of labor. See Municipal Corporations XI, 3.

Ordinances limiting hours of labor. See Ordinances, IV, 7, c.

Enjoining. See Injunctions, II, 17.

PUEBLO.

San Francisco as a pueblo. See San Francisco, I.

Pueblo lands. See Mexican Lands, II.

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QUIS DARREIN CONTINUANCE.

Plea of discharge after filing of answer. See Payment, 79.

PUNCTUATION.

Error in. See Statutes, VIII, 25.

PUNITIVE DAMAGES.

See Damages, VI.

PUPILS.

Admissions of children to schools. See Schools, V.

PURPRESTURES.

Accretion caused by. See San Francisco, 276.

Wharf in San Francisco bay. See Wharves, 42.

Railroad constructed in park is. See Nuisances, 4.

Who has the right to sue for. See Wharves, 42.

1. A purpresture exists where one incloses or makes several to himself that which ought to be common to many. (People ex rel. Britton v. Park and Ocean R. R. Co., 76 Cal. 156.)

2. A railroad unlawfully constructed in the park is a purpresture, and, if it unlawfully obstructs the free passage or use in the customary manner of such park by the public, it is a nuisance, and may be abated as such by a court of equity. If it is not a nuisance the remedy is not by the people who are not injured, but by the holder of the legal title. (People ex rel. Britton v. Park and Ocean R. R. Co., 76 Cal. 156.)

QUALITY.

Warranty of. See Sales, VII, 3, c.

QUANTITY.

Covenant of. See Covenants, I, 4.

QUANTUM MERUIT.

See Contracts, 249, 250.

In an action of assumpsit for work done and materials furnished in building a sidewalk, when it is not alleged by the defendant in his pleading that the contract for the sidewalk was not completed, but the defense is that the sidewalk was not constructed in a workmanlike manner, the defendant cannot object to a recovery upon a quantum meruit and quantum valebat, for the reason that the contract was entire, and the work was not completed. The plaintiff may recover in such case what the work done and materials furnished were worth, where the parties cannot rescind and stand in statu quo, but one of them must derive benefit from the labor of the other. (Katz v. Bedford, 77 Cal. 319.) Cited 19 Or. 369.

Action by agent on. See Agency, IV, 6, b. Burden of proving special contract. See Contracts, 347.

In assumpsit for services. See Assumpsit, 62.

Recovery on for services. See Master and Servant, II, 6.

Recovery on quantum meruit in action on street assessment. See Streets, XVI, 25, §. A.

Recovery on for services rendered on void contract. See Statute of Frauds, 130.

Director may recover on when. See Corporations, 550, 551.

Amendment changing action for breach of contract to action on. See Pleading and Practice, 571.

Interest in action on. See Interest, VI.

QUANTUM VALEBAT.

Seller may recover on. See Sales, 237.

QUARANTINE.

Delegation of powers concerning. See Constitutional Law, 176.

QUESTIONS OF LAW AND FACT.

Province of jury. See Jury and Jurors, XIII, 2.

Power of court to direct verdict. See Verdict, I.

1. In one connection a word or phrase may stand for a fact, while in another the same word or phrase may designate a conclusion of law. (*Hill v. Finigan*, 77 Cal. 267.)

Meaning of words is question for jury. See Slander, 25.

2. Construction of written instruments is a matter of law for the court and not of fact for the jury, unless the meaning and construction are doubtful and depend upon extrinsic evidence. (*Aguirre v. Alexander*, 58 Cal. 21, 30.)

3. It is error for court to submit to jury question of legal effect of written documents offered in evidence during the trial. (*Carpentier v. Thirston*, 24 Cal. 268.) Cited 9 Or. 334.

4. When admissibility of certain evidence depends upon question whether some preliminary fact has been proved, it is for the court to determine whether such preliminary fact has been proved; and, in such case, it is not error for the court to state to counsel, in passing on the question, that, as the case then stands, *prima facie* such fact has been proven. (*Reed v. Clark*, 47 Cal. 194.) Cited 84 Cal. 483; 15 Or. 265.

5. In order to justify submission of any question of fact to jury the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, and must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists; and, when the evidence is not sufficient to justify such an inference, the court may properly refuse to submit the question to the jury. (*Janin v. London & San Francisco Bank*, 92 Cal. 14.)

6. Questions arising on a trial as to proper parties plaintiff, as to the validity and effect of a Mexican grant from which plaintiff deigned title, as to its loss and contents, and as to the validity and effect of the mesne conveyances through which plaintiff claimed, and as to whether the proceedings in the probate court showed jurisdiction in said

court to make orders, by virtue of which sales were had, resulting in deeds, through which plaintiff in part claimed, were matters for the court alone, and not for the jury. (*Seaward v. Malotte*, 15 Cal. 304.)

Abandonment. See Abandonment, 23.

Abandonment is question for jury. See Ejectment, 254; Mines and Mining, 239.

Actual bias is question of fact. See Jury and Jurors, 135.

Adverse possession and ouster, questions of are for the jury. See Cotenancy, 108, 109.

Adverse user is question of fact. See Easements, 14.

Agent, authority of is question of fact. See Insurance, 31.

Appointment of assignee, legality of. See Bankruptcy and Insolvency, 266.

Banking game, question of is one of law. See Criminal Law, 1662.

Bill of sale, what included in is question of fact. See Insurance, 156.

Bona fide purchaser, who is, is question of fact. See Public Lands, 659.

Bona fide settler, whether one is, is question of fact. See Railroads, 49.

Boundaries, location of. See Boundaries, II, 1.

Boundary, who to decide question of. See Boundaries, II, 1.

Boundaries of pueblo is a question of law. See Mexican Lands, II, 1.

Building, completion of is question of fact. See Mechanics' Liens, 206.

Building, fishing-scow, whether a, is question of fact. See Insurance, 157.

Buildings, whether fixtures is question of fact. See Fixtures, 5.

Condition, fulfillment of is question of law. See Insurance, 167.

Confession, whether voluntary is question for court. See Criminal Law, 714.

Contract, letters, whether constituta. See Contracts, 54, et seq.

Contract, question as to nature of is for court. See Damages, 15.

Contract, modification of is question of fact. See Contracts, 359.

Contract, whether one is party to. See Contracts, 104.

Contract, question of fact for jury, whether railroad contracts to transport over connecting road. See Common Carriers, 165.

Cultivation, land, whether suitable for is question of fact. See Public Lands, XIII.

Damages is question for jury. See Trespass, 60, 61.

Damages from excavation is question of fact. See Easements, 43.

Deed, whether intended as a mortgage. See Mortgages, 73, 100.

Deed, assent of grantee to is question of fact. See Deeds, 116.

Deed, construction of is province of court. See Deeds, VIII, 1, a.

Dedication is question of fact. See Dedication, VI, 1.

Delay, unreasonable, when a question of law and when of fact. See Pledges, 76.

Delivery, who to determine. See Sales, IV, 8.

Delivery is question of fact. See Deeds, 57, Fraud, 83.

Delivery to third person, whether for grantee is question of fact. See Deeds, 66.

Description, whether will apply. See Ejectment, 152.

Description, sufficiency of is question of fact for jury. See Mechanics' Liens, 239.

Diligence in construction of ditch, question of is one of fact. See Watercourses, 111.

Distance is a question of fact. See Notice, 88.

Evidence, sufficiency and weight of. See Appeals, XI, 22.

Evidence, admissibility of dying declarations is question of law. See Criminal Law, 1967.

Evidence, admissibility of, when a question of fact. See Evidence, 451.

Evidence, jury determines weight and credibility of. See Criminal Law, 2387, 2582; Evidence, XI, 2.

Evidence, materiality of is question of law. See Criminal Law, 2544.

Ejectment, province of court and jury on equitable defense in. See Ejectment, XI, 5, c.

Embezzlement, questions for jury in. See Criminal Law, XXI, 19, e.

Extreme cruelty is question of fact. See Marriage and Divorce, 72, 73.

Farming neighborhood, question whether a neighborhood is a, is a question of fact. See Eminent Domain, 37.

Forfeiture is question of law. See Mines and Mining, 252.

Fraud is question of fact. See Bankruptcy and Insolvency, 266; Insurance, 11, 12.

Fraud, whether question of law or fact. See Fraud, IV, 9.

Highway, existence of is question of fact. See Highways, I, 4.

Good faith is question of fact. See Eminent Domain, 209.

Grant, what premises included in is question of fact. See Mexican Lands, 46.

Homestead, dedication of is question of fact. See Homesteads, 134, 135.

Identity is question of fact. See Criminal Law, 2370; Deeds, 18, 162.

Insanity is question of fact. See Wills, 62.

Insanity is question of fact for jury. See Criminal Law, 1363, 2369, 2418; Mortgages, 53; Sales, 79.

Intent, criminal, is question for jury. See Criminal Law, 534.

Intent, fraudulent, whether question of law or fact. See Fraudulent Conveyances, III, 8, d.

Intent, fraudulent, is question of fact. See Bankruptcy and Insolvency, 67; Mortgages, 178.

Jurisdiction is question of law. See Bankruptcy and Insolvency, 76.

Libel, person referred to in is question for jury. See Criminal Law, 2482.

Juror, competency of is question for court. See Jury and Jurors, V, 2.

Malice, who to determine. See Malicious Prosecution, III, 8.

Murder, jury are judges of degree of. See Criminal Law, XXI, 31, c, C.

Murder is conclusion of law from certain facts. See Criminal Law, 1720.

Premeditation and deliberation. See Criminal Law, 1736.

Position of defendant when shot. See Criminal Law, 1900.

Whether powder marks effaced is question for jury. See Criminal Law, 1910.

Self-defense, jury determines question of. See Criminal Law, 1762.

Mandamus, questions of fact, disposition of in. See Mandamus, III, 13.

Marking, whether distinctly traceable is question of fact. See Mines and Mining, VI, 92.

Marital rights, assumption of. See Marriage and Divorce, 20.

Mental suffering, question of is one of fact. See Marriage and Divorce, 73.

Mining claim, work upon, question as to is one of fact. See Mines and Mining, 135.

Mining district law, existence of is a question of fact. See Mines and Mining, 177.

Names, whether idem sonans is question of fact. See Idem Sonans, 2.

Safety of machinery is question for jury. See Master and Servant, 80.

Selection and care of appliances is question of fact. See Master and Servant, 33.

Negligence, contributory, is question of fact. See Common Carriers, 82, 110; Master and Servant, II, 2, f, B.

Negligence, contributory, who to determine question of. See Negligence, V, 8, i.

Negligence, who to determine question of. See Negligence, V, 4.

Knowledge of danger is question of fact. See Master and Servant, 44, 51.

Necessity for taking land, question of is one of fact. See Eminent Domain, 59.

New trial, question whether one is entitled to because verdict is against evidence. See Appeals, 33.

Notice of dissolution of partnership is question of fact. See Partnership, 332.

Notice, possession, whether is question for jury. See Notice, II, 3, d.

Notice of dissolution of partnership, publication of is question of fact. See Partnership, 331.

Nuisance, question is one of fact. See Nuisances, II, 5.

Ordinance, whether passed is question of fact. See Ordinances, 43.

Ordinance, whether properly published is question of fact. See Ordinances, 34.

Partition, whether can be made without prejudice is question of fact. See Partition, 105.

Patent, court must construe. See Public Lands, 714.

Peddling, whether one habitually earns living by is question of fact. See Exemptions, 16.

Performance, substantial, is question of fact. See Mechanics' Liens, 223.

Possession is question of fact. See Ejectment, 28; Forcible Entry and Unlawful Detainer, VI, 6, b, D; Public Lands, 104.

Possession, change of, whether question of law or fact. See Fraudulent Conveyances, II, 9, b, E.

Possession, what constitutes is question of fact. See Possession, 17, 18.

Possession, actual, who to decide. See San Francisco, 231.

Possession, wrongful prevention of is question of law. See Sales, 83.

Possession, jury cannot determine whether grant presumed from. See Possession, 59.

Pleadings, what facts are admitted in is question for court. See Pleading and Practice, 80.

Pleadings, construction of is question for court. See Pleading and Practice, 86.

Pre-emption right, conditions necessary to existence of is question for jury. See Public Lands, 196.

Presumptions of fact are within exclusive province of jury. See Presumptions, 8.

Previous chaste character is question of fact. See Criminal Law, 2668.

Privileged communication, question is one of fact. See Privileged Communications, 1, 33.

Privileged communications, how determined. See Privileged Communications, 1.

Probable cause, who to determine. See Malicious Prosecution, III, 8.

Promise, whether original or a guaranty is question of fact. See Guaranty, 3.

Proximate cause is question for jury. See Railroads, 177.

Railroad, whether manner of crossing track of another railroad is the best is question for jury. See Railroads, 95.

Removal, whether temporary is question of fact. See Homesteads, 339.

Reasonable use of water, what is, is question of fact. See Watercourses, XIV, 1, c.

Service of summons is question of fact. See Summons, IV, 6.

"Settle," meaning of is question of fact. See Accounts, 40.

Statute, strict compliance with, question of is one of law. See Bankruptcy and Insolvency, 261.

Statute, bar of, who to determine. See Statute of Limitations, X, 6.

Statute, question of correctness or existence of is one of fact. See Statutes, 12.

Time, reasonable, is question of law. See Bills and Notes, 168; Contracts, 214.

Time, reasonable. See Insurance, 65.

Time of completion, question of fact. See Mechanics' Liens, 227.

Time, whether there is agreement to extend, and meaning of, are questions of law. See Contracts, 229.

Trespasser or passenger, question whether one is, is question of fact. See Criminal Law, 1216.

Trivial imperfection is question of fact. See Mechanics' Liens, 221.

Usual medical attendant, who is, is question for jury. See Insurance, 213.

Waiver is question of fact. See Insurance, 88.

Warranty, adequacy of means used to comply with is question of fact. See Insurance, 164.

Water-front line, location of is question of fact. See San Francisco, 284.

Water line of San Francisco, what is, is question of fact. See San Francisco, 257.

Weapon, whether deadly is question of fact. See Criminal Law, 1286.

Wharf built into tide water, whether a nuisance, is a question of fact. See Wharves, 12.

Will, construction of is question for court. See Wills, XI, 3.

Witness, credibility of is question of fact for jury. See Witnesses, IX, 1.

Witness, competency of is question of law for the court. See Witnesses, V, 8, b.

Children, competency of to testify is a question of law. See Witnesses, 25.

QUIET ENJOYMENT.

Covenant of. See Covenants, I, 2; Landlord and Tenant, IV, 4.

QUIETING TITLE.

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Purchaser pending action. See Lis Pendens, 25, et seq.

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1. Nature of Action to Quiet Title.

1. The complaint, in an action under section 738 of the Code of Civil Procedure, to determine an adverse claim to real estate, is to be treated as a bill in equity. (*Brandt v. Wheaton*, 52 Cal. 430.)
Cited 71 Cal. 186; 87 Cal. 60.

2. A jury being waived, it is immaterial whether action under section 254 of the Practice Act is an equitable or a legal proceeding. (*Smith v. Brannan*, 13 Cal. 107.)

Suit to quiet title is in nature of suit in equity. See post, 69.

Bill to quiet title not equitable defense. See Ejectment, 277.

Action to restrain dumping of mining debris in effect suit to quiet title. See *Venue*, I, 3, a.

II. Right to Sue.

1. Adequacy of Legal Remedy; Concurrent Remedies.

3. Where it appears that the defendant has acquired no equity which a court of equity can enforce, an action to quiet title to land brought under section 738 of the Code of Civil Procedure will not be dismissed because of the adequacy of plaintiff's legal remedy. (*People ex rel. Love v. Center*, 66 Cal. 551.)

Bill for lies only where no legal remedy. See *Specific Performance*, 10.

4. The existence of concurrent remedies at law for trespass, or for an injunction in equity, is not exclusive of the right to sue to quiet title, where the parties are claiming conflicting and adverse interests in real estate. (*Staudard v. Round Valley Water Co.*, 77 Cal. 399.)

2. What Title Sufficient to Maintain.

5. A purchaser of land from the devisee of a decedent who receives a conveyance of the title of such devisee before settlement or distribution of the estate, may maintain an action to quiet title to the devised premises, as against any one except the executor or administrator. (*Jordan v. Fay*, 98 Cal. 264.)

6. The contract of plaintiff to convey the premises to a third party is no objection to an action by plaintiff, who is the holder of the legal title, to quiet and protect the title against the defendants, who have broken and abandoned a previous contract on their part to purchase the same premises. No rescission of such prior contract is necessary, if the defendants have acknowledged their inability to pay for the land, and voluntarily abandoned the contract. (*Snodgrass v. Parks*, 79 Cal. 55.)

7. To maintain a suit to quiet title, by a party in possession, it is enough that he claims under a deed which creates an equitable estate, or even a right of possession. (*Smith v. Brannan*, 13 Cal. 107.) Cited 35 Cal. 84; 81 Cal. 130.

8. A party owning homestead interest in real estate may maintain an action to quiet his title thereto against the claim of others. (*McKinnie v. Shaffer*, 74 Cal. 614.)

9. Under the Code of Civil Procedure, section 738, the owner of an estate or interest in land less than an estate in fee can maintain an action to determine an adverse claim made by another person. (*Pierce v. Felter*, 53 Cal. 18.) Cited 58 Cal. 10; 74 Cal. 616; 81 Cal. 130.

10. An action to quiet title to lands is maintainable in this state, although the legal title thereto is in the government of the United States. (*Orr v. Stewart*, 67 Cal. 275.)

11. In an action to quiet title, brought by the grantee in a constable's deed made upon an execution sale, in an action against one in possession of the land, it appeared from the plaintiff's evidence that the land was public land, and the court granted a nonsuit on that ground. Held, that the court erred; that the

defendant, having shown no title whatever, could not rely upon an outstanding title in the United States. (*Wilson v. Madison*, 55 Cal. 5.) Cited 67 Cal. 277; 83 Cal. 171.

12. A plaintiff who only relies upon the naked possession of public lands, without connecting himself with the title of the government, must be regarded as a mere trespasser, as against persons claiming under the government; and cannot maintain an action to quiet title against a defendant who has filed a valid homestead claim upon the premises. Such homestead claimant has title to and right of possession of all the land described in the certificate of entry, and could not be prevented by an unauthorized inclosure of plaintiff from making a homestead entry of the tract including such inclosure, if he entered peaceably upon another portion of the tract, and has in other respects complied with the law. (*Kitts v. Austin*, 83 Cal. 167.)

13. One in possession of public land cannot maintain an action in equity against another who is an applicant to purchase the same from the United States, and who sets up an adverse claim to it, to obtain a decree that such other has no right or title to it, and to enjoin him from setting up or asserting any title to it. (*Brandt v. Wheaton*, 52 Cal. 430.) Cited 67 Cal. 277.

14. An action to quiet title cannot be maintained by the owner of an equitable interest as against the holder of the legal title. (*Von Drachenfels v. Doolittle*, 77 Cal. 295.) Cited 79 Cal. 448; 83 Cal. 39; 84 Cal. 467; 85 Cal. 631; 92 Cal. 14; 6 Utah, 453.

15. An action to quiet title will not lie as such where it appears that the legal title is in the defendant, though the complainant may be entitled to a conveyance from the defendant of the legal title upon a complaint seeking such conveyance from him as trustee. (*Nidever v. Ayers*, 83 Cal. 39.)

16. It seems that if the legal title had passed from the plaintiff to the defendant by reason of a mistake in the description of a deed between the parties, the mistake could not have been corrected in an action to determine an adverse claim, because the action cannot be maintained against the holder of the legal title by one who has a mere equitable right. (*Castro v. Barry*, 79 Cal. 443.) Cited 6 Utah, 453.

17. A judgment quieting title in favor of the owner of an equitable title, against a defendant who appears, from the proofs and findings, to hold the legal title in trust for the plaintiff, cannot be sustained upon a complaint to quiet title, with the ordinary averments of ownership and possession by plaintiff, and unfounded claim by defendant, though the facts proved and found may clearly entitle the plaintiff, under proper pleadings, to a decree compelling a conveyance of the title and a delivery of possession. (*Bryan v. Tormey*, 84 Cal. 128.)

18. An action to quiet title will not lie in favor of the owner of an equitable title, for whom the defendant holds the legal title in trust, the only proper remedy for such plaintiff being an action to enforce the trust,

and to compel a conveyance of the legal title. (*Harrigan v. Mowry*, 84 Cal. 456.) Cited 92 Cal. 14.

19. The fact that the reasons of the defendant for withholding a conveyance from the plaintiff are insufficient, unreasonable, or unjust, will not warrant the court in declaring that the defendant has no title. (*Harrigan v. Mowry*, 84 Cal. 456.)

Administrator may bring action to quiet title. See *Executors and Administrators*, 269.

Trustee appointed to take land dedicated, may maintain. See *Dedication*, 15.

Rights of grantees of toll-road to quiet title. See *Turnpike Companies*, VIII.

Owner of incorporeal hereditament, right to quiet title. See *Turnpike Companies*, 56.

3. Possession.

a. Necessity of.

20. Possession in plaintiff is necessary in an action to quiet title. (*Reed v. Calderwood*, 32 Cal. 109.) Cited 19 Cal. 253; 10 Nev. 378.

21. To maintain an action to quiet title, under the two hundred and fifty-fourth section of the Civil Practice Act, it is essential that the plaintiff have possession of the premises when the action is commenced. (*Rico v. Spence*, 21 Cal. 504, cited 25 Cal. 437, 84 Cal. 559, 37 Cal. 307, 80 Cal. 465, 11 Or. 120; *Lyle v. Rollins*, 25 Cal. 437, cited 28 Cal. 536, 34 Cal. 559, 565, 37 Cal. 307, 39 Cal. 18, 21, 5 Mont. 91, 9 Nev. 168; *Pralus v. Jefferson G. & S. Min. Co.*, 34 Cal. 558, cited 37 Cal. 307, 72 Cal. 534.)

22. In an action to determine an adverse claim to land, under section two hundred and fifty-four of the Practice Act, the plaintiff cannot prevail without proof of possession, at the time of commencing the action, if the allegation of possession is denied by the answer. (*Brooks v. Calderwood*, 34 Cal. 563.) Cited 37 Cal. 307; 45 Cal. 521; 67 Cal. 484; 86 Cal. 565; 2 Idaho, 323; 5 Mont. 91.

23. An action cannot be maintained to quiet a legal title to land vested in the plaintiff, unless the plaintiff is in possession of the property in dispute at the commencement of the action. (*Ferris v. Irving*, 28 Cal. 645.) Cited 3 Wash. 511.

24. If adverse possession to part of land should be shown in third person, the suit would be considered as brought to determine the adverse claim of the defendant only to the land remaining in the possession of the plaintiff. (*Sepulveda v. Sepulveda*, 39 Cal. 13.) Cited 2 Utah, 489, 490.

25. Suit under section two hundred and fifty-four of the Practice Act only lies with reference to property of which the plaintiff is in possession; and where suit is brought, under that section, to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyances would not cloud plaintiff's title. And if the grantees under such

conveyances should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. (*Curtis v. Sutter*, 15 Cal. 259.)

Cited 17 Cal. 461; 34 Cal. 389; 37 Cal. 307; 2 Idaho, 321; 5 Or. 106; 19 Or. 120; 2 Utah, 318; 5 Utah, 42.

26. As to that portion of the ranch occupied by settlers, such suit has nothing to do. If they are trespassers, ejectment lies, with an injunction to restrain waste pending suit. (*Curtis v. Sutter*, 15 Cal. 259.) Cited 39 Cal. 21.

27. A judgment creditor need not be in possession of land to enable him to maintain a suit in equity, after he has a sheriff's deed, to cancel a deed of the same given by the debtor to defraud him before he recovered judgment. (*Hager v. Shindler*, 29 Cal. 47.) Cited 28 Cal. 649; 29 Cal. 190.

28. Under the code, the right is given to prosecute an action to quiet title without reference to the question of possession, and the complaint need not aver that the plaintiff has been in possession of the land within a period of five years, or show that his cause of action is not barred by the statute of limitations. If it does not appear upon the face of the complaint that the action is barred, the question can only be presented by answer. (*Brusic v. Gates*, 80 Cal. 462.)

29. Section 738 of the Code of Civil Procedure authorizes an action to quiet title to be maintained by a plaintiff out of possession. The defendant in such action may assert a legal estate, or any equity which he may claim to have enforced; and the judgment, if in favor of the plaintiff, may provide for a restitution of the possession, and decree the claims of the defendant to be invalid. (*People ex rel. Love v. Center*, 66 Cal. 551.) Cited 74 Cal. 497; 79 Cal. 447; 80 Cal. 465; 85 Cal. 630; 86 Cal. 361, 565; 88 Cal. 126.

30. An action to determine an adverse claim to land, under section 738 of the Code of Civil Procedure, may be maintained by the holder of the legal title against a defendant in the actual adverse possession of the premises in controversy. (*Hyde v. Redding*, 74 Cal. 493.)

31. It is not necessary, in an action to quiet title, to prove that the defendants held the possession adversely to the plaintiffs, or that the plaintiffs were in possession thereof. (*Miller v. Luco*, 80 Cal. 257.)

32. In an action to quiet title, an issue as to the possession of the plaintiff at the commencement of the action is immaterial, and no finding need be made thereon. The title of the litigants does not turn on the possession of either at the time of or prior to the commencement of the action. (*Pearson v. Creed*, 78 Cal. 144.) Cited 86 Cal. 564.

b. Sufficiency of.

33. Adverse possession for requisite time and character confers title, upon which the owner may maintain a suit to quiet title. (*McCormack v. Silsby*, 82 Cal. 72.)

34. The actual possession and occupation of land under claim of ownership for any period is sufficient to enable the party in possession

to maintain an action to quiet title as against a trespasser or one who establishes no title in himself. (*McGovern v. Mowry*, 91 Cal. 383.)

35. The possession necessary to maintain an action, under section 254 of the Practice Act, must be such as would enable the plaintiff, without the aid of any other title, to maintain an action to eject a mere intruder therefrom. (*Sepulveda v. Sepulveda*, 39 Cal. 13.) Cited 49 Cal. 521; 84 Cal. 467; 5 Mont. 91; 9 Nev. 168, 172.

36. A person in the possession of property is in a position to bring an action, under the two hundred and fifty-fourth section of the Practice Act, to quiet his title thereto, and on trial no other evidence on his part than proof of possession is necessary in the first instance. (*Horn v. Jones*, 28 Cal. 194.) Cited 79 Cal. 447; 5 Or. 106; 2 Utah, 491, 492.

37. The true rule under the statute is, that whenever the owner has a possession, whether actual or constructive, which may be intruded upon, he may bring suit to determine an adverse claim, and thus prevent an intrusion under claim of title. Per Temple, J., dissenting. (*Sepulveda v. Sepulveda*, 39 Cal. 13.)

Possession alone will not entitle one to maintain action. See post, 158.

38. If one who has a paper title to a tract of salt marsh tide land, which is not susceptible of occupation except during three months of the year, and in which there is a dry knoll, has actual possession of the knoll, and there is no adverse possession to the remainder, he may resort to his title deeds to extend his possession to the remainder of the tract, so as to enable him to sue in equity to quiet the title. (*Coleman v. San Rafael etc.*, 49 Cal. 517.) Cited 2 Utah, 490.

39. One who is in actual possession of a small piece of dry land in a tract of salt marsh tide land, which is not susceptible of actual occupation, except for grazing during two or three months of the year, and who uses and controls the marsh land by himself and tenants, so far as the same is capable of use and control, may sue to quiet the title to the same, if there is no adverse possession, or his tenant may sue when the premises are thus held by him. (*Coleman v. San Rafael etc.*, 49 Cal. 517.)

40. If possession in plaintiff exist, it matters not how it was acquired. (*Reed v. Calderwood*, 32 Cal. 109.)

41. One who, by collusion with tenant, acquires possession of the leased premises, has such a possession as enables him to maintain an action under the two hundred and fifty-fourth section of the Practice Act to quiet title to the same. (*Calderwood v. Brooks*, 45 Cal. 519.) Cited 19 Col. 253; 10 Nev. 378.

Adverse possessor, right of to maintain suit. See Adverse Possession, 208, et seq.

4. Suit by Landlord Against Tenant.

42. An action cannot be maintained under the two hundred and fifty-fourth section of the Practice Act, by a landlord against his tenant in possession for the purpose of deter-

mining the validity of an adverse title set up by the tenant. (*Van Winkle v. Hinckle*, 21 Cal. 342.)

Cited 25 Cal. 438; 84 Cal. 559.

43. The section of the statute above referred to must be construed as giving a remedy only against parties who are in a position to assert their rights, and not against those who are barred by a temporary estoppel as to the rights asserted on the other side. (*Van Winkle v. Hinckle*, 21 Cal. 342.)

Tenancy must be pleaded. See post, 114.

Evidence that defendant has become a tenant of plaintiff. See post, 114, 153.

5. Former Suit Pending, Effect of.

44. An allegation in the answer that another action is pending between the parties for dissolution of a copartnership and settlement of accounts is immaterial, and cannot bar the right of plaintiff to have his title or interest in the property in controversy determined in an action to quiet title. (*Pennie v. Hildreth*, 81 Cal. 127.)

Pendency of action for. See Abatement, 17.

Judgment in ejectment is not bar to by successor. See Judgments, 448.

6. In What Cases Will Lie; What Constitutes Cloud on Title.

45. Section 254 of the Practice Act enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. (*Curtis v. Sutter*, 15 Cal. 259.)

Cited 66 Cal. 555; 69 Cal. 592, 593; 79 Cal. 446; 88 Cal. 124, 127; 2 Idaho, 321; 9 Nev. 172; 6 Utah, 453.

46. The statute (Practice Act, sec. 254) giving a right of action to a party in possession of real estate to determine adverse claims does not confine the remedy to the case of an adverse claimant setting up a legal title, or even an equitable title; but the statute embraces every description of claim whereby the plaintiff might be deprived of the property, or its title be clouded, or its value be depreciated, or whereby the plaintiff might be incommoded or damaged by the assertion of an outstanding title already held or to grow out of the adverse pretension. (*Head v. Fordyce*, 17 Cal. 149.)

47. It is not necessary that defendant's claim should be of any particular nature or character. Even if he makes no claim, he must file a disclaimer, and judgment may be entered against him, though in case of a disclaimer the judgment must not be for costs. (*Castro v. Barry*, 79 Cal. 443.)

48. F., defendant, began suit against the Volcano Water and Mining Company to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, cabins, etc., in enforcement of a mechanics' lien. Subsequently, the ditch, etc., was sold on a judgment in favor of one Harris, and purchased by S., from whom plaintiff, as judgment creditor of the company, redeemed, and in due time received, the sheriff's deed. Afterwards, F. had a decree directing a sale of the ditch, etc., to satisfy his lien. Plaintiff sues

to quiet title, alleging that F's decree is fraudulent, that he had no lien, and that he is about enforcing the decree, which is a cloud on plaintiff's title. Held, that aside from any question of fraud, the action lies; that the existence of a decree, founded upon proceedings taken prior to plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon that title. (*Head v. Fordyce*, 17 Cal. 149.)

Cited 28 Cal. 204; 31 Cal. 287; 34 Cal. 389; 35 Cal. 34; 79 Cal. 300, 446; 86 Cal. 585; 9 Nev. 169, 171, 173; 2 Utah, 491.

49. Under section 254 of the Practice Act a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained. (*Curtis v. Sutter*, 15 Cal. 259.)

Cited 28 Cal. 202; 34 Cal. 559; 35 Cal. 34; 37 Cal. 307.

50. Where one has outstanding deed which improperly clouds title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled. (*Shattuck v. Carson*, 2 Cal. 588.)

Cited 5 Cal. 75; 10 Cal. 11; 15 Cal. 133; 25 Cal. 357; 29 Cal. 56, 190; 82 Cal. 280; 3 Wash. 508.

51. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; otherwise, not. (*Pixley v. Huggins*, 15 Cal. 127.)

Cited 15 Cal. 264; 17 Cal. 461; 25 Cal. 357; 27 Cal. 653; 28 Cal. 42; 29 Cal. 190; 44 Cal. 30; 66 Cal. 586; 69 Cal. 591, 592; 70 Cal. 246; 7 Nev. 344.

52. If a title against which relief is prayed as a cloud be of such a character that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it constitutes a cloud, which the latter has a right to call upon equity to remove. (*Lick v. Ray*, 43 Cal. 83.)

Cited 2 Utah, 491.

53. Plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession, the effect of which claim might be litigation or a loss to him of the property. (*Head v. Fordyce*, 17 Cal. 149.)

54. Every deed from same source through which plaintiff derives his real property must, if valid on its face, necessarily cast a cloud upon the title. (*Pixley v. Huggins*, 15 Cal. 127.)

Cited 34 Cal. 389.

55. A deed from a sheriff upon an execution sale against the vendor of plaintiff would have the same effect in casting a cloud upon the title as if the deed were made directly by such

vendor. Such a deed from the sheriff put on record would create doubts as to the validity, as against the judgment creditor, of the previous transfer to plaintiff. (*Pixley v. Huggins*, 15 Cal. 127.)

56. If a title be void on its face, if it be a nullity, a mere *felo de se*, when produced, so that an action based upon it would "fall of its own weight," it does not constitute a cloud; and an action cannot be maintained to remove it as such, except upon a showing of special circumstances entitling the party to relief. (*Lick v. Ray*, 43 Cal. 83.)

57. An action to determine an adverse claim may be maintained, under section 738 of the Code of Civil Procedure, although the adverse claim rests on proceedings which are void on their face. (*Kittle v. Bellegarde*, 86 Cal. 556.)

58. A court of equity will not interfere to cancel a deed upon the ground that it operates as a cloud upon the complainant's title, when the deed is void on its face, or the result of proceedings void upon their face and requiring no extrinsic evidence to disclose their illegality. (*Cohen v. Sharp*, 44 Cal. 29.)

Cited 69 Cal. 591, 592; 86 Cal. 140.

59. The owner of the legal title to land may maintain an action to quiet title against the claimant of an invalid mortgage lien. The plaintiff has a right to be quieted in his title when any adverse claim is made, the effect of which might be litigation, or loss or depreciation of the value of his property. (*Withers v. Jacks*, 79 Cal. 297.)

60. Where Lick held a sheriff's deed to certain property under a judgment and execution in an attachment suit against James H. Ray, and James Ray held another sheriff's deed to the same property, under another judgment and execution, against James H. Ray, the latter judgment and deed being earlier in date than the former but not so early as the attachment lien in the former suit, and it appeared by averment that James Ray held his deed in trust for his father, James H. Ray, and it was conceded that Lick's was the superior title, but Ray claimed that his deed did not amount to a cloud, held, that the apparent title held by Ray under his deed was a cloud, and that Lick was entitled to relief in equity to remove it. (*Lick v. Ray*, 43 Cal. 83.)

61. One in possession of property, claiming title under a sheriff's deed, executed on a mortgage foreclosure, may maintain an action to quiet his title against another who claims a title against him which would be good against the mortgagor, although void as against the plaintiff. (*Horn v. Jones*, 28 Cal. 194.)

62. It is not enough that deed which is sought to be set aside may possibly be a cloud on the plaintiff's title, in an action to set aside a deed as a cloud upon the title of the plaintiff, but it must clearly appear that the claim set up under such deed is, in fact, in hostility to the plaintiff's title. (*Hartman v. Reed*, 60 Cal. 485.)

Cited 69 Cal. 590.

63. If the owner of a tract of land conveys an undivided one-third of the same, without designating what third, the grantee cannot maintain an action to remove, as a cloud on

his title, a claim set up by another party to a particular undivided third of the tract. (*Hartman v. Reed*, 50 Cal. 485.)

64. A tax deed, based upon assessment made under unconstitutional act of the legislature, will not constitute a cloud on the title. (*Williams v. Corcoran*, 46 Cal. 553.)

65. Assuming that the deed on a sale for delinquent taxes, when executed, would show the invalidity of the sale, the owner of the land may maintain an action to quiet his title and cancel the certificate to the purchaser, and a judgment granting such relief, and also enjoining the execution of a deed, will not be reversed because the deed would cast no cloud upon the title. (*Axtell v. Gerlach*, 67 Cal. 463.)

66. If plaintiff in action to remove cloud from title to land has no title, an abortive attempt by the defendant to purchase the land from another, not authorized to sell it, cannot constitute a cloud on the plaintiff's title, nor depreciate the value thereof. (*City of San Diego v. Allison*, 46 Cal. 162.)

67. Where the plaintiff pretends no title to the soil, but only to a franchise, sale of the realty can work no irreparable damage, or throw a cloud on his title. (*De Witt v. Hayes*, 2 Cal. 463.)

Mistake in deed cannot be corrected by. See ante, 16.

Mistake in boundary cannot be corrected in suit to quiet title. See Public Lands, XX, 4.

Cotenancy, action by to quiet title. See Cotenancy, II, 10.

Breach of contract by vendee, quieting title on. See Vendor and Vendee, X, 9.

Vendor procuring release from vendee may quiet title as against one furnishing vendee with money. See Vendor and Vendee, XI, 3.

Action by grantor on breach of condition subsequent. See Deeds, 348, et seq.

Action to quiet title against right to ditch. See Watercourses, 100.

Mortgage executed by purchaser from husband of wife's realty. See Husband and Wife, 336.

Removal of prior void mortgage, which is a cloud. See Homesteads, 309, 310.

Cloud on title, what sale creates. See Injunctions, 91, 92.

Cloud on title, sale of homestead under execution constitutes. See Homesteads, 204, 205.

Cloud on title, foreclosure sale. See Injunctions, 81.

Cloud on title, tax as. See Taxation, IX.

Cloud on title, void tax deed. See Injunctions, 233.

Cloud on title, sale by grantor. See Injunctions, 237.

Action to quiet title to mining claim. See Mines and Mining, 256.

Cloud on title, purchase under void sale is not. See Streets, 716.

Cloud on title, action to set aside conveyance as. See Statute of Limitations, 285.

Cloud, void deed does not create. See Municipal Corporations, 157.

Cloud on title, cancellation of. See Equity, 38, 45.

Cloud on title, executor's sale is, when. See Injunctions, 234.

Cloud on title, sale of wife's land under execution against husband creates. See Husband and Wife, 319, et seq.

7. Party Seeking to Quiet Title Must do Equity; Contract Must be Reasonable.

68. The plaintiff purchased at sheriff's sale, under foreclosure of mortgage, property for twenty dollars, which was shown to be worth three thousand, with a rental of fifty dollars per month. The defendant purchased the property, under another mortgage sale, for two thousand dollars, and the plaintiff, being in possession, filed his bill to cancel defendant's deed and remove the cloud from his title. Held, that to entitle a party to this relief it must appear that the contract was fair, just, and reasonable, and founded upon an adequate consideration, as a court of chancery will not use its powers to complete a speculation which is already too fortunate to obtain its favorable regard. (*Dunlap v. Kelsey*, 5 Cal. 181.)

69. An action to quiet title is in the nature of a suit in equity, and relief therein is subject to the maxim that he who asks equity must do equity. (*Benson v. Shotwell*, 87 Cal. 49.)

70. A mortgagor of land under a deed absolute in form cannot have his title quieted as against the mortgagee without first paying or tendering the debt for which the mortgage was given. The only way to quiet a mortgage is to pay it, regardless of whether the debt is or is not barred by the statute of limitations. (*Brandt v. Thompson*, 91 Cal. 458.)

71. A mortgagor of land under a deed absolute in form, after the statute of limitations has run against the mortgage debt, cannot have his title quieted against the interest claimed by the mortgagee under the deed, except upon the condition of payment of the debt. (*De Cazara v. Orefia*, 80 Cal. 132.) Cited 80 Cal. 354; 87 Cal. 60; 91 Cal. 462.

72. In an action by the mortgagor, brought after the mortgage debt had become barred by the statute of limitations, to quiet his title against the claim asserted by the mortgagee under the mortgage deed, the court may impose, as a condition to the relief asked, that the plaintiff first pays the amount of the mortgage debt. (*Booth v. Hoskins*, 75 Cal. 271.) Cited 80 Cal. 134, 354; 88 Cal. 443; 90 Cal. 442; 91 Cal. 462; 21 Or. 272.

73. Where the interest of a mortgagor escapes being bound by a decree in foreclosure through a slip in the proceedings, and he subsequently comes into equity to be relieved of the cloud cast upon his interests by reason of such proceedings, he will be required, as a condition of relief, to pay his proportion of the mortgage debt. (*Johnston v. San Francisco Savings Union*, 75 Cal. 134.)

74. A plaintiff cannot come into a court of equity, and ask for a decree debarring the defendant from asserting a claim under an instrument executed by the former, without restoring the consideration received by him. (*Chandler v. Chandler*, 55 Cal. 267.)

75. Where the plaintiff in an action to quiet title, if he had brought an action to rescind a contract with the defendant, would not have been entitled to that relief until he had restored all that he had received under the contract, he cannot avoid this obligation by coming into equity to quiet his title. (*Benson v. Shotwell*, 87 Cal. 49.)

76. An owner of land is entitled to have his title quieted as against an adverse claimant under a void tax deed, without first reimbursing the defendant for the amount paid by him at the tax sale. (*Greenwood v. Adams*, 80 Cal. 74.)
Cited 86 Cal. 564.

77. The action was brought to quiet title to an undivided interest in certain land. The plaintiff claims title under deeds of grant, bargain, and sale, executed by one Ellis. At the time of the execution of such deeds Ellis was not the owner of the lands, the title then being in the state. Subsequently Ellis purchased the land from the state, taking the deed therefor in his own name. The consideration for the purchase was advanced by a third person, to whom Ellis executed a deed of trust of his interest in the land to secure him for the advance. Held, that no implied trust was created in favor of the person making the advance, and that the plaintiff was entitled to have his title quieted against those claiming under the trust deed, without paying any portion of the amount advanced. (*Tripp v. Duane*, 74 Cal. 85.)

Duty of plaintiff to do equity. See *Fraudulent Conveyances*, 222; *Mortgages*, 109; *Municipal Corporations*, 158; *Streets*, 615.

Duty of vendor to return deposit on suit to quiet title against vendee. See *Vendor and Vendee*, X, 9.

III. Actions to Quiet Title.

1. Jurisdiction Over.

78. Legislature has power to confer jurisdiction on superior court of an action to determine an adverse claim to land. (*Hyde v. Redding*, 74 Cal. 493.)
Cited 88 Cal. 126, 127.

79. The circumstances that the plaintiff is an infant in present need of money, and that the lot is covered with water and not now productive, do not aid in giving a court of equity jurisdiction to remove a cloud on title. (*Cohen v. Sharp*, 44 Cal. 29.)

2. Laches in Bringing Suit.

80. Plaintiff who has been in possession of land cannot be guilty of laches in the bringing of an action to remove a cloud, at any time before an action has been brought to disturb his possession, or to deprive him of any enjoyment of his right. (*Hyde v. Redding*, 74 Cal. 493.)

81. The action was brought on the 26th of December, 1883, to determine an adverse claim to certain land. The plaintiff claims by means of conveyances under two certificates of purchase from the state issued to one Greene on the 16th of November, 1868. The defendant claims under certificates of purchase issued by the state to his grantors on the 15th of March,

1883, and a patent issued in pursuance thereof on the 25th of February, 1884, and under a judgment which was void on its face, rendered on the 21st of November, 1872, and purporting to foreclose and annul the interest of Greene in the certificates of purchase issued to him. It did not appear that the grantors of the defendant ever had possession of the land, nor when he took possession of it or improved it. Held, that conceding the action should be treated merely as a bill in equity to quiet title or remove a cloud, the plaintiff had not been guilty of such laches as to deprive him of his right to equitable relief. (*Hyde v. Redding*, 74 Cal. 493.)

82. The right of a grantor to have his title quieted as to land included in a deed by mistake, as against the claim asserted by the defendant under the deed, cannot become barred while the grantor remains in the actual possession of the land, claiming to be the owner thereof, and the actual owner, as against the defendant, of all interests therein except the mere naked title. (*Smith v. Matthews*, 81 Cal. 120.)

Action to quiet title by heir when barred. See *Estates of Deceased Persons*, 470.

3. Venue.

83. Where an action is brought in one of several counties in which the lands are situated, to secure the cancellation and annulment of certain agreements relating to all of the lands described in the complaint, and to quiet title thereto as against several defendants, a disclaimer of the lands situated in the county in which the suit is brought will not entitle a defendant who resides in another county, in which alone he alleges that he claims lands adversely to the plaintiff, to a change of the place of trial to the county of his residence. (*Pennie v. Visser*, 94 Cal. 323.)

Venue of actions to quiet title. See *Venue*, I, 3, e.

4. Parties.

84. Where the trustees of a corporation hold property in trust for its uses, their ownership and possession is the ownership and possession of the corporation, and the corporation has a sufficient interest in the property to bring an action in its corporate name to quiet title thereto, and to restrain by injunction a threatened interference with the possession. (*First Baptist Church of San Jose v. Branham*, 90 Cal. 22.)

85. Roman Catholic archbishop alleging that he is corporation sole, and is the owner and seised in fee of certain land which he holds in trust for the Roman Catholic Church, has a sufficient interest to maintain an action to quiet title. (*Mora v. Leroy*, 58 Cal. 8, 10.)

86. In an action to quiet title to land against the estate of a deceased person, both the personal representative of the decedent and his heirs at law are proper parties defendant. (*Louvall v. Gridley*, 70 Cal. 507.)

87. In a suit to quiet title to the real property of a deceased testator, the administrator, a living devisee, and heirs of a deceased devisee may properly unite as parties plaintiff. The children of the deceased devisee joined as plaintiffs need not prove that they

had succeeded to the devisee's interest, nor that the devisee did not in her lifetime devise it to strangers, that being matter of defense, if true. (*Miller v. Luco*, 80 Cal. 257.)

88. In an action to quiet title against an unfounded claim of the defendants, a mortgage of the defendants is not a necessary party. If the defendants are asserting an unfounded claim to the property, they cannot defend an action of this kind upon the ground that some one else is doing the same thing. (*Snodgrass v. Parks*, 79 Cal. 55.)

89. The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants; and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property executed by them. Held, that the latter were unnecessary parties, as the grantee in the deed, and those claiming under him, were the only parties necessary to the complete adjudication of the case. (*Peralta v. Simon*, 5 Cal. 313.)

90. In an action to quiet title, a trustee holding the legal title to the premises in controversy, although he has no beneficial interest therein, is a proper party to a final determination of the controversy, and may be brought in as a party defendant by an amendment to the complaint. (*Reynolds v. Lincoln*, 71 Cal. 183.)

91. One who claims title to land alleged to be a public street or highway cannot maintain an action to quiet his title thereto against a street commissioner of a city, who claims no interest in the land. (*Leet v. Rider*, 48 Cal. 623.)

92. Under the provisions of the Consolidation Act of 1850, the city and county of San Francisco could properly be made a party defendant in an action to quiet title at the instance of a private person. (*San Francisco v. Holladay*, 76 Cal. 18.)
Cited 93 Cal. 250.

Right of one to sue for many. See Parties, 16.

Parties in suit to quiet title to fishing privileges. See Watercourses, VI.

Suing by fictitious names, dismissal of action. See Parties, 28.

Executor is proper party plaintiff in suit to quiet title to estate. See Executors and Administrators, 136.

Heirs may maintain without joining administrator. See Executors and Administrators, 151.

Compelling amendment bringing in new parties. See Pleading and Practice, 617.

Intervening for purpose of quieting title. See Intervention, 19.

5. Joinder of Actions.

93. The rights of the parties in several tracts of land may be properly adjudicated in the same action to quiet title where the adverse claimants are the same to each tract, and ought to be so adjudicated; but they should all be included in one count, and the additional cost caused by pleading them in separate counts so as to make the complaint unneces-

sarily long should be paid by the plaintiff. (*Pennie v. Hildreth*, 81 Cal. 127.)
Cited 85 Cal. 630, 631.

Actions to annual marriage and quiet title, joinder of. See Joinder and Severance of Actions, I, 2, i.

6. Pleadings; Admissions in; Cross-complaint in.

94. A complaint which alleges that plaintiff is the owner and in possession of certain land, and that the defendant claims an estate or interest therein, but has none, states a cause of action. (*Rough v. Simmons*, 65 Cal. 227.)
Cited 77 Cal. 193; 79 Cal. 447.

95. A complaint which alleges that the plaintiff is the owner of the property, that the defendant claims an interest therein adversely to the plaintiff, that such claim is without right, and that defendant has no right, title, or interest in the property, is sufficient in an action to determine an adverse claim. And such a complaint is not vitiated by unnecessary allegations as to the nature of the defendant's claim. (*Castro v. Barry*, 79 Cal. 443.)

96. In an action brought under section 738 of the Code of Civil Procedure, to determine an adverse claim to real property, it is not essential that the complaint should aver the plaintiff to be the owner in fee; and it will be sufficient if it appears that the plaintiff claims an interest in the land, and that the defendant asserts a claim of title adverse to the plaintiff's claim. (*Stoddart v. Burge*, 53 Cal. 394.)
Cited 66 Cal. 338; 74 Cal. 616; 81 Cal. 130; 2 Utah, 491.

97. An allegation that the plaintiff is "the owner" of land is of an ultimate fact, and is a sufficient statement of the plaintiff's right in an action to quiet title. (*Souter v. Maguire*, 78 Cal. 543.)
Cited 86 Cal. 130; 2 Idaho, 868.

98. When the complaint in an action to quiet title avers possession of the plaintiff for a sufficient length of time to show title in the plaintiff, it is equivalent to a direct allegation of ownership, and a judgment that the plaintiff is the owner of the property is supported by the complaint. (*Batchelder v. Baker*, 79 Cal. 286.)

Pleading of evidence going to show ownership. See post, 179.

99. Where pleader sets forth specifically links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon. It will be presumed that every fact has been alleged which can be proved. (*Gruwell v. Seybolt*, 82 Cal. 7.)

100. When plaintiff claims under deed from defendant absolute in form, it is not bad pleading to state that fact in the complaint. (*Stoddart v. Burge*, 53 Cal. 394.)

101. A description of real estate in a complaint to quiet title which is sufficient for the identification of the property is not subject to a demurrer for ambiguity and uncertainty. (*Miller v. Luco*, 80 Cal. 257.)

102. It not being necessary that the de-

defendant's claim should be of any particular nature or character, it is not necessary that the complaint should set forth its nature or character, or state facts showing its apparent validity. Distinction in this regard between actions under the statute to determine adverse claims and suits to remove a cloud upon title exists. (*Castro v. Barry*, 79 Cal. 443.)

103. In an action to determine an adverse claim to land an allegation that the plaintiff is informed and believes that the defendant claims some interest in the land is insufficient. (*Pfister v. Dasey*, 65 Cal. 403.)

Cited 78 Cal. 199; distinguished 83 Cal. 609.

104. The object of sections 738 and 739 of the Code of Civil Procedure is to enable the plaintiff, in an action to determine an adverse claim, to dispel it as a cloud on his title; and the only purpose of an averment of adverse claim is to notify the defendant of the nature of the action, and that he is required to set forth and litigate any adverse title he may have, or to disclaim it either expressly or by default. But such averment does not tender a material issue to be tried, and only affects the question of costs. The only material issues tendered by a complaint in such action relate to the title to real property described in the complaint. (*Bulwer etc. Min. Co. v. Standard etc. Min. Co.*, 83 Cal. 589.)

105. When the complaint, in an action to quiet title, shows, by necessary implication, that the defendant's claim is invalid as against the plaintiff, it need not so aver in terms. (*Heeser v. Miller*, 77 Cal. 192.)

Cited 79 Cal. 447; 82 Cal. 9.

106. In an action to remove a cloud upon title, an allegation in the complaint that the judgment constituting the cloud was rendered without jurisdiction is a sufficient averment, in the absence of a demurrer, as to the invalidity of the judgment. (*Hyde v. Redding*, 74 Cal. 493.)

107. In an action to remove a cloud upon title, the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, should be stated in the complaint. (*Hibernia Savings and Loan Society v. Ordway*, 38 Cal. 679.)

Cited 79 Cal. 445.

108. But when the instrument which constitutes the cloud was a tax deed, which, under the statutes of this state, is declared to be prima facie evidence of title, the name of the instrument is sufficient for the purpose of showing an apparent validity. (*Hibernia Savings and Loan Society v. Ordway*, 38 Cal. 679.)

109. The rule in regard to rescission of contracts, that the parties must be placed in statu quo, has no application when the object of the action is to quiet the title of a vendor who has for value obtained a release of the rights of the purchaser and his assignee under a contract of sale; nor need such vendor allege, in his complaint to quiet title, more than his ownership of the land, and the defendant's unfounded adverse claims respecting it, nor is he required to disclose the nature of their several claims. (*Stratton v. California Land etc. Co.*, 86 Cal. 353.)

110. In suit by one obtaining title under execution to quiet title as against a later judgment, under which the defendant was about to proceed, it is not necessary to aver that at the time of his purchase he had no notice of the proceeding to enforce the later lien. Such notice is not presumed. (*Head v. Fordyce*, 17 Cal. 149, 151.)

111. In suit to quiet title to estate of decedent, the allegation that he left a will, which was duly admitted to probate in a specified court having jurisdiction to probate the will, is sufficient, without specifying the due execution or proof of the will. (*Miller v. Lugo*, 80 Cal. 257.)

What insufficient to sustain action. See ante, 17.

Possession, pleading. See ante, 28.

112. In an action under section 738 of the Code of Civil Procedure, brought by a plaintiff out of possession to determine an adverse claim to realty against a defendant in possession, the defendant must set up in his answer whatever interest or right of possession he may claim. (*Landregan v. Peppin*, 94 Cal. 465.)

113. An answer setting up that the defendant has a contract from the grantee of plaintiff's decedent for the purchase of the land in controversy, upon payment of certain sums of money, which does not allege that the defendant has paid any part of the purchase money, nor show any excuse for nonpayment, nor that upon a settlement of accounts with such grantee he would be entitled to any application of payment upon the land, does not show any equitable title, and a demurrer to such answer is properly sustained. (*Pennie v. Hildreth*, 81 Cal. 127.)

Cited 86 Cal. 365.

114. In an action to quiet title, the defendants cannot claim any protection as tenants of the plaintiffs unless such tenancy is pleaded in the answer. (*Snodgrass v. Parks*, 79 Cal. 55.)

115. In an action to quiet title to a mining claim containing veins and lodes of rock in place, an answer which expressly admits that plaintiff is the owner and entitled to the possession of the land described in the complaint, and of all veins, lodes, and ledges, throughout their entire depth, the tops or apexes of which lie inside of plaintiff's surface lines extended downward vertically, and expressly disclaims any estate therein adverse to plaintiff, and denies that defendant ever made such adverse claim, and sets up as new matter that defendant owns a certain wholly distinct quartz claim adjoining plaintiff's claim, and owns a particular vein which has its apex therein, which it claims the right to follow downward into the claim of plaintiff, presents no defense to the complaint, and tenders no material issue. And the same is true of an answer of the plaintiff to a cross-complaint of the defendant containing similar allegations and denials. (*Bulwer etc. Min. Co. v. Standard etc. Min. Co.*, 83 Cal. 589.)

General denial in action by administrator, what puts in issue. See *Executors and Administrators*, 293.

Answer raises material issue when. See Judgments, 181.

Supplemental answer, condition to granting relief. See Supplemental Pleadings, 14.

Amendment enlarging description of premises. See Pleading and Practice, 559.

116. If the answer in an action to quiet title admits plaintiff's ownership in fee simple and possession, the rightfulness of the possession follows the admission, and even if plaintiff went into possession by leave of defendant's tenant he is not estopped from denying defendant's title. (*Reed v. Calderwood*, 32 Cal. 109.)

Cited 19 Cal. 253.

117. If a complaint to quiet title avers plaintiff's possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by collusion with defendant's tenant. (*Reed v. Calderwood*, 32 Cal. 109.)

118. Where the complaint in an action to quiet title, after alleging the plaintiff's ownership of the land as marked on a plat, proceeds by way of recital to state that the land is particularly described according to certain specific metes and bounds, and the answer, without joining special issue as to the boundaries, denies the ownership by the plaintiff of the land described in the complaint, or any part thereof, the fact is not thereby admitted that the land is correctly described by the metes and bounds specified in the complaint, but the plaintiff must prove that fact, and, in the absence of any evidence to prove them, a judgment quieting the title to the land described by such specific boundaries will be reversed upon appeal. (*Redd v. Murry*, 95 Cal. 48.)

119. Defendant is not at liberty to dispute positive averment in his answer that his grantor, under whom the plaintiff also claimed title, was the owner of the land at the date of the conveyance to the defendant, but the averment as to the conveyance to the defendant not being admitted by the plaintiff, but derived by implication of law, the burden of proof is upon the defendant to prove such conveyance to him prior to the sheriff's sale to the plaintiff. (*Brusie v. Gates*, 96 Cal. 265.)

120. In a suit to quiet title, where defendant relies upon title in himself, a cross-complaint is unnecessary and may be stricken out. (*Miller v. Luco*, 80 Cal. 257.)

Cited 83 Cal. 599.

121. When the cross-complaint of the defendants in an action to quiet title relies upon enforcing specific performance of a contract of sale between the plaintiff and an individual purchaser, under allegations showing an implied trust in such contract in favor of a corporation under whom the defendants claim, the cross-complaint is insufficient to warrant a decree compelling specific performance, if it does not allege a tender of the balance of the purchase price, but relies wholly upon the failure of the plaintiff to procure and tender a title agreed upon, which the proof shows he did procure and tender as agreed. (*Stratton v. California Land etc. Co.*, 86 Cal. 353.)

122. Where the defendant in an action to quiet title has acquired the beneficial interest of the owner of the equitable title by an execution sale he is entitled to have it adjudged to him in the action; but in order to have it so adjudged, he must state the facts as fully in his cross-complaint as they should be stated in a bill in equity. (*Winter v. McMillan*, 87 Cal. 256.)

123. Where the plaintiff alleges title in himself he cannot recover by showing simply a lien without possession or right of possession; but the defendant may, by cross-complaint, test the validity of a lien claimed by the plaintiff if he alleges that the property which he has purchased at execution sale was conveyed to the plaintiff by the execution debtor merely to secure him against liability on a bond, and that no liability was incurred by plaintiff. (*Winter v. McMillan*, 87 Cal. 256.)

Cross-complaint is proper in. See Cross-complaint, 3.

Cross-complaint is unnecessary where defendant relies upon title in himself. See Cross-complaint, 23.

Cross-complaint to quiet title in ejectment. See Cross-complaint, 6.

Cross-complaint to quiet title in ejectment, conclusiveness of verdict. See Cross-complaint, 43.

Admissions in answer save nonsuit, when. See post, 151.

Findings on matters not pleaded. See post, III, 15.

7. Service of Summons.

124. A judgment in an action to quiet title to land against a nonresident is not void because of the service of the summons upon him, by publication, while absent from the state, although he does not answer or appear in the action. (*Perkins v. Wakeham*, 86 Cal. 580.)

Cited 92 Cal. 356.

125. A state has power to regulate the tenure of immovable property within its limits, the conditions of its ownership, and the modes of establishing the same, whether the owner be a citizen or stranger, and may provide for quieting title to land within its limits by constructive service of summons. (*Perkins v. Wakeham*, 86 Cal. 580.)

8. Disclaimer in; Herein of Costs.

126. An order setting aside a judgment quieting the title of the plaintiff to city lots to which the defendant disclaimed title, and allowing the grantees of the defendant to come in and defend, will not be disturbed if it is shown on the part of the defendant and his grantees that the disclaimer was made through an inadvertence and mistake of fact of the defendant's attorney in supposing that the property had been conveyed by the defendant before the commencement of the suit, whereas, in fact, the conveyances were made pending the suit, and after a notice of lis pendens had been filed by the plaintiff. (*Underwood v. Underwood*, 87 Cal. 523.)

127. The only effect of a disclaimer by the defendant of an adverse claim or interest in the lands described in the complaint, in an

action to quiet title, is to entitle the plaintiff to judgment quieting his title to such land, without costs. (Bulwer etc. Min. Co. v. Standard etc. Min. Co.; 83 Cal. 589.) Cited 83 Cal. 617.

128. A judgment in favor of plaintiff in an action to determine an adverse claim, quieting his title to the property disclaimed by defendant without costs, and saving the rights of the defendant as claimed by him, is clearly right. (Bulwer etc. Min. Co. v. Standard etc. Min. Co.; 83 Cal. 613.)

129. The defendant will not be exonerated from payment of costs, under section 255, by disclaiming any title or interest in himself, when if, at the same time, he answers, denying the allegation of possession contained in the complaint, thereby compelling the plaintiff to prove that issue, and the plaintiff finally succeeds on the issue. (Brooks v. Calderwood, 34 Cal. 563.) Cited 79 Cal. 447.

Disclaimer. See Disclaimer.
Costs where actions joined. See ante, III, 5.

Necessity of filing disclaimer and costs. See ante, 47.

Disclaimer as to part of lands, effect of on right to change of venue. See ante, III, 8.

9. Jury Trial; Framing Issues and Verdict on.

130. In an action, under section 738 of the Code of Civil Procedure, to determine an adverse claim to real property, where the defendants admit the legal title to the land to be in the plaintiffs and claim a right to the possession of the land under an alleged agreement for the sale of the land made by the predecessor of plaintiffs, to which they claim to have succeeded by assignment, and which they, in effect, ask to have specifically performed, the defendants are not entitled to a jury for the trial of the equitable issues thus presented. (Crocker v. Carpenter, 98 Cal. 418.)

131. Conceding that the defendant is entitled under the constitution to a trial by jury of the legal issues so raised, such right is waived by a stipulation between the parties expressly waiving a trial by jury. (Hyde v. Redding, 74 Cal. 493.) Cited 88 Cal. 126, 127.

Jury trial in action to determine adverse claim. See Jury and Jurors, 17, et seq.

Waiver of jury, effect of. See ante, I.

132. The court sitting in equity may direct, when proper, an issue to be framed upon the pleadings and submitted to a jury if questions of a purely legal character in relation to the title arise. (Curtis v. Sutter, 15 Cal. 259.) Cited 64 Cal. 56; 88 Cal. 126.

133. Upon the verdict, if a new trial be not granted, the court can act, by dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and awarding a perpetual injunction against its assertion to the property in question. (Curtis v. Sutter, 15 Cal. 259.)

10. Evidence, Burden of Proof and Presumptions.

134. In an action to quiet title, the plaintiffs are called upon to show title in themselves. (Martin v. Lloyd, 94 Cal. 195.)

135. In an action to quiet title, the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case he is not entitled to recover. (Winter v. McMillan, 87 Cal. 256.)

136. In an action by the grantee of a city to quiet title to a strip of land claimed by the city as part of a street, the burden is upon the plaintiff to show title in himself by proof that the land is within his grant, and the question of adverse possession is a false quantity in solving the question of title. (Oreña v. City of Santa Barbara, 91 Cal. 621.)

137. In an action brought by one in possession of land to try and determine an adverse claim set up by one out of possession, when the complaint avers that the defendant sets up an adverse claim without stating what it is, and the answer admits plaintiff's possession, and sets up the particulars of the defendant's alleged title, the burden of proof is cast upon the defendant. (Crook v. Forsyth, 30 Cal. 662.)

Cited 66 Cal. 559, 562; 9 Nev. 168, 172-74; 2 Utah, 492.

138. In an action to quiet title, where the plaintiff claims under a deed from the defendant, if the answer admits the execution and delivery of the deed, but avers that it was intended as a mortgage, the burden of proof is on the defendant to establish that fact. (Stoddart v. Burge, 53 Cal. 394.)

Burden is on defendant to prove allegation of conveyance to himself. See ante, 119.

139. Status once established is presumed by law to remain until the contrary appears; and in an action to quiet title, after proof of title in the plaintiff, he need not prove that he has not parted with the title, or that he is entitled to the possession of the land. (Eltroth v. Ryan, 89 Cal. 135.)

140. In action to quiet title by the purchaser from a devisee, where it does not appear that there was any unpaid claims or expenses of the estate at the time of the conveyance from the devisee, it is to be presumed that there were none. (Jordan v. Fay, 98 Cal. 264.)

141. In an action to quiet title, where the complaint does not show the source of plaintiff's title, but the answer claims title by deed from a grantor who is alleged to have owned the land at the date of defendant's deed, and the plaintiff proved a sheriff's sale and deed in due form under execution upon a valid judgment against the defendant's grantor, though the execution was issued subsequent to that date, such case makes a prima facie case for the plaintiff, independently of any prior lien by attachment, subject to be overcome by proof of a conveyance to the defendant prior to the sheriff's sale. (Brusie v. Gates, 96 Cal. 265.)

142. In an action by the wife to quiet title to land alleged to be her separate property, if her husband is a party plaintiff, and she produces on the trial a deed of gift of the property

made by him to her, a prior deed of bargain and sale to her from a third person may be received in evidence to complete the chain of title. (*Branson v. Caruthers*, 49 Cal. 374.)

143. On the trial a deed was offered in evidence, under which plaintiff claimed to have derived its title, but which did not describe the land in dispute, and was admitted over the objection of defendant that it was incompetent and irrelevant. Held, the admission of the deed did not injure the defendant. The plaintiff, having proved possession of the land, made out all the title required by the law to entitle it to the relief demanded. (*Niagara etc. Min. Co. v. Bunker Hill etc. Min. Co.*, 59 Cal. 612.)

144. Evidence of the plaintiff, in an action to quiet title, tending to show that the premises in controversy were within the patented lines of a confirmed Mexican grant, under which he derails title, is sufficient to make at least a prima facie case in his favor. (*Mendenhall v. Paris*, 84 Cal. 193.)

145. In an action by the adverse possessor to quiet the title acquired by his adverse possession against the holder of the paper title, evidence is admissible that the plaintiff and her predecessors had paid street assessments and insurance on the premises. (*Frick v. Sinon*, 75 Cal. 337.)

146. In an action to quiet title, the defendant offered to prove prior possession of the property in a stranger, and the evidence was excluded on the ground that the defendant did not propose to connect its title with that of the prior possessor. Held, the ruling was correct. (*Niagara etc. Min. Co. v. Bunker Hill etc. Min. Co.*, 59 Cal. 612.) Cited 83 Cal. 171.

147. The plaintiff in an action to quiet title cannot show, in rebuttal of the defendant's title under his homestead entry, that a third person, not a party to the suit, and with whom he shows no privity, resides on the land as a qualified pre-emptor, and has a certificate of pre-emption which antedates the homestead entry of the defendant. (*Kitts v. Austin*, 83 Cal. 167.)

Outstanding title. See post, 154.

148. In an action brought by an heir to quiet his title to the distributed premises as against the representatives of the purchaser at the probate sale, where the complaint describes the premises by metes and bounds, and there is no question as to the identity of the land distributed with that sold under the probate order, the refusal to admit in evidence a map referred to in the complaint, when offered by the defendants, in so far as it was offered for the purpose of identifying the land sold under the probate order, though admitted for all other purposes, is immaterial. (*Dougherty v. Miles*, 97 Cal. 568.)

149. In an action to quiet title, the defendants cannot introduce in evidence a judgment-roll in an action to foreclose a mortgage on premises not purporting to be the same as those in controversy, and to which the plaintiff was neither party nor privy. (*Martin v. Lloyd*, 94 Cal. 195.)

150. In suit by one obtaining title under

execution to quiet title as against a later judgment under which the defendant was about to proceed, the plaintiff cannot set aside the decree as a cloud upon his title without showing affirmatively that there was no claim on the property, or any right to subject it, or any part of it; and as the findings do not show any particular description of the aqueducts, flumes, cabins, etc., their value, nor the value of the materials furnished, nor that F.'s claim was solely for furnishing materials for building the cabins, flumes, etc., the court cannot pass on the question of F.'s lien. (*Head v. Fordyce*, 17 Cal. 149.)

151. In an action to quiet title, a nonsuit should not be granted for failure of the plaintiff, after having proved title in himself, to prove an adverse claim, title, or interest in the defendants, when the complaint alleges, and the answer admits, that the defendants claim and assert an interest in the property. (*Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 560.)

152. If such proof were necessary on the part of plaintiff, an error in denying defendant's motion for a nonsuit for want of it is cured by proof on the part of defendants of the adverse claim or interest in the property on which they relied to defeat the action. (*Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 560.)

Adverse possession of defendants need not be shown. See ante, 31.

153. Evidence is competent in an action to quiet title, to show that defendants, who had contracted to purchase the land from the plaintiffs, had become their tenants, in order to prove an abandonment of the contract of purchase. The contract of tenancy operates as a mutual abandonment of the contract of purchase upon sufficient consideration, and bars any recovery thereon, though the contract of purchase be not formally surrendered. In such case, there is no forfeiture of the contract. The vendor waives and abandons his vendor's lien, if he had one, and is not required to file his bill in equity to enforce the same, but may sue the purchaser to quiet title to the premises. (*Snodgrass v. Parks*, 79 Cal. 55.)

154. Complaint counting upon title alone is not supported by evidence of prior possession insufficient to make title under the statute of limitations. The plaintiff, in such a case, must stand upon title, and this may be defeated by the defendant in possession showing an outstanding title in a third person, without connecting himself with it. (*McGrath v. Wallace*, 85 Cal. 622.)

Plaintiff alleging title cannot recover by showing lien. See ante, 123.

155. When the statute of limitations is not pleaded, and an offer is made by defendants to prove merely that no one had occupied the premises in controversy for ten years prior to the commencement of the action, such evidence cannot aid the defendants' claim of title, and is properly excluded. (*Vaca Valley etc. R. R. v. Mansfield*, 84 Cal. 560.)

Evidence of possession, necessity of. See ante, II, 3, a.

Proof of possession is sufficient in first instance. See ante, 36.

11. Injunctions.

156. Where, in suit to quiet title, an injunction was granted on the complaint restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants, held, that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined. (*Curtis v. Sutter*, 15 Cal. 259.)
Cited 23 Cal. 84; 3 Or. 409, 410.

Who may enjoin interference with possession. See ante, 84.

Restraining defendants from further setting up claim. See post, 168.

Enjoining execution of deeds. See post, 169.

To restrain sale pending suit. See ante, 25, 26.

Enjoining execution sale which would cloud title. See Executions, 184, 185.

Injunction granted in action to quiet title. See Injunctions, 346.

Cloud on title enjoining sale, casting. See Injunctions, 86, et seq.

12. Legal Title Prevails; Effect Where Neither Party has Title.

157. When, in an action to quiet the title to land, both parties show an equal equity, but one has also the legal title, he who has the legal title must prevail. (*Maina v. Elliott*, 51 Cal. 8.)

158. If court finds that neither party has title to the premises in controversy, neither is entitled to judgment as against the other, but the action should be dismissed. The fact that the plaintiff is in possession does not entitle him to judgment, for possession is not title, but only evidence from which title may be presumed. (*City of San Diego v. Allison*, 46 Cal. 162.)
Cited 2 Dak. 264; 5 Mont. 91.

13. Instructions.

159. In an action to quiet a title claimed to have been acquired by adverse possession, an erroneous instruction as to the effect in passing the title of a deed which was executed and delivered to the defendants prior to the commencement of the plaintiff's adverse possession is immaterial. (*Fredericks v. Judah*, 73 Cal. 604.)

14. Judgments.

160. Although a decree quieting title is not in rem, strictly speaking, it fixes and settles the title to real estate, and to that extent partakes of the nature of a judgment in rem. (*Perkins v. Wakeham*, 86 Cal. 580.)

161. In an action to quiet title, where the answer admits that the plaintiff is in possession of a portion of the premises sued for, and denies his possession of the remainder, the plaintiff cannot recover judgment upon the pleadings for that portion of the premises not admitted to be in his possession. (*Espinosa v. Gregory*, 40 Cal. 58.)

162. If the defendant fails to appear at the trial the court may properly enter a judgment for the plaintiff, for want of evidence to support the answer. (*Stoddard v. Burge*, 53 Cal. 394.)

163. In such a case it is a misnomer to designate the judgment as a judgment on the pleadings; but, having been properly entered, it will not be disturbed because it is called by a wrong name. (*Stoddard v. Burge*, 53 Cal. 394.)

164. The defendant in an action to quiet title may specially plead that the plaintiff has only a lien, or any interest less than he claims, and that the defendant has an equitable title or any interest in the land either paramount or subordinate to that of the plaintiff; and the decree of the court should declare the rights of the parties in the property accordingly. It is immaterial whether plaintiff's title is a mortgage or a deed of trust held as security, as the defendant would in either case have the right to a judgment declaring just what interests in the property were held by each of the parties. (*Pennie v. Hildreth*, 81 Cal. 127.)

165. In an action to determine an adverse claim to real property by a party in possession who, during the pendency, is turned out of possession, it is error for the court to render judgment for the value of the use and occupation of the premises for the time the defendants were in possession. (*Polack v. Gurnee*, 66 Cal. 266.)

166. In an action brought in the usual form to quiet title, the court will not decree a specific performance of an agreement of the defendant to convey to the plaintiff's executor. (*Killey v. Wilson*, 33 Cal. 690.)
Cited 6 Utah, 453.

167. Decree pronouncing that conveyance is fraudulent and void has the effect to remove any cloud resulting from its execution without an express direction that it be set aside. (*Gibbons v. Peralta*, 21 Cal. 629.)

168. If the court finds and adjudges that a defendant has no just claim or title, legal or equitable, the judgment will not be reversed because it also contains a clause perpetually restraining the defendants from further setting up the claim so adjudged to be invalid. (*Brooks v. Calderwood*, 34 Cal. 563.)

169. Injunction in judgment against executing deeds in pursuance of the certificates of sale upon which the adverse claim is founded is proper in so far as it is ancillary to the principal relief and necessary to make that relief effectual; and if it is unnecessary to enjoin the execution of void deeds, the injunction is superfluous, and cannot injure the defendants. (*Kittle v. Bellegarde*, 86 Cal. 556.)

170. A judgment that the defendants have no right, title, or interest in or lien upon the land in question is equivalent to a judgment canceling all papers and proceedings upon which the adverse claim is founded, and has the same effect; and defendants who make default, and admit that the adverse claim is void upon its face, cannot be injured by an express cancellation in the judgment of as-

assessments and certificates of sale upon which their adverse claim is alleged to be founded. (*Kittle v. Bellegarde*, 86 Cal. 556.)

171. When the answer of a defendant out of possession in an action to quiet title sets up an adverse claim of title, which is found to be superior to the claim of the plaintiff, the court may in its decree award possession of the premises to the defendant. (*Kitts v. Austin*, 83 Cal. 167.)
Cited 9 Utah, 7.

Directing possession. See post, III, 16.

172. In an action to determine an adverse claim to real property, brought by a person in possession at the time the action was commenced, but who, during its pendency, is turned out of possession, a judgment in favor of the plaintiff may provide for a restitution of the premises; and such action is not thereby changed into one for the recovery of the possession of the land, but remains an equitable one. (*Polack v. Gurnee*, 66 Cal. 266.)
Cited 83 Cal. 172; 87 Cal. 60.

173. In an action to quiet title, where the answer consists of denials of the plaintiff's allegations, and contains none of the elements of a cross-complaint, as distinguished from a defense to the plaintiff's action, and contains no prayer for affirmative relief, it is error for the decree to award affirmative relief. (*Hungarian Hill Min. Co. v. Moses*, 58 Cal. 168.)

174. A judgment in favor of the plaintiff against one of several defendants, in an action to set aside a deed as a cloud upon the plaintiff's title, is an adjudication that the title is in the plaintiff. (*Marshall v. Shafter*, 32 Cal. 176.)

175. A decree, in an action to quiet title to land, that the plaintiff is the owner in fee simple of the land, and that one claiming the legal title thereto under a deed absolute in form has no interest therein except that of a mortgagee, "to be determined by proper suit of foreclosure," merely reserves the right to the mortgagee to have his interest determined as such mortgagee, without declaring what that interest is, and does not exclude him from enforcing his rights as such mortgagee, though it is erroneous in undertaking to quiet the title of the mortgagor, and then disturbing it again by declaring the mortgagee's right to foreclose. (*Brandt v. Thompson*, 91 Cal. 458.)

176. The judgment in the present action construed, and held to quiet the title of the plaintiff, as against the appellant, to only an undivided thirty-three ninety-sixths of the premises described in the complaint. (*Tripp v. Duane*, 74 Cal. 85.)

177. Judgment for plaintiff in action to quiet title is a bar to subsequent litigation on the same subject matter. (*Reed v. Calderwood*, 32 Cal. 109.)

Nonsuit in. See ante, 151, 152.

Defendant cannot object to decree against other defendants. See Appeals, 2002.

Judgment quieting title against mortgagee and canceling mortgage, modifying. See Appeals, 3039.

Judgment on pleadings. See Ejectment, 419.

Dismissal of complaint as bar. See Judgments, 341.

15. Findings.

178. When the answer in an action to quiet title claims no interest in the property, it is not necessary to find that the defendant had no interest. A finding of facts showing the plaintiff to be the owner of the property is sufficient as to the matter of ownership. (*Batchelder v. Baker*, 79 Cal. 266.)

179. When the plaintiff alleges ownership of real estate in an action to quiet title, a finding upon the issue of ownership is a finding of fact, and the evidence going to prove such ownership need not, and should not, be pleaded or found. (*Daly v. Sorocco*, 80 Cal. 367.)

180. Finding as to rights of defendants under contract of tenancy not pleaded is outside the issues, and must be disregarded. (*Snodgrass v. Parks*, 79 Cal. 55.)

181. When there is no plea of adverse possession for five years before and under the statute of limitation, issues as to the payment of taxes by the defendant in possession, and adverse possession by him, are immaterial in an action to quiet title, and no finding need be made thereon. (*Pearson v. Creed*, 78 Cal. 144.)

182. If the answer claims an adverse interest in the land described in the complaint in a suit to quiet title, a denial that the defendant made such adverse claim before the commencement of the action is immaterial, and no finding need be made thereon. Nor need such finding be made upon an answer which denies ever having made any adverse claim if the judgment merely quiets title without costs. (*Bulwer etc. Min. Co. v. Standard etc. Min. Co.*, 83 Cal. 589.)

Findings in, immaterial omission. See Appeals, 2674.

Finding as to plaintiff's possession is immaterial. See ante, 32.

Failure to find on issue of statute of limitations, when not prejudicial. See Appeals, 2128.

16. Writs of Possession.

183. If the answer denies plaintiff's title, and alleges ownership, possession, and right of possession in the defendant, and the court renders a decree quieting the plaintiff's title, the plaintiff is entitled to a writ of possession, although the complaint fails to allege that the plaintiff was out of possession. (*Landregan v. Peppin*, 94 Cal. 465.)

184. Where judgment has been rendered in favor of the plaintiff, in an action to quiet title, the fact that the defendant, since the date of the judgment, has purchased an outstanding title is no defense to an application for a writ of possession; nor can the merits of the claim be considered upon such application. (*Landregan v. Peppin*, 94 Cal. 465.)

185. In an action to determine an adverse claim, when it has been adjudicated that the defendant has no adverse claims or interests in the property in controversy, the subject of litigation is exhausted; and if it appears that the plaintiff is out of possession, the judgment necessarily entitles him to possession.

Nor is it essential that the judgment itself should direct the issuance of the writ of possession, but the law is fully satisfied by a supplemental order to that effect. (*Landrean v. Peppin*, 94 Cal. 465.)

Restitution of premises. See ante, 172.

IV. Quieting Title to Personalty.

186. Action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former for money or property upon an alleged obligation. (*King v. Hall*, 5 Cal. 82.)

187. This does not deprive the latter of his right of action, otherwise the remedies of arrest and attachment would be virtually denied. (*King v. Hall*, 5 Cal. 82.)

188. An action will not lie, under section 1050 of the Code of Civil Procedure, against a county for the purpose of determining an adverse claim which it is alleged the defendant makes against the plaintiff for a sum of money, under an ordinance imposing a license tax upon persons engaged in certain business, which ordinance the plaintiff claims is void. (*Whittaker v. County of Tuolumne*, 96 Cal. 100.)

Water, action to quiet title or determine adverse claim to. See *Watercourses*, XIV, 2, r.

QUITCLAIM DEEDS.

See *Deeds*, XI.

QUORUM.

See *Supervisors*, III.

Where no provision made. See *Offices and Officers*, 83.

QUO WARRANTO.

See *Turnpike Companies*, III.

Distinction between mandamus and quo warranto. See *Mandamus*, I.

1. Whether the constitution of 1879, restoring the writ of quo warranto, which was abolished by section 802 of the Code of Civil Procedure of 1872, has or has not had the effect to repeal sections 803 to 809 of the Code of Civil Procedure, which provide for an action by the attorney general in the name of the people against the usurper or unlawful holder of an office or franchise, can make but little difference, as the power under a writ of quo warranto is quite as broad as under the statute, and an information or complaint sufficient under those sections of the code will be sustained as in support of a writ of quo warranto if the proper parties are before the court. (*People ex rel. Attorney General v. Dashaway Association*, 84 Cal. 114.)

2. An information in the nature of a quo warranto is the proper proceeding to try the title to an office. (*People ex rel. Attorney General v. Scannell*, 7 Cal. 432, cited 63 Cal. 177; compare *Hull v. Superior Court*, 63 Cal. 174, cited 63 Cal. 179, 84 Cal. 392, 85 Cal. 338.)

Title to office can only be tried by. See *Offices and Officers*, 69.

Action to determine title to office, appealability. See *Appeals*, 61.

3. Prohibition will not lie to prevent the usurpation of an office. Quo warranto is the proper remedy. (*Buckner v. Veuve*, 63 Cal. 304.)

Cited 85 Cal. 338.

4. Quo warranto lies to test the right of an appointee of the board of pilot commissioners. (*People ex rel. Palmer v. Woodbury*, 14 Cal. 43.)

5. The supreme court is strictly an appellate tribunal, and has no original jurisdiction except in cases of habeas corpus; and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of a collector of the foreign license tax. (*Ex parte Attorney General*, 1 Cal. 85.)

Cited 1 Cal. 343; 3 Cal. 390; 21 Cal. 169.

6. On petition of attorney general for a writ of quo warranto against a tax-collector, held, that the court had no jurisdiction, and the prayer of the petition was denied. (*Ex parte Attorney General*, 1 Cal. 85.)

7. The superior court of the city of San Francisco has no jurisdiction of proceedings by quo warranto; and a judgment of that court, by which it was determined that A was not entitled to hold his seat as a member of the board of aldermen of that city, was accordingly reversed on appeal. (*People ex rel. Hughes v. Gillespie*, 1 Cal. 342; followed 1 Cal. 345, 36 Cal. 696; commented on 5 Cal. 403, 39 Cal. 518.)

8. An action brought by the attorney general to oust a person from the office of supervisor of the city and county of San Francisco, and to recover the statutory penalty of five thousand dollars for usurpation of office, is in the nature of quo warranto, and within the constitutional grant of jurisdiction to the superior court. This jurisdiction, being conferred by the constitution, cannot be abridged or taken away by the legislature, and the provision of the consolidation act that the board of supervisors "shall be the judge of election returns and qualifications of its own members" was superseded by the present constitution, at least so far as it could be held to have conferred exclusive jurisdiction upon the supervisors. (*Sharpstein, J., and Thornton, J., dissenting. People ex rel. Swift v. Bingham*, 82 Cal. 238.)

9. The relator in need not be shown to be entitled to the office usurped by the respondent, nor does the recovery of the penalty provided for by statute depend upon the relator's title. The recovery of the fine is for the benefit of the state, and must be paid into the state treasury, no matter who is the relator. (*People ex rel. Swift v. Bingham*, 82 Cal. 238.)

10. In a proceeding by the state in the nature of a quo warranto to deprive a corporation de facto of its corporate charter, and procure its dissolution on the ground of a want of substantial compliance with the statutory requirements in its formation, the corporation de facto is a necessary party, and making it such, with the averment that it is a corporation de facto but not de jure, does not estop the state from questioning its corporate character. (*People v. Montecito Water Co.*, 97 Cal. 276.)

11. Certificate of election is not necessary to enable a party, claiming to have been elected, to bring his action by quo warranto. (*Magee v. Supervisors of Calaveras County*, 10 Cal. 376.)

12. In quo warranto for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp, and enjoy the office without a license, and also contains allegations as to the right of relator to the office. Held, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. (*People ex rel. Flynn v. Abbott*, 16 Cal. 358.)

Cited 10 Mont. 168; 4 Utah, 432, 436.

13. In quo warranto to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority is a sufficient allegation of intrusion and usurpation. (*People ex rel. Palmer v. Woodbury*, 14 Cal. 43.)

Cited 10 Mont. 168; 4 Utah, 436.

14. If the complaint be defective in this particular, the defect must be reached by special demurrer. (*People ex rel. Palmer v. Woodbury*, 14 Cal. 43.)

15. The defendant in an action to try the right to an office may set forth in his answer more than one defense. (*People ex rel. Madden v. Stratton*, 28 Cal. 382.)

16. In an action of quo warranto to determine the right to an office, where the relator claims the office as against the incumbent, the court may not only determine the right of the defendant, but of the relator also; and if it determines in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office. (*People ex rel. Dickenson v. Banvard*, 27 Cal. 470.)

Grand jury, quo warranto does not lie against. See *Jury and Jurors*, 368.

Defective incorporation of railroad company. See *Railroads*, 3.

Proceedings against corporation, no defense to mandamus by. See *Mandamus*, 245.

To determine right of city to exercise rights, city is necessary party. See *Mayors*.

Stipulation in suit by attorney general for usurpation of office, whether binds people. See *Stipulations*, IX.

RAILROAD COMMISSIONERS.

See *Railroads*, IX.

RAILROADS.

I. Incorporation of, Statutes Relating to.

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III. Land Grants to.

IV. Right of Way, Grant or Condemnation of; Damages.

V. Crossing Track of Another Railroad; Tearing up Track.

VI. Rights Incidental to Management of.

VII. Contracts of; Issuance of Bonds; Rights and Priority of Bondholders; Receivers.

VIII. Management of Trains and Liability for Negligence.

1. *Speed of Trains.*

2. *Trespassers on Track, and Duty Towards.*

3. *Backing Train in Street.*

4. *Frightening Horses.*

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6. *Injuries to Animals; Duty of Railroad to Fence.*

7. *Injuries from Fire.*

8. *Lease of Road or Intrusting Management to Another, Effect of.*

9. *Actions for Negligence.*

a. *Evidence.*

b. *Contributory Negligence Generally; Care Required of and Towards Children; Standing in Dangerous Position.*

IX. Railroad Commission; Commissioner of Transportation.

X. Street Railways.

1. *Power to Grant Franchise; Validity of; Roads Using Same Streets.*

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4. *Construction of Road.*

a. *Manner of Construction.*

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5. *Contracts of Adjoining Owners to Pay Sums on Completion; Rights Arising from.*

6. *Management of.*

a. *Duty as to Care; Liability for Negligence; Rights of Public.*

b. *Failure to Run Cars.*

7. *Railroad as Property; Repairing Street; Liability for Street Assessment.*

Are common carriers. See *Common Carriers*, I.

Common carriers, rights and liabilities as. See *Common Carriers*.

Assessment of. See *Taxation*, V, 13.

Property of, taxation of. See *Taxation*, IV, 11.

Licenses. See *Licenses*, II, 7, b.

Nuisances, railroads as. See *Nuisances*, II, 1.

Obstruction of. See *Criminal Law*, XXI, 48. Information as to location of depot. See *Contracts*, 178.

Action against railroad for negligence, where may be brought. See *Venue*, I, 3, b. Superstructure, definition. See *Taxation*, 482.

Action against corporation to condemn land for railroad, place of trial. See Venue, I, 3, k.

I. Incorporation of, Statutes Relating to.

1. Under the act of May 20, 1861, providing for the incorporation of railroad companies (Stats. 1861, p. 607), and requiring at least one thousand dollars per mile to be subscribed, and ten per cent thereof, in cash, to be actually and in good faith paid in before incorporation, held, that payment of such ten per cent could not be made in a check on a bank, drawn by a person who had not on deposit funds sufficient to meet it, even though it appeared that such check would have been paid if presented. (People ex rel. Plumas County v. Chambers, 42 Cal. 201.)

Distinguished 45 Cal. 313.

2. The provision of section 1 of the act for the incorporation of railroad companies (Stats. 1861, p. 607), requiring payment of ten per cent of the amount subscribed in cash, is not merely directory; it is a condition precedent, without which the subscribers to a company have no power to incorporate. (People ex rel. Plumas County v. Chambers, 42 Cal. 201.)

3. Where Bolinger and Chambers, the chief subscribers of the "Oroville and Virginia City Railroad Company," paid in the ten per cent of their subscriptions, required by law to be paid in cash, in a check drawn by Bolinger on the Bank of California, and it appeared that Bolinger had no funds there, but that the check would have been paid if presented, held, that such payment was not a payment in cash, as required by law, and that the incorporation, under such circumstances, was invalid, and should be so declared on quo warranto. (People ex rel. Plumas County v. Chambers, 42 Cal. 201.)

4. There is typographical error in the statutes of 1851, page 443, section 31. As printed, said section repeals the act of April 22, 1850, concerning railroad corporations. The enrolled act only repeals the third chapter of said act of April 22, 1850. (Brewster v. Hartley, 37 Cal. 15.)

Articles of incorporation must state amounts subscribed. See Corporations, 24.

Subscription, statements as to time of completion of road. See Corporations, 120.

Affidavit to articles of incorporation of. See Corporations, 35.

Cannot issue stock until paid up. See Corporations, 145.

Stockholders have power to elect directors. See Corporations, 509.

Property of is vested in trustees. See Corporations, 533.

II. State, County or City Aid to; Holding Stock in Road.

5. The mere fact that a railroad is owned and operated by a private corporation, and for private profit, does not prevent it from being also of "public use." (Stockton etc. R. R. Co. v. Stockton, 41 Cal. 147.)
Cited 51 Cal. 272.

6. Aid, as fostering a public use, may be extended to the construction of a railroad, by

means of the power of eminent domain, or of subscription to capital stock, and by donation made by cities and other political subdivisions of the state, under the authority of the legislature. (Stockton etc. R. R. Co. v. Stockton, 41 Cal. 147.)

7. Napa Valley R. R. Co. v. Napa County, 30 Cal. 437, on the point that railroads concern the public interest as a matter of legal judgment, and that legislative action to that effect is not open to review by the judicial department, cited as controlling authority. (Stockton etc. R. R. Co. v. Stockton, 41 Cal. 147.)

8. Section 10 of article XI of the constitution, prohibiting the state from giving or loaning its credit to or in aid of a corporation, does not prohibit the state from appropriating its funds, in time of war, to aid a corporation in the construction of a railroad to be used by the state for military purposes. (People ex rel. McCullough v. Pacheco, 27 Cal. 175.)

9. Aid under act of April 4, 1870, may be voted and granted to a railroad company which is organized for and proposes to build a railroad between certain points, even if not incorporated until after the order has been made calling the election. (Coleman v. Board of Supervisors, 50 Cal. 493.)

10. Under said act, after a company has proposed to build a road upon a certain route, and the question has been submitted to the electors, and they have voted to grant aid, and the board of supervisors has accepted the proposition and resolved to extend the aid, it may authorize the railroad company to diverge from the proposed line of road in part. (Coleman v. Board of Supervisors, 50 Cal. 493.)

11. So much of section 18 of "An act to authorize the county of Placer to subscribe to the capital stock of the Central Pacific Railroad Company of California, and to provide for the payment of the same," etc. (Stats. 1863, p. 145), as provides that "the taxes that may be paid by said [railroad] company to said [Placer] county, from time to time," shall be paid into "the railroad fund" created by said act, is unconstitutional and void so far as it relates to the school tax of said county. (Orosby v. Lyon, 37 Cal. 242.)

12. The fact that the amendatory act changes in substance the proposition as presented by the original act is immaterial, because not touching the power of the legislature, or the authority of the public agent under it; the change in the proposition being, that by the original act the people were to vote as to whether the county should exchange county bonds to the amount of twenty thousand dollars for that amount of railroad bonds; while by the amendatory act the board of supervisors were required, if the first proposition was accepted by the popular vote, to remit two years' interest on the railroad bonds. (Hobart v. Supervisors of Butte County, 17 Cal. 23.)

13. A board of supervisors may call a special meeting for the purpose of calling an election to vote on the question of issuing the bonds of the county to a railroad company to

aid in the construction of a railroad, under the act of April 4, 1870, commonly known as the five per cent act. (*Coleman v. Board of Supervisors*, 50 Cal. 493.)

14. It was unnecessary to publish the notice of the election for the purchase by Butte county of bonds of the California Northern Railroad Company, for twenty days after the passage of the amendatory act of 1860. The substantial matter was provided for in the original act, and the details provided for in the amendatory act did not affect the substantial features of the original act. (*Hobart v. Supervisors of Butte County*, 17 Cal. 23.)

15. It was not necessary under the act of 1860 (Stats. 1860, p. 90), authorizing Butte county to purchase bonds of the California Northern Railway, that the polls should be opened in every precinct in the county. (*Hobart v. Supervisors of Butte County*, 17 Cal. 23.)

16. If a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority vote is obtained, the municipal authorities, on proceedings to compel them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption practiced and perpetrated by the railroad company and its employees. (*People ex rel. Central Pac. R. R. Co. v. Supervisors of San Francisco*, 27 Cal. 655.)

17. At an election duly held in the county of Santa Cruz, the board of supervisors were authorized by a vote of the electors to grant the aid of the county to a company for the construction of a railroad upon terms which might appear to them advantageous to the county, and to issue bonds for that purpose for a certain amount for every mile of the track that should be actually constructed. The proposition submitted to the people, and voted upon by them, specified the termini of the proposed road. The road was only constructed over a portion of the distance between the points named. Held, that the issuing of bonds by the board to an amount corresponding with the completed portion of the road was not in excess of its power, and that the bonds are valid. (*Nevada Bank v. Steinmitz*, 64 Cal. 301.)
Cited 62 Cal. 250; 74 Cal. 336, 596.

18. When the conditions precedent upon which a railroad company is entitled to have bonds issued to it have all been performed, mandamus will lie to compel the issuance of bonds. (*Santa Cruz R. R. Co. v. Supervisors of Santa Cruz County*, 62 Cal. 239.)

19. Complaint alleged failure of board of supervisors to issue certain bonds to the plaintiff at the times the same should have been issued, and that the plaintiff had suffered damage thereby. Held, the facts alleged would not justify a judgment against the county. For a neglect or a refusal to perform a duty imposed on him by law, a supervisor is, by section 4086 of the Political Code, made personally liable. (*Santa Cruz R. R. Co. v. County of Santa Clara*, 62 Cal. 180.)

20. Under the act of 1860 (Stats. 1860, p. 133), relative to the issuance of the bonds of Butte county to the California Northern Railroad Company in certain contingencies, the basis upon which the supervisors are to proceed in estimating the work done by the company, so as to entitle it to bonds, is the actual expenditure by the company, and not the value of the work. This actual expenditure, connected with proof of the other facts required by the statute, prima facie constitutes the company's claim on the county for the bonds. (*California Northern R. R. Co. v. Butte County*, 18 Cal. 671.)

21. The county might refuse to issue the bonds if the expenditures were not really made, or if fraud had been committed in the contracts for such expenditures. (*California Northern R. R. Co. v. Butte County*, 18 Cal. 671.)

22. The board of supervisors act ministerially in the issuance of bonds under this act, and mandamus lies if they improperly refuse. (*California Northern R. R. Co. v. Butte County*, 18 Cal. 671.)

23. Under the second section of the act no proceedings can be taken by the company against the board for refusal to issue the bonds until ten days from the time of their decision upon the "estimate of expenditures" presented by the company. During that period any taxpayer has a right to institute proceedings in the district court to review the action of the board. (*California Northern R. R. Co. v. Butte County*, 18 Cal. 671.)

24. The proceeding of the taxpayer in the district court contemplated by this statute is a proceeding by certiorari in the form and according to the course of that kind of suit, and the issuance of that writ is necessary to stay the proceedings beyond the ten days, though probably no formal order of injunction is necessary. (*California Northern R. R. Co. v. Butte County*, 18 Cal. 671.)

25. The repeal of the act of April 4, 1870, which authorized the issuing of bonds in aid of railroads in certain cases, did not affect the validity of bonds issued under a contract which was made and partially performed prior to the passage of the repealing act. (*Nevada Bank v. Steinmitz*, 64 Cal. 301.)

26. If a subsidy in bonds is granted by a city to a railroad company to aid in the construction of a railroad from the city in the direction of another city, the bonds to be delivered when a certain number of miles of railroad are constructed, the company does not forfeit its right to the subsidy by the fact that it purchases and adopts as a part of its line a section of a railroad already constructed on a portion of the route on which the proposed railroad was to be built. (*Stockton etc. R. R. Co. v. Stockton*, 51 Cal. 328.)

27. If a subsidy in bonds is granted by a city to a railroad company, to aid in the construction of a railroad from said city through the county in which it lies, up the valley of a river in the direction of a town in another county which lies south of the city, the company does not forfeit the subsidy by the fact that the first few miles of railroad runs east from the city, and then turns south, provided

it is built in the valley of the river and in the direction of the town. (*Stockton etc. R. R. Co. v. Stockton*, 51 Cal. 328.)

28. Bonds issued by the Central Pacific Railroad Company, under the act of April 4, 1864, are valid, and the state is liable upon the interest coupons issued in accordance with the provisions of the act. (*Bank of California v. Dunn*, 66 Cal. 38.)

29. The act of April 1, 1870, empowering the city of Stockton to aid in the construction of the Stockton and Visalia Railroad (*State*, 1869-70, p. 551), declared constitutional; and the common council of Stockton required by mandamus to levy a tax to pay interest accruing under its provisions. (*Stockton etc. R. R. Co. v. Stockton*, 41 Cal. 147.)

30. The interest paid by the state of California on the bonds issued in pursuance of the act of April 4, 1864, to aid the construction of the Central Pacific Railroad Company, is not a loan by the state to the company; nor does the act, or the agreement executed by the company in pursuance thereof, give to the company any alternative right to perform the conditions of the agreement, or, at its option to pay the amount paid by the state as interest on the bonds. (*People v. Central Pac. R. R. Co.*, 76 Cal. 29.)

31. The amount mentioned in the act of April 4, 1864, authorizing the issuance of bonds to aid the construction of the Central Pacific Railroad Company to be paid by the company upon its failure to perform any of the conditions imposed upon it by the act, is to be treated as a penalty, and not as liquidated damages. (*People v. Central Pac. R. R. Co.*, 76 Cal. 29.)

32. In an action by the state against the Central Pacific Railroad Company to recover damages for the breach of any of the conditions to be performed by it under the act of April 4, 1864, the complaint must specifically allege the facts constituting the breach, and the amount of damage sustained as the result thereof. Tested by this rule the complaint in question held insufficient on the ground of ambiguity and uncertainty. (*People v. Central Pac. R. R. Co.*, 76 Cal. 29.)

33. Under the act of April 28, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river, at or near Knight's Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection. (*Pattison v. Yuba County*, 13 Cal. 175.)
Cited 16 Cal. 345.

34. A county owning stock in a railroad company is directly interested, like any other stockholder, in the conduct and management of its affairs, and, as a consequence, in the selection of its officers. The county would have a right, through her board of supervisors, to contest the election of such officers, if deemed to have been illegal, and to that end to adopt any remedy she might be advised was legal, and the expense thus in-

curred would become a legal charge against the county. Courts can exercise no control over the judgment and discretion possessed by boards of supervisors in such cases. (*Hornblower v. Duden*, 35 Cal. 664.)

Loan of credit of state to railroad. See Constitutional Law, 409.

Special privileges to. See Constitutional Law, 400.

Subscription to railroad. See Municipal Corporations, XI, 9.

Statute authorizing or requiring subscription by city or county to. See Constitutional Law, VIII, 6, d.

Compelling subscription to railroad. See Mandamus, II, 13, e.

Statute providing for subscription to by city, invalidity of part. See Constitutional Law, 215.

Subscription to, statute dependent on popular will. See Constitutional Law, 225, 226.

Act authorizing city to convey lands to. See Municipal Corporations, 152.

Power to levy tax to lay out route. See Placerville, 1.

Power to tax for benefit of railroad. See Taxation, 16.

Bonds issued to, countersigning of. See Bonds, 36.

Bonds issued to, redemption and payment. See Bonds, 62, et seq.

Interest on bonds issued to aid. See Bonds, 64.

Claims of Central Pacific against San Francisco. See San Francisco, 71.

III. Land Grants to.

35. The grant of land to the Central Pacific Railroad Company, by the acts of Congress of July 1, 1862, and July 2, 1864, to aid in the construction of its road, was a grant in present, passing the legal title to the lands granted as of the date of the grant, as soon as the sections were identified by a legal survey and the definite location of the road. (*Jatunn v. Smith*, 95 Cal. 154.)

36. The act of Congress of July 1, 1862, granting to the railroad company organized under its provisions certain odd sections of land, to be afterwards located, passed to the company a present interest in the lands to be designated within the limits therein specified, and, upon the location of the route to be established, the grant became specific, and attached itself to every odd-numbered section. (*McLaughlin v. Menotti*, 89 Cal. 354.)

37. Under section 7 of the act the route of the railroad was definitely settled, so that the grant attached, when a map, approved by the directors, designating the route of the proposed road, was filed with the secretary of the interior, and no adverse right could be initiated between the time it was so filed and the time when the notice of the order withdrawing the lands was received at the local land-office. (*McLaughlin v. Menotti*, 89 Cal. 354.)

38. The Pacific Railroad Companies, by virtue of the acts of Congress of 1862 and 1864, granting them lands to aid in the construction of a railroad, did not acquire an equity in the land granted which state courts are bound to

respect, until commissioners, appointed under the fourth section of the act, certified that the railroad and telegraph line had been completed on a subdivision examined by them. (*Broder v. Natoma Water etc. Co.*, 50 Cal. 621.)

39. The Pacific Railroad Companies, by virtue of the acts of Congress of 1862 and 1864, granting them lands, did not acquire a right to abate ditches on such lands as a nuisance, provided the ditch owner had acquired a right to the use of water which was recognized by the local customs and decisions of the courts prior to the passage of the act of Congress of July 26, 1866, granting the right of way to ditch owners over the public lands. (*Broder v. Natoma Water etc. Co.*, 50 Cal. 621.)

40. As the legal title to land granted to the Central Pacific Railroad Company vested in the company upon identification of the land, and not at the date of the patent issued by the United States, the statute of limitations commenced to run in favor of one who diverted the waters of a stream upon the land after such identification and prior to the date of the patent, from the date of the diversion, as against the railroad company and its grantees. (*Jatunn v. Smith*, 95 Cal. 154.)

41. The recitals in the patent from the United States to the Central Pacific Railroad Company, showing that the line of the railroad was definitely located, and that the company afterwards filed with the register and receiver at Sacramento a selection of the land under the acts of Congress, and that such selection was properly certified to or approved by such register and receiver, are sufficient proof of the fact that the land was at the date of its selection surveyed by authority of the United States, and identified as land to which the grant made to the company had then attached, and that the costs of such survey and other fees required by law had been paid by such company. (*Jatunn v. Smith*, 95 Cal. 154.)

42. Under section 7 of the act of Congress of July 1, 1862, providing that the railroad company shall designate the general route of the road as near as may be, and shall file a map of the same in the department of the interior, and that the secretary of the interior shall thereupon cause the lands to be withdrawn from pre-emption, private entry, and sale, the filing of the map and an order of the secretary withdrawing the lands precluded the acquisition or initiation of any right, other than that of the company, in any of the odd-numbered sections of land. (*McLaughlin v. Menotti*, 89 Cal. 354.)

43. When railroad lands granted to the Pacific Railroads are withdrawn from pre-emption and sale by the direction of the secretary of the interior, it will be presumed that the railroad company had filed a map designating the general route of the road. (*Weaver v. Fairchild*, 50 Cal. 360.)

44. Upon the filing of the plat of the Central Pacific Railroad, only the vacant odd-numbered sections within the twenty-miles limit were withdrawn, and the even-numbered sections remained subject to pre-emption and homestead as before. (*Pratt v.*

Crane, 58 Cal. 533; *Carr v. Crane*, 59 Cal. 302.)

45. The lands having been disposed of to the railroad company, the land department had no jurisdiction to transfer them, and its listing thereof to the state was inoperative and void; and the facts showing such invalidity are admissible in an action of ejectment by the grantees of the railroad company against a defendant claiming under the state. (*McLaughlin v. Menotti*, 89 Cal. 354.)

46. The Atlantic and Pacific Railroad Company, not having constructed any railroad in the state of California, never had either a present or prospective right to any indemnity or lieu lands within the state of California; and land in said state within the primary limits and terms of the grant of March 3, 1871, to the Southern Pacific company, which constructed a branch line of road from Tehachapi Pass, by way of Los Angeles, to the Texas Pacific Railroad, at or near the Colorado river, and performed all the conditions of said grant necessary to entitle it to a patent, passed by a perfect title to the Southern Pacific company, which attached to specific land at the date when the map of the definite location of the road was filed in the office of the commissioner of the general land-office, notwithstanding said land may have been within the indemnity limits of the prior grant to the Atlantic and Pacific company. (*Forrester v. Scott*, 92 Cal. 398.)

47. A mere trespasser on land situated within the indemnity limit grant to the Atlantic and Pacific Railroad Company, having no contract with or authority from said company, cannot avail himself of the rights of that company in attacking a void patent issued by the government of the United States for the same land to the Southern Pacific Railroad Company. (*Foss v. Hinkell*, 78 Cal. 158.)

48. One who has simply entered upon public land and improved it, without complying with the laws providing for the acquisition of the title, is not possessed of a "lawful claim" within the meaning of section 4 of the act of Congress of July 2, 1864, reserving from its operation any pre-emption, homestead, swamp land, or other "lawful claim." (*McLaughlin v. Menotti*, 89 Cal. 354.)

49. The question whether a prior settler upon lands included within the grant to the railroad company is a bona fide settler within the meaning of the act of 1864 is a question of fact; and the failure of the court to find the ultimate fact of a bona fide settlement in an action of ejectment, where such a settlement is relied on by the defendant to defeat the title of the railroad company, leaves the question as to which party has the better title uncertain and unsettled, and is error entitling the defendant to a new trial. (*McLaughlin v. Menotti*, 89 Cal. 354.)

50. A party who has entered upon public land to acquire the title from the government as a bona fide settler prior to the railroad grant must show his good faith by diligently complying with the requirements of the law under which he expects to secure the title, and must be entitled to initiate a valid claim

under the law. (*McLaughlin v. Menotti*, 89 Cal. 354.)

51. If the line of the Pacific railroad was definitely fixed before a pre-emptor, living on an odd section granted to said road, which had been surveyed, had filed his declaratory statement, then, although he afterward files such statement and receives a patent, the railroad company has the better title. (*Weaver v. Fairchild*, 50 Cal. 380.)

52. Evidence that a party was in possession of public land, and was entitled to a homestead entry, and made application therefor, which was refused, without a showing that he paid or offered to pay the register's fees, does not bring the case within the exception in a legislative grant to a railroad company, of lands to which pre-emption or homestead claims were attached "at the time the line of said road is definitely fixed." (*Southern Pac. R. R. Co. v. Purcell*, 77 Cal. 69.)

53. The grant made to the Central Pacific Railroad Company of California, by the acts of Congress of July 1, 1862, and July 2, 1864, gave to said company and its assigns a title to the odd sections within the limits of the grant which were included within the boundaries of an inchoate Mexican grant, proceedings for the confirmation of which were pending when said acts were passed, but which was afterwards rejected by the courts of the United States. (*Central Pac. R. R. Co. v. Yolland*, 49 Cal. 438.)
Cited 49 Cal. 448, 452; overruled 52 Cal. 205.

54. A patent to the Southern Pacific Railroad Company of land which was included in the exterior limits of a Mexican grant, which was sub judice at the date of the grant by Congress to that railroad company, is void from the beginning, such land having been reserved from the grant. (*Foss v. Hinkell*, 78 Cal. 158.)

55. A patent issued to the Central Pacific Railroad Company, as the successor in interest of the Western Pacific Railroad Company, under the acts of July 1, 1862, and July 2, 1864, for land within the exterior limits of a Mexican grant which was sub judice when the lands included in the railroad grant were withdrawn from entry and sale, is void as to such land, it being a "government reservation" within the meaning of the act of 1864. (*Carr v. Quigley*, 79 Cal. 130.)

56. Land included within the exterior boundaries of a Mexican grant, an application for the confirmation of which was pending when the grants were made to the Central Pacific Railroad Company by the acts of Congress passed July 1, 1862, and July 2, 1864, and which grant was afterwards rejected, did not pass to said railroad company by said acts of Congress. (*McLaughlin v. Fowler*, 52 Cal. 203.)

57. A patent issued to the Western Pacific Railroad Company, under the act of July 2, 1864, for land within the limits of a Mexican grant sub judice at the date of the withdrawal of the lands, is void, and may be attacked collaterally. (*Carr v. Quigley*, 57 Cal. 394.)

Cited 63 Cal. 211; 64 Cal. 517; 78 Cal. 161; overruled 63 Cal. 216, 218; distinguished 78 Cal. 240, 241.

58. The odd sections of land included within the boundaries of a rejected Mexican grant which was rejected after the passage of the acts of Congress of July 1, 1862, and July 2, 1864, granting land in aid of the construction of the Central Pacific Railroad Company of California, passed by said acts to the railroad company, and the State, after the passage of said acts, could not select such sections as lieu lands. (*Central Pac. R. R. Co. v. Robinson*, 49 Cal. 446.)
Cited 49 Cal. 452.

59. The grant of land made to the Central Pacific Railroad Company of California by the acts of Congress of July 1, 1862, and July 2, 1864, gave said company a title to the odd sections within the limits of the grant, as against a claimant under a Mexican grant, which was rejected after the passage of said acts. (*Kaiser v. McLaughlin*, 49 Cal. 449.)
Overruled 52 Cal. 205.

60. A patent issued by the United States government to the Central Pacific Railroad Company, for land included within the boundaries of the grant made to it by the act of Congress of July 1, 1862, and the amendatory act of July 2, 1864, is not conclusive evidence that the land covered by the patent is nonmineral in character; and a person claiming the land under a subsequent mining patent in an action by him to quiet his title against a grantee of the railroad company, may show that the land is mineral, and therefore excepted from the operation of the grant to the company, and, upon such showing being made, is entitled to have his title quieted. (*Chicago Quartz Min. Co. v. Oliver*, 75 Cal. 194.)
Cited 85 Cal. 486; distinguished 78 Cal. 240.

61. The court assumes, for the purposes of a decision, that lands containing cinnabar or quicksilver are mineral lands, within the meaning of the act of Congress passed July 1, 1862, granting lands to the Western Pacific Railroad Company of California to aid in the construction of a railroad. (*McLaughlin v. Powell*, 50 Cal. 64.)

62. A patent to the Western Pacific Railroad Company of California of land granted to said company by Congress to aid in building its railroad, is relevant evidence tending to prove the title of the company to the land granted, in an action of ejectment brought by the company or its grantee, without first proving that the land is not mineral. (*McLaughlin v. Powell*, 50 Cal. 64.)
Cited 63 Cal. 218; 85 Cal. 486.

63. The question not decided whether the plaintiff in ejectment, who relies on a patent to the Western Pacific Railroad Company, must prove that the demanded premises are not mineral lands, or are not within the exceptions contained in the grant. (*McLaughlin v. Powell*, 50 Cal. 64.)

64. If the plaintiff, in ejectment, relies on a patent to the Western Pacific Railroad Company of California, for land granted to aid in the construction of its railroad, which patent excepts from the transfer all mineral lands, the defendant may prove that the demanded

premises are mineral lands. (*McLaughlin v. Powell*, 50 Cal. 64.)
Cited 75 Cal. 198; distinguished 78 Cal. 240, 241.

65. A patent to the Western Pacific Railroad Company which excepts from the transfer "all mineral lands, should any be found to exist in the tracts described," does not convey lands which are mineral. (*McLaughlin v. Powell*, 50 Cal. 64.)

66. The fact cannot be assumed that all the lands described in such patent are mineral lands, as the exception does not necessarily extend to all the tracts granted. (*McLaughlin v. Powell*, 50 Cal. 64.)

Railroad lands, right to enter upon to mine. See *Mines and Mining*, V, 2, e.

Grants containing minerals. See *Mines and Mining*, 16.

Mineral lands, railroad lands covering. See post, 73.

67. By the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad, etc." the "timber" growing on the odd-numbered sections of public mineral lands of the United States was granted to the Central Pacific Railroad Company of California; and under the term "timber" is included all trees and wood. Held, accordingly, that a subsequent patentee of such lands took no title to the timber. (*Carr v. Central Pac. R. R. Co.*, 55 Cal. 192.)

68. In an action to quiet title based upon a patent purporting to have been issued in pursuance of the grant by Congress to the Southern Pacific Railroad Company, the defendant may show that the land included in the patent was swamp and overflowed land, and therefore excepted from the congressional grant. (*Southern Pac. R. R. Co. v. McCusker*, 67 Cal. 67.)
Cited 83 Cal. 107; 85 Cal. 486.

Grants of rights of way and land adjoining by Congress. See post, IV.

Location of military land warrant before grant to railroad. See *Public Lands*, VII.

Spanish grant, whether subject to railroad grant. See *Mexican Lands*, I, 20.

Selection of land granted to railroad, confirmation of. See *Public Lands*, 627.

Patent to railroad for lands, deception of land officers. See *Public Lands*, 778.

Grant to, rights of settler. See *Public Lands*, 351.

Rights of occupant of public land against trespasser. See *Public Lands*, 130.

Withdrawal of railroad lands, presumptions as to validity. See *Public Lands*, 588.

Railroad grants, taxation of. See *Taxation*, 104.

IV. Right of Way, Grant or Condemnation of; Damages.

69. The act of Congress of August, 1852, which gives to railroad and other companies, on complying with certain conditions, a right of way over the public lands, does not confer upon the companies availing themselves of its provisions the right to enter upon premises in the actual occupancy of a settler without compensating him for the damage done to his pos-

session. (*California Northern R. R. Co. v. Gould*, 21 Cal. 254.)
Cited 13 Nev. 97.

70. The purpose of the act of Congress was merely to give a right to enter upon the public lands, assuming them to be vacant, and its effect is to relinquish to the companies complying with its requirements any claim for compensation that might belong to the United States, as proprietor, under any proceeding, by virtue of a state law, to appropriate the land for public use. (*California Northern R. R. Co. v. Gould*, 21 Cal. 254.)

71. The grant by Congress of the right of way over the public lands to the Central Pacific Railroad Company, vests in the company the full and ample right to enter upon the four hundred feet in width, and use the same for railroad purposes, and a mere naked possessor cannot prevent such entry, or recover damages for an injury necessarily done to his possession or improvements by such entry. (*Doran v. Central Pac. R. R. Co.*, 24 Cal. 245.)
Cited 2 Idaho, 907.

72. The right of way over a strip of land two hundred feet in width on each side of its road, granted to the Central Pacific Railroad Company by the second section of the act of Congress, passed July 1, 1862, extends to and covers all public lands, whether mineral or not. (*Doran v. Central Pac. R. R. Co.*, 24 Cal. 245.)
Cited 5 Mont. 549.

73. The proviso to section 8 of said act, excepting mineral lands from its operation, refers to the alternate sections granted to said company, and has no reference to the grant of the right of way in section 2. (*Doran v. Central Pac. R. R. Co.*, 24 Cal. 245.)

74. The act of Congress of July 1, 1862, granting to the Central Pacific Railroad Company a right of way two hundred feet in width on each side of its road, did not grant a mere easement for the construction and operation of its road, but operated as a special grant of land, and is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and gave to the grantee the exclusive right to the possession of all the land embraced in the grant of such right of way; and the railroad company may maintain an action of ejectment to recover possession of the whole of the four hundred feet so granted, although only occupying a small portion thereof for its roadbed. (*Southern Pac. Co. v. Burr*, 86 Cal. 279.)

75. The right of such railroad company to recover the land so granted is not affected by the fact that it offered to lease to defendant the parcel in dispute, as the defendant had no right to inclose or occupy the land without permission of the railroad company. (*Southern Pac. Co. v. Burr*, 86 Cal. 279.)

76. In an action of ejectment by the successor in interest of the Central Pacific Railroad Company to recover possession of a strip of land forming part of the right of way granted to the company by Congress, evidence is not admissible to show possession of the land by the predecessors of the defendant prior to the railroad grant, and that they were qualified

pre-emptors, if it appears that none of them procured title to the land before it was granted to the railroad company. (*Southern Pac. Co. v. Burr*, 86 Cal. 279.)

77. The right of way granted to the Central Pacific Railroad Company of California, over the public lands of the United States, for its road, became perfect upon the filing of the plat of the location of the railroad in the proper land-office, as against pre-emptioners who had not perfected their pre-emption right by payment of the price of the land. (*Western Pac. R. R. Co. v. Tevis*, 41 Cal. 489.) Cited 5 Mont. 547.

78. A claimant of public land, within the meaning of the third section of the act of Congress granting a right of way over the public lands to the Union and Central Pacific railroad companies, is one who has an interest in the land recognized by the laws of the United States. One who is a pre-emptioner, but has not paid for the land, is not such claimant. (*Western Pac. R. R. Co. v. Tevis*, 41 Cal. 489.)

79. Congress has the power to grant a right of way for a railroad over public lands which are occupied by persons who have the right to pre-empt, but have not yet perfected that right by proving up and making payment for the land. (*Western Pac. R. R. Co. v. Tevis*, 41 Cal. 489.) Cited 58 Cal. 143; 86 Cal. 282; 89 Cal. 364, 365.

80. In a proceeding to condemn land, a railroad corporation, under section 465 of the Civil Code, has power to acquire a right of way in accordance with the most advantageous route for its road; and the taking for such purpose is not rendered unnecessary by the fact that it had previously purchased a less advantageous right of way over the land of the defendant. (*Eel River etc. R. R. Co. v. Field*, 67 Cal. 429.)

81. The general railroad law has not given to any company organized under it the right to condemn or use any lands owned or previously located and appropriated for railroad purposes by another railroad company, except where it may be necessary for one railroad to cross another. Land once located by a company, who are proceeding in good faith and with reasonable diligence in the construction of their road, cannot be taken from it and appropriated by another company. (*Contra Costa R. R. Co. v. Moss*, 23 Cal. 323.) Cited 31 Cal. 217.

82. The complaint in an action by a railroad to obtain a right of way over the right of way of another railroad need not allege the value of the property sought to be condemned. (*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.) Cited 83 Cal. 510; 88 Cal. 55.

83. The complaint to acquire a right of way, after stating the general route of the proposed road, alleged that the termini were to be National City and "a connection with the Atlantic and Pacific Railroad Company at or near the thirty-fourth parallel of north latitude in the state of California." Held, that the termini were alleged with sufficient certainty.

(*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.)

84. Under section 1244 of the Code of Civil Procedure a proceeding by a railroad corporation to acquire a right of way across the right of way of another railroad company, and a proceeding to acquire a right of way over lands which the defendant owns in fee, may be united. (*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.)

85. Where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for right of way, and makes the parties in possession defendants to their application, the latter are entitled to have the compensation, as determined by the commission, paid to them, although third parties have given notice of their ownership of the land. (*Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 577.)

86. In the absence of circumstances making the cost of fences an element of damage, the provisions of the statute, imposing on a railroad company the duty of fencing its road or to pay for fencing, do not affect the question as to the compensation to be paid for taking the land or imposing an easement upon it. (*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.) Cited 94 Cal. 434.

87. When the answer in a proceeding to condemn land for a railroad fails to allege that fences and cattle guards were necessary, the failure to find upon such issue is not error. (*Moran v. Ross*, 79 Cal. 159.)

88. If, by the construction of a railroad through the inclosure of a farmer, it is made necessary to construct fences on either side of the road, to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. (*Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 74.) Cited 29 Cal. 117; 42 Cal. 68.

89. So far as the value of the property to be taken is concerned, in a proceeding by a railroad to obtain a right of way across the right of way of another road, the verdict of the jury is conclusive, although perhaps a new trial may be allowed by the court. All other issues of fact may be submitted to the jury. (*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.)

90. A steam railroad corporation cannot acquire a right of way for its road over a street in a municipality the fee in which is owned by an abutting proprietor, except upon compensation first made to him. (*Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202.) Cited 87 Cal. 598, 602.

Using same track or road with another company, compensation. See post, X, 1.

91. In a proceeding by a railroad company to condemn land for the use of its road, it is not an abuse of discretion for the court to refuse to recall the jury, after they had retired for deliberation, for the purpose of submitting to them a special issue, which is embraced within another issue already submitted to them. (*California Cent. R. R. Co. v. Hooper*, 76 Cal. 404.)

92. In a proceeding by a railroad to obtain

a right of way over the right of way of another railroad, the judgment on the assessment of damages, and adjudicating that the use is public, the taking necessary, etc., is the final judgment; the final order of condemnation is a special order made after final judgment, and an appeal therefrom must be taken within sixty days after its entry. (*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.)

93. Where, in a proceeding to condemn lands for railroad purposes, the railroad company had already obtained a deed from M., who was by it made a party to the proceeding granting the demanded right of way, and the commissioners, nevertheless, awarded him damages, held, that as the right of way was already secured by contract, M. must look for his compensation therefor under his contract, and that the report of the commissioners as regards M. must be set aside, and the court below directed to dismiss the proceedings as to him. (*Western Pac. R. R. Co. v. Reed*, 35 Cal. 621.)

94. Where the owner of the lots claimed that he was entitled to recover for the damages to his lot, involved in the first suit, by reason of the construction and operation of a switch and side-track since the judgment in the first action, and the court ruled in his favor in that regard, but he failed to prove any damages accruing specially by reason of such construction, a verdict in favor of the railroad company will not be disturbed. (*Beronio v. Southern Pac. R. R. Co.*, 86 Cal. 415.)

Taking private property for. See Eminent Domain, IV, 3, a.

Unlawfully constructed in park. See Eminent Domain, 2.

Road-bed, definition. See Taxation, 482.

Roadway, definition. See Taxation, 482.

Title, what passes, on contract to convey by railroad. See Vendor and Vendee, 52.

Sale by guardian of land for railroad. See Guardian and Ward, V, 6, c, A.

Contract to convey to on consideration of continued operation. See Specific Performance, 123, 124.

V. Crossing Track of Another Railroad; Tearing up Track.

95. The question whether the manner of crossing the right of way of another railroad is compatible with the greatest public benefit and least private injury is one of fact to be determined with reference to the circumstances of the case. (*California Southern R. R. Co. v. Southern Pac. R. R. Co.*, 67 Cal. 59.)

Right of street railroad to cross track of another road. See post, 243.

Right of way over lands of another company. See ante, 81, et seq., 89, 92.

96. The whole of the road as laid out having been dedicated as a highway, a railroad corporation has a right to construct its railroad therein, and may enjoin a grantee, whose land is adjacent to the part of the road not actually used by the public, from tearing up its track. (*Southern Pac. R. R. Co. v. Ferris*, 93 Cal. 263.)

VI. Rights Incidental to Management of.

97. Under the act for the incorporation of railroad companies, passed May 20, 1861, railroad corporations possessed all the powers and privileges, for the purpose of carrying on the business of the corporation, that private individuals and natural persons had. (*Pixley v. Western Pac. R. R. Co.*, 33 Cal. 183.)

98. A grant by the legislature of the right to build a street railroad over a designated route, which crosses a navigable stream, includes the right to build a bridge over the stream. (*People ex rel. Board of State Harbor Commissioners v. Potrero etc. R. R. Co.*, 67 Cal. 166.)

99. A license granted by a municipality to a railroad company to run a line of cable cars along the streets of the city does not authorize the company to construct and operate a stationary engine upon its land in such a manner as to interfere with the comfortable enjoyment of his premises by an adjoining proprietor. (*Tuebner v. California Street R. R. Co.*, 66 Cal. 171.)
Cited 72 Cal. 251.

100. Railroad companies have the right to own and control steamboats for the purpose of transporting their freight and passengers across navigable waters on the line and constituting a part of their routes, and those lying at the end of their roads, separating them from the ostensible and substantial termini of their routes. (*Wheeler v. San Francisco etc. R. R. Co.*, 31 Cal. 46.)
Cited 19 Nev. 131.

101. Whether workshops for repairing and safely keeping the cars and locomotives of a railroad are necessary appendages to a railroad, and whether land sought to be condemned as a site for such workshops is really needed for that purpose, are questions of fact on which issues may be joined, to be decided at the trial. (*Southern Pac. R. R. Co. v. Raymond*, 53 Cal. 223.)
Distinguished 79 Cal. 164.

VII. Contracts of; Issuance of Bonds; Rights and Priority of Bondholders; Receivers.

102. If a contract with a railroad company for constructing its road provides that the contractor shall not deviate from the contract, nor receive any pay for extra work, unless a written order for the same is made and signed by the engineer, the contractor cannot recover for extra work done on the verbal order of the engineer, even if there is another clause in the contract which provides that the engineer may direct alterations in and additions to the work. (*White v. San Rafael etc. R. R. Co.*, 50 Cal. 417.)
Distinguished 14 Nev. 306.

103. The provision in the act concerning railroad corporations, that "no contract shall be binding on the company unless made in writing," refers only to contracts wholly executory; but the action against the corporation on such verbal executory contracts must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation. (*Foulke*

v. San Diego Southern Pac. R. R. Co., 51 Cal. 365.)

Cited 67 Cal. 129.

Dedication by is not ultra vires. See Dedication, 6.

Lien on part of. See Mechanics' Liens, 163.

Reservation in deed by, construction of. See Deeds, 317.

Circular offering land, acceptance of. See Vendor and Vendee, I, 5.

Purchasers of land advertised in circular, priority. See Vendor and Vendee, 396, et seq.

May guarantee bonds of another railroad. See Corporations, 365.

104. Section 15 of the act of 1861, as amended by section 1 of the act of May 14, 1862, authorizes a railroad corporation, by a majority vote of its board of directors, to issue bonds secured by a mortgage of its property and franchises, in payment of debts contracted, or contracts made, for constructing and completing its road. (McLane v. Placerville etc. R. R. Co., 66 Cal. 606.)

105. The instrument sued on, although executed to trustees, and in form a conveyance in trust, is a mortgage of the form usual with such securities executed by railroad corporations, and the holders of the bonds secured by it are entitled to the same benefit they would have if actually made parties to the instrument. (McLane v. Placerville etc. R. R. Co., 66 Cal. 606.)

106. The mortgage provided that upon default in the payment of interest for one year, the trustees or the survivor of them should be entitled to take possession of the property mortgaged, hold it, receive and collect the income and profits arising from it, and apply the same to certain stated purposes. Held, that upon the happening of that event, a court of equity had power in an action to enforce the specific execution of the mortgage, to appoint the surviving trustee a receiver of the mortgaged property, to put him in possession thereof pendente lite, and the road being without rolling stock or other equipments, to authorize him to make provision for operating the road by purchasing the necessary equipments, so as to secure an income and profits. (McLane v. Placerville etc. R. R. Co., 66 Cal. 606.)

107. The expenses of the trustee and receiver reasonably incurred in the discharge of his trust are a lien upon the trust property prior to that of the bondholders. Among the expenses which should be allowed him are reasonable fees for counsel employed by him in the proper discharge of his trust, the cost of litigation, and the expenses in taking care of, protecting, and repairing the property in his charge. (McLane v. Placerville etc. R. R. Co., 66 Cal. 606.)

108. Under the circumstances of the case, held, that money expended for rolling stock and machinery should also be allowed. (McLane v. Placerville etc. R. R. Co. 66 Cal. 606.)

109. It appeared that the mortgagor was insolvent; that an execution purchaser under a junior encumbrance would do nothing to discharge the interest; that the operation of the road by the trustee would result in a

loss; that the trustee had no proceeds with which to make repairs; and that the road, if unused, would necessarily decay. Held, that the court had power to order a sale of the property, although the mortgage did not in terms authorize a sale upon default in the payment of interest, and the bonds had not yet matured. (McLane v. Placerville etc. R. R. Co., 66 Cal. 606.)

110. A purchaser of railroad bonds in good faith, and for their market value, may be a bona fide holder, although some of the interest coupons attached thereto are past due and unpaid at the time of the purchase. (McLane v. Placerville etc. R. R. Co., 66 Cal. 606.)

Consent to appointment of receiver. See Certiorari, 82.

Receiver of, action against. See Receivers, 38.

Property of in hands of receiver is subject to attachment. See Attachments, 115.

Receiver for, effect of conveyance by company. See Receivers, 27.

Receiver, liability of. See Receivers, 46.

Action to enforce deed of trust by railroad, receiver in. See Receivers, 17.

VIII. Management of Trains and Liability for Negligence.

1. Speed of Trains.

111. Fifteen miles per hour is not reckless or dangerous speed for a railroad train between stations outside of cities and towns. (Benson v. Central Pac. R. R. Co., 98 Cal. 45.)

Speed at crossing. See post, 131, 135.

2. Trespassers on Track and Duty Towards.

112. A person who walks upon a railroad track without license or right to do so is a trespasser. (Toomey v. Southern Pac. R. R. Co., 86 Cal. 374.)
Cited 88 Cal. 406.

113. A railroad company has a right to the use of its track, and may ordinarily presume that no one is upon it to be injured. It owes to persons wrongfully there no duty to look out for them that they may not be injured. Whatever duty it owes such persons arises after and because they have been discovered there by its servants. (Benson v. Central Pac. R. R. Co., 98 Cal. 45.)

114. A railroad company is not bound to furnish any particular kind of machinery or appliances for the benefit of a trespasser, or (when not aware of his presence) to give cautionary signals to warn him of the approach of its trains, and its omission to do so is not negligence. (Toomey v. Southern Pac. R. R. Co., 86 Cal. 374.)

115. A statutory provision requiring the bell to be rung or whistle blown on approaching a crossing is for the benefit of those who use the crossing, and not for the benefit of trespassers at other points, and such trespassers cannot complain of the omission to comply with the statute, even though they would have heard the signals had they been given, and been warned thereby. (Toomey v. Southern Pac. R. R. Co., 86 Cal. 374.)

116. The action was brought to recover

damages for personal injuries inflicted on the plaintiff through the alleged negligence of the defendant's employees. At the time of the injury, the plaintiff was lying in an unconscious condition by the side of the defendant's track, and while there was run over by a passing train. The negligence was claimed to consist in the failure of the engineer to use ordinary diligence in stopping the train after seeing the plaintiff. On a review of the evidence, held, that there was no negligence shown on the part of the defendant or its employees. (*Williams v. Southern Pac. R. R. Co.*, 72 Cal. 120.)

Cited 86 Cal. 380.

117. Where child, six years old, attempted to cross a railroad track, close to where it lived, and in doing so became dizzy and fell down on it at a point about fifteen feet from where the highway crossed the track, and remained there, unconscious or asleep, until shortly afterwards a construction train came along on an up grade, and at a rate of eight miles an hour, and, without whistling or ringing the bell, ran over the child and seriously injured it, and it further appeared that the track was straight and free from weeds, that the day was clear, and that those in charge of the train saw the object lying on the track some five hundred feet ahead, but supposed it a bunch of weed, the evidence is sufficient to justify a finding of negligence. (*Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513, 516.)

Cited 10 Cal. 498.

118. In an action for damages for personal injuries, alleged to have been caused by the negligence of the officers of the defendant in the management of its engine and train, it appeared from the evidence of the plaintiff that he was injured upon the roadway of the defendant while going aloft over a trestle spanning a ravine, over which the road passed. Held, the plaintiff was guilty of contributory negligence, which contributed approximately to the injuries he received, and a nonsuit was rightly granted. (*Tennbrook v. South Pac. Coast R. R. Co.*, 59 Cal. 289.)

Cited 86 Cal. 380.

Passengers carried beyond destination walking back upon track. See *Common Carriers*, IV, 3, c.

3. Backing Train in Street.

119. If the track of a railroad passes along the street of a city, crossing another street, and a train of cars is stopped in the first street, so that the last car in the train stands in the cross street, and while a person is walking along the cross street over the track, behind the train, the train, without any notification, is suddenly backed, and the person is knocked down and injured by the cars, the employees of the company are guilty of gross negligence. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

Cited 63 Cal. 452.

120. If bell of train was rung, this does not of itself establish proper care by the employees of the company; for, although the bell is intended to give notice to all, it is the duty of the engineer to see that all have acted

on the notice. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

121. In such case railroad company should provide lookout, upon whose signal that the track was clear the engineer should have acted. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

122. The fact that agents of defendant in such case did not know that the person injured was on the track amounts to culpable negligence on their part. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

123. The person injured in such case is exercising an undoubted right in crossing the railroad track on a public street, and is not guilty of such want of care or diligence as contributes to the injury, and the railroad company is not released from liability on the ground of contributory negligence. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

Cited 13 Nev. 125.

124. The person injured in such case had a right to presume that he would be notified that the train was about to move, and was not bound to wait because the train was on the street, or assume that it might move suddenly backward without notice. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

Cited 85 Cal. 70.

125. It is no defense to an action for the injury in such case, that the plaintiff, by his own act, has contributed to his injury, but it must appear that by his own fault he has so contributed. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

126. A foot passenger is not debarred the use of the street because a train of cars occupies a portion of such street. (*Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409.)

4. Frightening Horses.

127. Both railroad trains and teams are entitled to use of street, where a railroad track passes along the street, and if horses are frightened by the appearance of the train or the ordinary noise of its passage, the railroad company is not liable for damages. (*Hahn v. Southern Pac. R. R. Co.*, 51 Cal. 606.)

128. If cylinder cocks are opened and steam is blown off, and this is necessary in the prudent management of the engine, and horses are frightened thereby, the railroad company is not liable for the damages. (*Hahn v. Southern Pac. R. R. Co.*, 51 Cal. 606.)

129. Act of leaving span of horses unhitched in close proximity to railroad, at a time when the train usually comes along, is negligence; and if the owner afterwards, when the train arrives, and when the horses have moved to the track, attempts to rescue them, and is injured, he is guilty of additional negligence, which approximately contributes to his injury, and he cannot recover damages. (*Deville v. Southern Pac. R. R. Co.*, 50 Cal. 383.)

Cited 52 Cal. 50; 20 Nev. 307, 311.

Frightening horse which runs upon track. See post, 164.

5. Injuries at Crossings.

130. The court refused the following instruction: "The rights of a traveler on a street or

highway at a point where it is crossed by a railroad are subordinate to those of the railroad company, so far as to require the traveler to give way to any train which is in sight or hearing." Held, separated from the context, the instruction might have misled the jury, and the court below was therefore justified in refusing it. (*Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326.)

131. In an action against a railroad company to recover damages for injuries inflicted on the plaintiff at a crossing of its road, by reason of the alleged negligent manner in which the defendant ran the train causing the injury, an instruction which assumes that the defendant was guilty of negligence, proximately causing the injury, by reason of its omission to slow the train when approaching the crossing, or to station a flagman at that place, without reference as to whether the plaintiff was guilty of negligence, is erroneous. (*Carraher v. San Francisco Bridge Co.*, 81 Cal. 98.)

132. Where an injury at a railroad crossing is caused by a locomotive, upon which a bell was not kept ringing continuously, nor a whistle blown at intervals at a distance of eighty rods before reaching the crossing, and also in passing over it, as required by section 486 of the Civil Code, the railroad company operating the locomotive is prima facie liable for such injury, unless the person sustaining it contributed thereto by his own negligence; and it need not be further proved by the plaintiff that the failure to ring the bell or blow the whistle was the proximate cause of the injury. (*Orcutt v. Pacific Coast Ry. Co.*, 85 Cal. 291.)

133. The statute (Civ. Code, sec. 486) provides, in substance, that a locomotive bell must be rung when the engine is approaching a crossing, under a penalty for failing so to do; and declaring that the railroad corporation is also liable for all damages sustained by any person, and caused by its locomotive, trains, or cars, when the bell is not rung. Held, that a failure to ring the bell does not abrogate the doctrine of contributory negligence. (*Meeks v. Southern Pac. R. R. Co.*, 52 Cal. 602.)

Cited 85 Cal. 298.

134. The failure of the engineer of a railroad train to ring a bell or blow a whistle at a street crossing, as required by section 486 of the Civil Code, does not abrogate the doctrine of contributory negligence, and where the driver of a wagon recklessly drives across a railroad track at the time when the train is known to be due, without checking speed, or listening for an approaching train, or adopting any precaution to prevent a collision, the railroad company is not responsible for an injury resulting from a collision, notwithstanding the neglect of the engineer to comply with the statute. (*Hager v. Southern Pac. Co.*, 98 Cal. 309.)

Evidence of subsequent employment of automatic bell. See post, VIII, 9, a.

135. Action by the father to recover damages for loss of five children, ranging from five to sixteen years of age. The children killed

were returning home in a light wagon drawn by one gentle horse. The oldest—a girl of sixteen—was driving. She was acquainted with the highway. Several persons in vehicles preceded her and had crossed the railroad. On the railroad, about three hundred and thirty-five feet from the point of crossing, was a covered bridge. On either side of the railroad, between the bridge and its intersection with the highway, were a number of eucalyptus trees planted by the defendant, and which had attained such size as prevented—in connection with some of the neighboring orchards—an approaching train from being seen until the traveler should reach very close to the railroad track. There was also evidence going to show that at the time of the accident the train was slightly behind time, and was running at the rate of from thirty-three to thirty-five miles per hour, whereas the rate at which the trains usually ran at that point was from twenty-five to thirty miles an hour. Further, there was some evidence tending to show that the bell was not rung nor the whistle blown. Held, (1) this evidence, especially that relating to the increased speed, under the circumstances appearing, tended to show negligence on the part of the defendant, and it was for the jury to pass upon the effect of this testimony; (2) the evidence was sufficient to justify the verdict of the jury against the defendant on the question of the defendant's negligence. (*Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 320.)

136. A person crossing the track of a railroad upon a public highway is bound to exercise proper care to avoid the cars of the railroad company; and if he does not do so, and for that reason is injured, and by the exercise of such care could have avoided the danger, he cannot recover damages. (*Hearne v. Southern Pac. R. R. Co.*, 50 Cal. 482.)

137. If a person, while crossing the track of a railroad on a public highway, is injured by a passing train, his negligence, if it contributes at all to the injury, contributes directly and proximately. (*Hearne v. Southern Pac. R. R. Co.*, 50 Cal. 482.)

138. A person of mature age, in the full possession of his faculties, while driving along a public road as it nears a railroad crossing, from which road a clear and unobstructed view of the railroad track could be had for a considerable distance, is guilty of contributory negligence in driving over the crossing without first looking for the approach of coming trains; and if, in attempting to cross the track under such circumstances, he is killed by a passing train, the railroad company is not liable, notwithstanding the engineer of the train omitted to ring his bell or blow his whistle as the train approached the crossing. (*Glascok v. Central Pac. R. R. Co.*, 73 Cal. 137.)

Cited 80 Cal. 525; 85 Cal. 298; 88 Cal. 92; 20 Nev. 307.

139. In an action against a railroad company for damages for injuries received while driving across the track, where the evidence showed that the railroad crossed the road at an oblique angle on a level with the highway,

that the crossing was filled in with planks between the rails, except that the company had, unknown to the plaintiffs, removed one plank along the side of one of the rails, and had neglected to restore it, and that the rails projected above the planking about an inch or an inch and a half, that the plaintiffs were driving a steady horse at the rate of five or six miles an hour, and did not slacken speed at the crossing, and that when crossing the track the wheel of their cart caught in the space left between the planking and the rail, and they were upset and injured, the fact that the plaintiffs failed to slacken speed at the crossing does not, as matter of law, show negligence on their part, but the question is one of fact for the jury, and a verdict for the plaintiffs will not be disturbed. (*Whalen v. Arcata etc. R. R. Co.*, 92 Cal. 669.)

140. So far as affects the liability of defendants, the plaintiffs had a right to assume that it had performed its duty and maintained the crossing in good condition; and, conceding that the plaintiffs crossed the track at a different angle from what travelers generally did, it cannot be said, as matter of law, that a person of ordinary prudence would not have crossed as plaintiffs did, but it was for the jury to say whether it was culpable negligence on their part, and whether it contributed proximately to the injury. (*Whalen v. Arcata etc. R. R. Co.*, 92 Cal. 669.)

141. If a person is driving a four-horse team along a road running parallel with and near to a railroad, and is approaching a crossing, and the air is so filled with dust that he cannot see the railroad, and his wagon makes some noise, and he attempts to cross the railroad without stopping his team to listen for an approaching train, and his horses are killed by the engine, he is guilty of contributory negligence, and cannot recover damages. (*Flemming v. Western Pac. R. R. Co.*, 49 Cal. 253.)
Cited 73 Cal. 141; 88 Cal. 92; 13 Nev. 121; 14 Nev. 392; 17 Or. 11.

142. Action for damages for injuries alleged to have been caused by the negligence of defendant's servants. The plaintiff was driving his wagon at a slow trot towards the railroad crossing upon a street which was crossed by the defendant's track, and, upon approaching the track, his horses were frightened by the passage of the locomotive and ran away, throwing the plaintiff from the wagon and seriously injuring him. It appeared from the evidence of the plaintiff that the street was built up on each side, and lined with piles of lumber in such a manner that a train upon the track could not be seen until the plaintiff approached very near to it; and also that the engine bell was not rung, as required by section 486 of the Civil Code. Held, the evidence did not show such contributory negligence as to justify a nonsuit or a reversal of the order denying a new trial. (*Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326.)

143. Had the plaintiff been where the track was ordinarily visible, but some transitory obstacle impeded his vision, it might have been his duty to wait until the obstacle was removed. But here plaintiff's view was cut

off by permanent erections; and whether he was properly cautious after he reached a place from which he could see the track was a question of fact as to which the court cannot say the jury found wrongly. (*Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326.)

144. It was argued that the jury disobeyed the following instruction: "If M street was obstructed by lumber on the side thereof at the point where it united with Front street, and plaintiff drove through M street nearly on to defendant's railroad track on a trot, and was driving at a trot when his horses were frightened, and was seated on or within eight inches of the bottom of the wagon, so that he could not see over the rumps of his horses, and could have heard the approach of a locomotive or train if he had been driving at a walk, then he was guilty of contributory negligence, and cannot recover." Held, the verdict does not prove this, because the jury may have found that plaintiff could not have heard the approach of the locomotive. (*Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326.)

145. The following instructions, asked by defendant, held to have been properly refused: "If plaintiff's horses were frightened by the mere ordinary appearance of defendant's locomotive or train, or by the ordinary noise of its passage, and his injury caused thereby, he cannot recover." "A person cannot recover against a railroad company for injury caused by the mere frightening of his horse, unless the locomotive or some part of the train actually comes into contact with the horses or vehicle." (*Strong v. Sacramento etc. R. R. Co.*, 61 Cal. 326.)

6. Injuries to Animals; Duty of Railroad to Fence.

146. If plaintiff is guilty of negligence, or even of possible wrong, in placing his animals on track, yet the railroad company are bound to exercise reasonable care and diligence in the use of their road; and if, for want of that care, the animals are injured, the company is liable. In such case the company is also bound to use reasonable care and diligence in removing the animals. (*Needham v. San Francisco etc. R. R. Co.*, 37 Cal. 409.)

147. In this state a railroad company is responsible for damages done cattle by running over them on the track, if the accident could have been avoided by ordinary care and prudence on the part of the company; and this, though the owner of the cattle permits them to run at large near the line of the railroad. (*Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 351.)

148. If in such case the agents of the company could not, by ordinary care and prudence, prevent the accident, then the company is not responsible. (*Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 351.)

149. In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the uninclosed commons," where the defence is negligence on the part of the plaintiff in thus allowing

the horse to run at large. (*Waters v. Moss*, 12 Cal. 535.)
Cited 38 Cal. 581; 69 Cal. 147; 15 Nev. 262.

150. Plaintiff was not guilty of negligence in thus allowing his horse to run at large. (*Waters v. Moss*, 12 Cal. 535.)

151. Where an unfenced line of railroad passes through a field in which the livestock of the owner or occupier of the field are running, and the stock of the occupant stray into the road and are killed by the train, these facts, unexplained, make a prima facie case of negligence against the railroad company. (*McCoy v. California Pac. R. R. Co.*, 40 Cal. 532.)
Cited 74 Cal. 10; 8 Mont. 283; 3 N. Mex. 327, 328; 18 Or. 397.

152. The owner of the stock is not guilty of contributory negligence from the fact that he knew the road was not fenced when he turned his stock in the field. (*McCoy v. California Pac. R. R. Co.*, 40 Cal. 532.)

153. The neglect of the company to build the fence does not operate to dispossess the occupant of his entire field, or prevent him from making a lawful use of it. (*McCoy v. California Pac. R. R. Co.*, 40 Cal. 532.)

154. A railroad company which continues running its cars upon an open track undertakes, at its peril, that no harm shall come to the stock running in the field, through which the road runs, for want of a proper fence. (*McCoy v. California Pac. R. R. Co.*, 40 Cal. 532.)

155. The fact that the animals injured were running at large in a lane, where they might trespass upon the railroad company's right of way across the lane, contrary to the provisions of the county act requiring all cattle to be confined by their owners to prevent trespass upon the land of others, could not be relied on by the railroad company to show contributory negligence on the part of the owner of the animals, but they would still have to show that it was the proximate cause of the injury complained of. (*Orcutt v. Pacific Coast Ry. Co.*, 85 Cal. 291.)

156. Where the animals injured were, when last seen by the owner, nearly one half a mile from the railroad track, the owner had a right to assume that the required statutory signals would be given by the railroad company, so that the animals would be driven off if near the track when any locomotive or train was about to pass over the crossing, and his failure to prevent them from straying upon the track, toward which they were turned, is too remote to be regarded as the proximate cause of the injury. (*Orcutt v. Pacific Coast Ry. Co.*, 85 Cal. 291.)

157. Where failure to give warning in approaching a crossing is proved, in an action to recover damages for the negligent killing of animals, evidence is immaterial as to whether or not the engineer, from his place on the engine, could see the animals near the track when the engine was approaching before they came running upon the track when the engine was but forty feet from the crossing, and that he did all he could to avoid injuring them, as the failure to give the signals required by sec-

tion 486 of the Civil Code amounted to presumptive negligence. (*Orcutt v. Pacific Coast Ry. Co.*, 85 Cal. 291.)

158. There is no statute in this state requiring railroad corporations to fence in their track. (*Richmond v. Sacramento Valley R. R. Co.*, 18 Cal. 351.)
Cited 38 Cal. 581.

159. The proviso in section 30 of the Railroad Act of May 20, 1861, simply provides that a railroad company shall not be compelled to perform the offer or agreement (referred to in the preceding part of the section) to fence on the sides of its road, where it runs through uninclosed lands, until the owner of the land has built fences abutting on the railroad. It does not exempt the company from the liability created by section 40 for the value of animals killed by its locomotives on unfenced portions of the road. (*Fontaine v. Southern Pac. R. R. Co.*, 54 Cal. 645.)

160. The act of 1861, requiring railroad companies to maintain a sufficient fence on both sides of their property, without prescribing what a sufficient fence shall be, must be considered as referring to and adopting the general law fixing the standard of lawful fences. (*Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230.)
Cited 67 Cal. 594.

161. If an insufficient barway is placed by a railroad company in a fence on the line of its road, at the request of and for the use of the owner of adjoining land, and he uses the same, and does not complain of its insufficiency, or notify the company to alter it, the company is not liable for damages for injuries to his cattle happening in consequence of the barway being too low to turn cattle. (*Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230.)

162. The provisions of the law requiring railroad companies to build fences on the lines of their roads are designed for the protection of adjoining owners, and such provisions may be waived by them. (*Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230.)

163. If the plaintiff introduces evidence to show that he contracted with a railroad company as to the kind of fence to be built, he is precluded from introducing evidence as to the statutory character of the fence. (*Enright v. San Francisco etc. R. R. Co.*, 33 Cal. 230.)

164. A railroad corporation, which fails to erect fences along its track, as required by section 485 of the Civil Code, is liable to a person on horseback who is injured by a passing train in consequence of the horse becoming frightened and unmanageable on the approach of the train and attempting to run across the track immediately in front of the engine, the rider not being guilty of contributory negligence. (*Hynes v. San Francisco etc. R. R. Co.*, 65 Cal. 316.)

165. In an action against a railroad company to recover damages for the killing of a pair of horses, alleged to have been caused by the negligence of the defendant in running its locomotive and cars, evidence that a fence alongside of the defendant's track was out of repair, and that the horses came through an

open gate in the fence on to the track, is inadmissible, in the absence of any allegation in the complaint showing that the gate was left open, or allowed to remain open, through the negligence of the defendant, which operated as a proximate cause of the injury. (*Jahant v. Central Pac. R. R. Co.*, 74 Cal. 9.)

166. A licensee who has acquired from the lessees of land the right to pasture his sheep thereon occupies no more favorable position to recover from a railroad company for the loss of sheep which strayed upon the track through an opening in the fence, made by the lessees for their own convenience, than that occupied by the lessees, who could not recover if the stock lost had been their own. (*McCoy v. Southern Pac. Co.*, 94 Cal. 568.)

167. If the lessees made the opening in the fence, through which the sheep strayed, with the consent of the railroad company, and upon its agreement to replace the opening with a gate, it was the duty of the company to put up the gate within a reasonable time, and if it failed to do so, it would be liable for the loss of the stock occasioned by such neglect, precisely as if it had left the opening without the consent of the adjoining owner when it constructed the fence. (*McCoy v. Southern Pac. Co.*, 94 Cal. 568.)

168. In order to show that the railroad company agreed to put up a gate as claimed, it must be shown that the person assuming to act for it had authority, either actual or ostensible, to act for it in the matter, or that his agreement was subsequently ratified by the defendants. (*McCoy v. Southern Pac. Co.*, 94 Cal. 568.)

Fence, sufficiency of to turn cattle. See Evidence, 279.

7. Injuries from Fire.

169. A railroad company, authorized by its charter to use steam power, necessarily has the right to use fire as a means of generating steam, and is not liable for injuries unavoidably produced by the fire kept for such purpose. (*Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 518.)

170. Steamboat and railroad companies, in propelling boats on the river, and cars on the railroad, must provide all reasonable precaution to protect the property of others, and they must also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to the circumstances of the danger. (*Gerke v. California Steam Navigation Co.*, 9 Cal. 251.)

Cited 14 Cal. 171.

171. Ignition of combustible substance lying along track of railroad, by sparks dropped by a passing engine, is not an unavoidable accident. (*Flynn v. San Francisco etc. R. R. Co.*, 40 Cal. 14.)

Cited 50 Cal. 181; 6 Mont. 589.

172. If railroad permits dry grass, which will readily take fire, to remain on its track, it is not negligence per se, but a fact from which negligence may be inferred by the jury in an action to recover damages for the destruction of a crop, alleged to have been set

on fire by sparks from an engine. (*Perry v. Southern Pac. R. R. Co.*, 50 Cal. 578.)

173. If a railroad company permits dry grass to remain standing between the railroad track and the fence in such quantities as to show negligence, evidence of the fact, in an action to recover damages for the destruction of a crop by fire in an adjoining field, alleged to have been caused by sparks from a locomotive, is admissible. (*Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176.)

174. If, in such case, there is some evidence that such dry grass had been recently burned, and it also appears that the fire originated in an adjoining field, and the court refuses to strike out the evidence about the dry grass, but instructs the jury to disregard it if the fire did not originate in such dry grass, it will be presumed, in view of the charge, that no injury was done by the refusal to strike out. (*Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176.)

175. If, by the negligence of a railroad company, a fire, communicated from the sparks of an engine, commences on the premises of one proprietor and spreads to those of another, and destroys his crop, the latter may recover damages for the injury, if the injury was the direct consequence of the original firing. (*Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176.)

Cited 6 Mont. 589.

176. The negligence, which was the proximate cause of the injury, where a fire was communicated to an adjacent grain field by the falling of sparks from a passing engine, which ignited the dry grass and weeds lying along the track, was the leaving the combustible matter upon the railroad where it was liable to be so set on fire. (*Flynn v. San Francisco etc. R. R. Co.*, 40 Cal. 14.)

177. If a crop is destroyed by fire on the line of a railroad, and the fire originates from a spark emitted from the engine, which ignites the grass some distance from the crop, the question whether the destruction of the crop was the proximate result to be reasonably expected from the carelessness of the railroad company is one of fact for the jury. (*Perry v. Southern Pac. R. R. Co.*, 50 Cal. 578.)

Cited 50 Cal. 585.)

178. In an action against a railroad company for damages for injuries caused by fire, the question whether the damage done to the plaintiff was an ordinary and natural result of the negligence must be determined by the jury from all the circumstances proved. (*Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 518.)

179. It is not negligence, in legal sense, for farmer to leave grass and stubble standing on his pasture and grain field along the side of which, and separated therefrom by a fence, a railroad passes. (*Flynn v. San Francisco etc. R. R. Co.*, 40 Cal. 14.)

180. The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable, from the ordinary working of the engine, is prima facie proof of negligence,

sufficient to go to the jury. (*Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 387.) Cited 50 Cal. 182; 67 Cal. 524.

181. The action was against a railroad company to recover damages for injuries caused by fire. The complaint alleged that through the negligence of the defendant fire from its locomotive was suffered to escape and did escape, and by reason thereof came upon the land of the plaintiff, causing the injury complained of. The evidence was that the fire commenced on the land of another, from which it spread to the land of the plaintiff. Held, that there was no variance. (*Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 518.)

182. On a review of the evidence, held, that the negligence of the defendant was *prima facie* established. (*Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 518.)

183. In an action against a railroad company for damages caused by a fire alleged to have been communicated from the sparks escaping from a locomotive, the plaintiff may prove that prior to, and subsequent to, the fire which caused the injury, and about the same time, other fires were kindled in the vicinity by the same engine. (*Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176.) Cited 67 Cal. 531; 74 Cal. 331.

184. On the trial a witness testified that, about two weeks after the fire complained of, at a place from a quarter to half a mile distant from the spot where it was kindled, he saw fire in a field near the defendant's road, just after a train had passed, drawn by the same engine from which it was claimed the sparks escaped causing the damage to the plaintiff. Held, that the evidence was admissible. (*Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 518.) Cited 74 Cal. 331; 12 Col. 297.

185. In an action to recover for damages caused by a fire alleged to have been occasioned through the negligence of a railroad company in emitting sparks from one of its locomotives, the court instructed the jury that in determining the question of negligence, they might consider the fact that the defendant's engines had dropped fire at other times before or after the occurrence of the fire complained of. The defendant objected to the instruction, on the ground that it was not limited as to time, place, or to the particular engine. Held, that the instruction was proper, and that any objection on account of the remoteness of the other fires should have been made at the time of the introduction of the evidence. (*Steele v. Pacific Coast Ry. Co.*, 74 Cal. 323.)

186. In an action against a railroad company for damages from fire, an objection to a question asked a witness in reference to other similar fires on the defendant's road, on the ground that it was not limited to some recent period, should specify the particular ground of the objection. An objection that the question was "irrelevant and immaterial" is insufficient. (*Steele v. Pacific Coast Ry. Co.*, 74 Cal. 323.)

187. Evidence is also admissible that soon after the fire the engine was repaired so as

more effectively to retain the sparks. (*Butcher v. Vaca Valley etc. R. R. Co.*, 67 Cal. 518.)

188. If, in an action against a railroad company to recover damages alleged to be caused by a fire communicated by sparks from a locomotive, there is evidence tending to show that the fire was not the probable result of the ordinary working of the locomotive, and that the fire was communicated from the engine, this is sufficient evidence of negligence to go to a jury, and a nonsuit should not be granted. (*Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176.)

Cited 50 Cal. 581; 67 Cal. 519.

189. In an action to recover for damages caused by a fire alleged to have been occasioned through the negligence of a railroad company in allowing sparks to issue from a locomotive, and through its negligence in allowing dry grass to remain upon its right of way, an instruction that the plaintiff could not recover if the defendant was not negligent in allowing the sparks to escape, but which ignores all reference to its negligence in allowing the dry grass to remain on its right of way, is properly refused. (*Steele v. Pacific Coast Ry. Co.*, 74 Cal. 323.)

8. Lease of Road or Intrusting Management to Another, Effect of.

190. Where railroad company has leased its road and rolling-stock to another company, it remains liable, under sections 30 and 40 of the Railroad Act of May 20, 1861, for cattle killed by the trains of the lessee, on the unfenced portions of the lessor's railroad. (*Fontaine v. Southern Pac. R. R. Co.*, 54 Cal. 645.)

191. If a railroad company, whose road forms a junction with another road, intrusts a person employed and paid by such other road with the business of attending to its trains at such junction, the fact that he was employed by the other company does not release it for damages caused by his negligence. (*Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323.)

Cited 82 Cal. 81.

192. If a railroad company is sued for damages alleged to have been caused by the incompetency of its agent, the question should be left to the jury whether the company used all reasonable precautions to ascertain the agent's competency before employing him, but were nevertheless deceived by the fraudulent practices of the agent. (*Taylor v. Western Pac. R. R. Co.*, 45 Cal. 323.)

Covenant of to continue to operate road is personal. See Covenants, 36.

Street franchise, assignment, who can question. See Franchises, 22.

Consolidation of. See Corporations, 715.

Articles consolidating as evidence. See Evidence, 225.

Copy of articles of consolidation. See Evidence, 116.

9. Actions for Negligence.

a. Evidence.

193. In an action against a railroad company to recover damages for personal injuries alleged to have been caused by the negligence of an engineer in the management of a train

on the road of the defendant, the declarations of the engineer in explanation of the accident, made about five minutes after its occurrence, are not part of the *res gestæ*, and are inadmissible in evidence. (*Durkee v. Central Pac. R. R. Co.*, 69 Cal. 533.)
Cited 1 N. Dak. 164.

194. An offer of evidence that subsequent to the accident the railroad company placed an automatic bell at the crossing where the collision occurred is properly rejected. (*Hager v. Southern Pac. Co.*, 98 Cal. 309.)

In action for injuries to trespassers. See ante, VIII, 2.

Where one injured by backing train. See ante, VIII, 3.

In action for injuries at crossings. See ante, VIII, 5.

In action for injuries to animals. See ante, VIII, 6.

In action for injury from fire. See ante, VIII, 7.

Other fires, evidence of. See ante, VIII, 7.

Variance, what is not. See ante, 181.

Variance, evidence of negligence other than that alleged. See ante, 165.

Evidence of custom as to handling trains. See Common Carriers, 133.

h. Contributory Negligence, Generally; Care Required of and Towards Children; Standing in Dangerous Position.

195. Children driving and approaching a railway crossing are not bound to exercise more care than a prudent man would ordinarily exercise for his protection. (*Nehrbas v. Central Pac. R. R. Co.*, 62 Cal. 320, 336.)
Cited 63 Cal. 432.

196. That which would be but ordinary negligence as to a grown person may be gross negligence as respects a child. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447.)

197. A railroad company, if not aware of the position of danger of a person upon or near its track, owes such person no duty to take any particular precaution, and is not guilty of negligence if injury results from the running of its cars in the ordinary way; but if the danger is known to the employees of the company they are bound to use care, and if they discovered it in time to have stopped the train and to have avoided the accident they are guilty of negligence in failing to do so. (*Esrey v. Southern Pac. Co.*, 88 Cal. 399.)

198. A person standing within a space of three feet between a railroad track and a raised platform while a train passes, thinking that there was sufficient room to stand without being struck by the cars, and who is injured by the passing train, is guilty of contributory negligence, and cannot recover for the injuries so received, notwithstanding his dangerous position was seen by the employees of the railroad company, if the complaint does not charge and the evidence does not show that the negligence of the railroad company was willful or wanton. (*Esrey v. Southern Pac. Co.*, 88 Cal. 399.)

199. One is guilty of contributory negligence barring recovery where he stands beside a wharf thirteen inches from the outer

rail of a railway upon the wharf (which rail he has just crossed, and which is in his plain view), and who neither looks nor listens for the approach of trains, and in consequence is injured by the running of a train in the ordinary way. (*Trouclair v. Pacific Coast Steamship Co.*, 80 Cal. 521.)

200. When the plaintiff's own negligence is the proximate cause of damage to his person, by reason of his placing himself between two railroad tracks, at a place where he ought not to have been in the proper performance of his duty as an employee of the railroad company, and with his back toward an approaching train, which strikes him, he cannot recover on account of the negligence of the company in displaying no light upon the train, or in not complying with the precautions required by a municipal ordinance. (*Ryall v. Central Pac. R. R. Co.*, 76 Cal. 474.)

Trespassing on track. See ante, VIII, 2.

Where person injured by sudden backing of train in street, what is not contributory negligence. See ante, VIII, 3.

Leaving horses unhitched near railroad. See ante, VIII, 4.

Contributory negligence of traveler at crossing. See ante, VIII, 5.

Contributory negligence in action for injuries to animals. See ante, VIII, 6.

Farmer leaving grass and stubble standing. See ante, 179.

IX. Railroad Commission; Commissioner of Transportation.

201. Section 22 of article XII of the constitution, providing for a railroad commission for the control of railroad corporations and transportation companies, should be construed to extend the supervision of the commission to all persons engaged in the business of transportation, whether as corporations, joint stock companies, partnerships, or individuals, and so it has been construed by legislative enactment. (*Moran v. Ross*, 79 Cal. 159.)

202. Section 9 of the act of April 1, 1878, entitled, "An act to create the office of commissioner of transportation," etc., is not repealed by the act of April 15, 1880, entitled, "An act to organize and define the powers of the board of railroad commissioners." (*Dyer v. County of Placer*, 90 Cal. 276.)

Mandamus to compel railroad to give information. See Mandamus, 55.

X. Street Railways.

1. Power to Grant Franchise; Validity of; Roads Using Same Streets.

203. Legislature has right to delegate to municipal boards the power and discretion to say whether a railroad shall be laid in the streets, and, if so, where and under what conditions, and it has granted authority to construct a railroad on any highway or street subject to the conditions that the consent of two-thirds of the members of the council or board must be obtained before any street or avenue of an incorporated city or town can be taken for such purpose. (*Town of Arcata v. Arcata etc. R. R. Co.*, 92 Cal. 639.)

204. When an application for a franchise was referred to a committee of two, and upon their favorable report the franchise was granted, the fact that one of the committee was a subscriber to the stock of the company for whose benefit the franchise was granted renders the franchise void. (*Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597.)

205. Under section 499 of the Civil Code, in no case may a street be occupied by two railroads, whether belonging to corporations or private persons, for a distance of more than five blocks; and an ordinance permitting is void. (*People v. Rich*, 54 Cal. 74.) Cited 57 Cal. 169.

206. The act of 1870 (Stats. 1869-70, p. 786), granting to city councils the power to authorize street railroads to be laid down in streets in a city, does not prohibit such councils, when there is one railroad track in a street, from granting the right to construct another in the same street. (*Oakland R. R. Co. v. Oakland etc. R. R. Co.*, 45 Cal. 365.) Distinguished 54 Cal. 75.

207. The defendants were granted a right of way for a street railroad over a portion of Montgomery avenue in San Francisco, and the plaintiff was granted a similar right of way for more than five blocks over the same portion of the street. Held, that, under the provisions of section 499 of the Civil Code, the grant to the plaintiff was void. (*Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160.) Cited 83 Cal. 414; 91 Cal. 44.

208. McKinsty, J., concurring, was of the opinion that the act of April 1, 1872, was violative of section 31, article IV, of the old constitution, as judicially construed in cases of *San Francisco v. Spring Valley Water Works*, 48 Cal. 493, and *Waterloo Turnpike Co. v. Cole*, 51 Cal. 381, and therefore, under the settled law of this state, void. (*Omnibus R. R. Co. v. Baldwin*, 57 Cal. 169.)

209. Thornton, J., dissenting, was of the opinion that, conceding the seventeenth section of the act of 1872 to be void, nevertheless the track of the plaintiffs was rightly in place. (*Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160.)

210. Section 499 of the Civil Code, permitting two lines of street railway, operated under different managements, to use the same street for a distance of not more than five blocks consecutively, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly, is controlling as to the amount of compensation to be given in such case, and must prevail, in reference to street railroads, over the general provisions of the code respecting the assessment of compensation and damages in case of the intersection of one railroad by another. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

211. A court which, through its receiver, has the custody and control of an insolvent street railway company's property has the power to determine what is the amount of one-half of the cost of the construction of the tracks and appurtenances which would be occasioned by its track being intersected and used by another street railway company. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

212. There is no occasion to exercise the right of eminent domain to determine the amount of such cost, and there is no private property to be taken for public use. The street railway company has no proprietary interest in the street, and no exclusive right to its use; and its franchise having been taken with the understanding that another company might be authorized to use the track jointly with itself as fully as if that condition had been expressly stated in the grant, it is estopped from claiming that the taking is without its consent and must be made under the right of eminent domain. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

213. A grant of a franchise to a street railway company is for the purpose of facilitating and not of abridging the public use of the street; and the granting of a subsequent franchise to another company to connect with the track of the former company, and use the same in accordance with the provisions of the statute, is not a taking of the property of the former company for a higher or different purpose than that to which it had already been devoted. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

Street act exempting railroad from operation of general law is void. See Constitutional Law, 491.

Invalid ordinance granting franchise, ratification of. See Ordinances, 66, 67.

2. Revocation of Grant.

214. An order of the board of trustees of a municipality granting a railroad company the right to lay and maintain a side track upon certain streets of the municipality, but containing no conditions as to the time within which the work was to be commenced or completed, is not a mere license revocable at the pleasure of the board. (*Town of Arcata v. Arcata etc. R. R. Co.*, 92 Cal. 639.)

215. After the company had acted upon the terms of the order and expended money in the construction of the side track, the board could not rescind or recall the privilege it had granted, unless the company failed to comply with the terms or conditions of the grant. (*Town of Arcata v. Arcata etc. R. R. Co.*, 92 Cal. 639.)

3. Usurpation of Franchise; Contract Based on Agreement not to Contest Right.

216. If one street railroad company is occupying or using a street without proper license to do so, it is no concern of another railroad company having a railroad on the same street, but must be inquired into by proceedings on behalf of the public. (*Market St. R. R. Co. v. Central Ry. Co.*, 51 Cal. 583.) Cited 57 Cal. 179.

217. A complaint in an action upon a written obligation for the payment of money, which alleges that the obligation was given by the defendant, an electric street railroad company, to repay the plaintiff and other property owners for paving the street, in consideration that the plaintiff would not take any steps to prevent the electric company from tearing up the paving and laying its tracks, and which also alleges facts showing

that the franchise of the company is void, having been granted by the city council without power, and that the plaintiff and other property owners could and would have prevented the defendant from laying its tracks on the street but for the promise to pay, shows a want of consideration for the promise, and states no cause of action. (*Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311.)

218. A track laid and poles erected in the street without authority constitute an illegal obstruction, or public nuisance; and where no fact is averred to show special damage to the plaintiff by the obstruction, an agreement not to prevent it is an agreement not to institute a public prosecution, which is against public policy and void, and cannot constitute a consideration or a promise to pay money for not preventing it. (*Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311.)

4. Construction of Road.

a. Manner of Construction.

219. The tracks of a street-car company should be laid as nearly as practicable in the middle of the street. If the franchise does not indicate the precise position of the track, and it is not nearly as practicable to the middle of the street, the track is an unauthorized obstruction, and the owner of the fee of the street may maintain ejectment against the company. (*Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597.)

220. The mere fact that it is more convenient to the traveling public to have the track on the side of the street, and that it obstructs travel a little less than it would do in the center of the street is not a sufficient reason for not complying with the law. (*Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597.)

Right of railroad to cross track of another railroad. See post, 243.

Implied right to build bridge. See ante, VI.

Power of cable company to build stationary engine. See ante, VI.

b. Right of Adjoining Owner to Enjoin or for Damages; Turnouts and Switches.

221. The owner of land bordering on a public street, but not including any portion of the street, cannot enjoin the obstruction of the street by a railroad, unless the injury to him will be different in character, and not merely greater in degree, than that which the general public will suffer. (*Crowley v. Davis*, 63 Cal. 460.)

Cited 71 Cal. 87; 76 Cal. 513.

Enjoining interference with land by railroad company. See post, X, 5.

222. Dedication of street to public use authorizes any ordinary use for street purposes; and the use of a street for the tracks of a street-car company is of this class, and may be authorized by the city authorities, without compensation to the owner of the fee of the street. (*Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597.)

223. If the owner of lots fronting on a street in a city does not own the street in front of his lots subject to a public easement,

he cannot maintain an action for damages for building a railroad on the street, except for special damages by reason of a nuisance caused by the obstruction of a public street. (*Severy v. Central Pac. R. R. Co.*, 51 Cal. 194.)

Cited 71 Cal. 86.

224. The legislature may grant the right to lay down and construct a railroad upon public streets without providing for compensation for the damage to the owners of property along the line of such street, provided the owners of the property along the line of the streets are not the owners of the contiguous land *usque ad flum. vis.* (*Carson v. Central R. R. Co.*, 35 Cal. 325.)

225. The mere consequential disadvantage of a street railroad to a particular locality, and its consequential detriment to property along its line, cannot be the subject of a private action, and such injury must be regarded as *damnum absque injuria*. (*Carson v. Central R. R. Co.*, 35 Cal. 325.)

226. Where a street railroad company is authorized by law to build necessary switches and turnouts, and constructs them, a plaintiff who sues to abate a turnout as a nuisance cannot introduce evidence of the damage he has sustained, until he has first introduced evidence tending to show that the switch and turnout are not necessary. (*Carson v. Central R. R. Co.*, 35 Cal. 325.)

227. In an action to recover damages caused by the construction of defendants' roadbed in the street in front of the plaintiff's lot, it appeared that the track of the defendant was laid through the street by the consent and permission of the town authorities, but that in front of the plaintiff's lot it was elevated considerably above the street, and ingress and egress to the plaintiff's lot was much impeded thereby. Held, that the plaintiff was entitled to recover the damages sustained by him prior to the commencement of the suit. (*Ford v. Santa Cruz R. R. Co.*, 59 Cal. 290.) Cited 86 Cal. 421; 89 Cal. 629.

228. A judgment for damages to an abutting lot, caused by the construction of a railway along the street, is a bar to an action for damages to another abutting lot, owned by the same party, two hundred and sixty feet distant from the first lot, arising from the same cause, and accruing at the same time, and prior to the filing of the complaint in the first action; nor is he entitled to recover for the continued operation of the railroad after the judgment in the former action, where the evidence shows no damage accruing after that date. (*Beronio v. Southern Pac. R. R. Co.*, 86 Cal. 415.)

Compensation where an adjoining owner owns fee. See ante, 90.

229. If an act of legislature grants the right to build a street railroad with the proper and necessary switches and turnouts, and a turnout and short sidetrack are made from the main track towards and along the sidewalk, upon which the cars run for the purpose of standing until other cars pass and stop to allow passengers to make an exchange of cars, this is a switch and turnout within the meaning of the act, and the presumption

is that it is a proper and necessary turnout. (Carson v. Central R. R. Co., 35 Cal. 325.)

230. If an act of the legislature authorizes the laying down in a public street of a railroad, a switch, turnout, and sidetrack, the laying down of the switch, turnout and sidetrack and the use of it is the exercise of a lawful right, from which no liability for damage for consequential injury arises, unless there is some misconduct or negligence. (Carson v. Central R. R. Co., 35 Cal. 325.) Cited 87 Cal. 139.

231. When a company is authorized by law to construct a railroad in a public street, and necessary switches and turnouts, and the road is built having switches and turnouts, the presumption of law is, that the switches and turnouts are necessary, and one complaining that they are a nuisance has cast upon him the burden of proving that they are so. (Carson v. Central R. R. Co., 35 Cal. 325.)

Compensation where street taken for railroad. See Eminent Domain, X, 3.

c Time to Commence and Complete Work*

232. Section 502 of the Civil Code does not declare that a failure to comply with the provision which requires work to be commenced within one year shall work a forfeiture; but that a failure to comply with that, and also with the provision which requires the work to be completed within three years, shall have such effect. (Omnibus R. R. Co. v. Baldwin, 57 Cal. 160.)

233. The provisions of section 502 of the Civil Code required that the work therein referred to should be commenced in good faith within one year from the date of the ordinance granting the right of way, and should be prosecuted with due diligence to completion within three years. The defendant had failed to comply with the first of these conditions, and his franchise was therefore forfeited. Ross, J., dissenting. (Omnibus R. R. Co. v. Baldwin, 57 Cal. 160.)

234. Under section 502 of the Civil Code the period of three years within which a street railway must be completed begins from the date of the commencement of the work, and not from the date of the ordinance granting the right of way; and at any time before the expiration of that time the grantee of the franchise may, with the consent of the authorities granting the right of way, abandon the uncompleted portion. (People ex rel. Sabichi v. Los Angeles Electric Ry. Co., 91 Cal. 338.)

235. If a franchise is granted by the legislature to construct a street railroad within a certain time, with a condition, that if the provisions of the act are not complied with the franchise shall be forfeited, a failure to lay the track within the time limited works a forfeiture of the right to lay the same without a judgment at the suit of the state declaring a forfeiture, and the legislature may confer the franchise upon any other company or person. (Oakland R. R. Co. v. Oakland etc. R. R. Co., 45 Cal. 365.)

236. Where a statute expressly provides that a failure to complete a contemplated

work within a certain time shall work a forfeiture, no action is necessary to enforce the forfeiture, but upon the happening of the event which is the statutory basis of forfeiture, the title to the thing forfeited immediately vests in the state; yet where the forfeiture is not expressly declared by statute, a judicial declaration of forfeiture, in a suit instituted for that purpose, is necessary to divest the title of the owner. (Town of Arcata v. Arcata etc. R. R. Co., 92 Cal. 639.)

237. Where the board of trustees of a municipality, without expressed conditions, granted to a railroad company the right to lay and maintain a sidetrack upon certain streets, even if the principle is applicable that the grantees must signify their acceptance by commencing the work within a reasonable time, and prosecuting it to completion with ordinary diligence, yet, in the absence of a statutory provision or municipal ordinance or order declaring a forfeiture for failure to complete the work within a reasonable time, the right of the company to the use of the street can be terminated only by a judgment of forfeiture in an action commenced directly for that purpose, and cannot be considered in an action of ejectment. (Town of Arcata v. Arcata etc. R. R. Co., 92 Cal. 639.)

238. Section 468 of the Civil Code, providing that a railroad corporation must begin the construction of its road within two years after filing its articles of incorporation, and must every year thereafter build and operate at least five miles of its road, until the road is fully completed, and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited, applies to the main road provided for in the company's articles of incorporation, and not to a switch or sidetrack which the company may find necessary for the proper conduct of business and the convenience of the public after the road has been put in operation. (Town of Arcata v. Arcata etc. R. R. Co., 92 Cal. 639.)

Failure to complete in time, effect on liability of one agreeing to pay on completion. See post, X, 6.

5. Contracts of Adjoining Owners to Pay Sums on Completion; Rights Arising From.

239. If property holders along the line of a street contract with a street railroad company to pay it certain sums of money if, within a certain time, it constructs a railroad along the street, the fact that the road is not built within the time is not an excuse for the non-payment of the money, if the road is actually built; but the subscribers may recoup the damage they sustain by the failure to complete in time. (Front Street etc. R. R. Co. v. Butler, 50 Cal. 574.) Cited 85 Cal. 327.

240. Where a contractor for the construction of a street railway agreed with the owners of land along the route that the road should be constructed and put in operation from the center of the city to a point near its northern boundary, by the time of the maturity of the notes or donations made conditional for the

construction of the road between the points agreed, and such railway was constructed across the land of plaintiff, but never completed to the center of the city, and the railway company, for which the contractor acted as agent, and the contractor assigned all their rights to another corporation, which expressly assumed to perform the condition as to the completion of the road, except as to time, whereupon the note of plaintiff was paid, and such second corporation assigned its rights to a third corporation, which also assumed the same obligations, after which the three corporations were consolidated under the name of such third corporation, and excavations and embankments were made upon plaintiff's land, the filling up and removal of which would cost six thousand dollars, the plaintiff is entitled to a decree enjoining the consolidated corporation from entering upon or interfering with the land, and is also entitled to recover from them the sum of six thousand dollars damages for the breach of the contract to complete the road. (*Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210.)

241. The detriment caused to plaintiff's land by the excavations and embankments made thereupon in the construction of the road across it was proximately and efficiently caused by the refusal of the defendant to construct its road to the center of the city as agreed, so as to make a harmonious whole of its line, whereby plaintiff would have been compensated by the increased value of his land for such detriment; and he is entitled to recover for such detriment, where it appears that the total damage to his land exceeded the costs of filling up and removal of such excavations and embankments. (*Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210.)

242. The difference between the value of the land with the contract consummated, and its value with the same contract broken, is the true criterion of damage for breach of the contract to construct the street railway as agreed. (*Smith v. Los Angeles etc. Ry. Co.*, 98 Cal. 210.)

6. Management of.

a. Duty as to Care; Liability for Negligence; Rights of Public.

243. Maintenance of a horse railroad on the streets of a city is a mere special mode of using the street, and does not exclude the public from the use of the street, nor prevent the crossing of its track by another railroad, provided the crossing is effected with as little damage as may be. (*Market Street R. R. Co. v. Central Ry. Co.*, 51 Cal. 583.) Cited 91 Cal. 453.

244. Defendants were owners of a private railroad, constructed by them, and run with machinery under a license from the city councils, through certain streets of San Francisco. The plaintiff claimed damages for injuries done to himself, his horse and wagon, in a collision with the railroad cars, charging the defendants with negligence. Held, that where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is

bound, in the exercise of such right, to use extraordinary care. (*Wilson v. Cunningham*, 3 Cal. 241.)

245. It is duty of driver of street-car to observe what is in the road before him, so as to avoid inflicting injury upon others, if practicable, and he is guilty of negligence if he omits, without apparent excuse, to look ahead and observe whether or not the track is clear. (*Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 179.)

Cited 97 Cal. 566.

246. While a street railroad company has a right to run its cars on a public street, yet the public have also a right to travel on the street, and the railroad company must exercise such care and precaution, for the purpose of avoiding accidents and endangering property or person, as a reasonable prudence would suggest. (*Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414.)

Cited 97 Cal. 566.

247. A street railroad company has only an equal right with the traveling public to the use of the street where its track is laid, with a few exceptions, such as, that the cars run on a track, and when a vehicle meets a car it must give way. (*Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414.)

248. The fact that the street is made for travel does not justify a trespass upon the person of one who is there for other purposes. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447.)

249. The owners of street railroads are to be held to due care in the management of their lines; and if they exercise such care, they are not responsible to a pedestrian who, in a careless, reckless, or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it. (*Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553.)

250. The persons in charge of a street-car, upon a clear track, where there is no negligence on their part, have a right to assume that people will not suddenly cross in front of it. (*Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553.)

251. Where a pedestrian was struck by a street-car and killed at a street crossing, the failure of the person in charge of the car to keep its bell ringing from a point twenty-five feet from the crossing until the crossing was passed, as required by the terms of a city ordinance, is negligence, both as being in violation of a reasonable ordinance, and as being in itself, under the circumstances, careless. (*Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553.)

252. It is no excuse for neglect to ring the bell while passing a street crossing that the gripman could not ring it because his hands were otherwise engaged, and that the conductor was temporarily absent from his post. (*Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553.)

253. Where the street railroad company was in default for not giving the proper warning, the question whether the deceased was guilty of contributory negligence in passing the

street crossing, and whether his negligence was the proximate cause of the injury, is one of fact for the jury; and where there is a conflict of evidence as to the actual conduct of the deceased, and the circumstances under which he acted, at the time of the accident, and there is sufficient evidence to warrant the jury in finding that deceased was not negligent, a verdict against the street railroad company will not be disturbed upon appeal. (*Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553.)

254. A pedestrian in crossing the track of a street railroad is only bound to use ordinary care, or that degree of care which people of ordinarily prudent habits could be reasonably expected to exercise under the circumstances of the case. (*Driscoll v. Market Street Cable Ry. Co.*, 97 Cal. 553.)

255. A person is entitled to walk on a street railroad track in a public street, using reasonable care and prudence to avoid injuries; but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company, and if he is injured by the carelessness of the company while walking on the track, the fact that he might have walked by the side of the track is not contributory negligence on his part. (*Shea v. Potrero etc. R. R. Co.*, 44 Cal. 414.)

Cited 93 Cal. 184.

256. It is not negligence per se for the driver of a patrol wagon to drive along and upon a street-car track, so long as he uses ordinary care to avoid a collision with the cars on the track, and it is a question for the jury whether he has used such ordinary care. (*Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 179.)

257. It is proper to instruct the jury that if, by reason of inattention, carelessness, or incompetency, the driver of a street-car fails to avoid a collision with a wagon upon the track, the street-car company is responsible for an injury thereby occasioned to the occupant of the wagon, if there is no contributory negligence upon the part of the occupant or the driver of the wagon. (*Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 179.)

258. On an action for damages, for injury, caused by defendant's street-cars, an allegation by plaintiff that defendant had no lawful right to lay its tracks, or run its cars on that portion of the street where the injury was done, is not irrelevant or immaterial. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447.)

259. In a suit against the owner of a railroad for negligence in its operation, the defendant is not injured by an instruction that it makes a sufficient prima facie case against the defendant to show that he was the owner of the railroad, without proving affirmatively that the persons in charge were his servants or employees. It is not necessary for the plaintiff to show that the owner had not leased the railroad, or had not in some other way given the entire management of it to another person. (*Davis v. Button*, 78 Cal. 247.)

260. Evidence that it was custom of inhabitants of a locality to allow boys to play

in the street does not tend to prove that such use of the street is lawful. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447.)

261. Evidence to prove that cars of another company were driven down same grade at less speed than the cars of defendant is inadmissible. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447.)

262. The action was for damages for killing a child by running over it with a dummy engine of the defendant. The court instructed the jury that "the verdict must be for the defendant, unless the evidence establishes that the death of the child was caused by want of ordinary care on the part of the agent of the defendant in the management of the dummy and car, and that the person in whose care the child was placed when the parents left the house took all proper precautions for its safety." Held, that the instruction was proper. (*Roller v. Sutter Street R. R. Co.*, 66 Cal. 230.)

263. A statement in an instruction to the jury that street-cars are easily and readily stopped, being the statement of a fact of common knowledge which the jury might properly consider without any other evidence of its existence, is not prejudicial to the defendant. (*Swain v. Fourteenth Street R. R. Co.*, 93 Cal. 179.)

Turntable, leaving unguarded or unfattended. See Negligence, III, 2.

Street-cars, collision of, action for. See Negligence, 55.

b. Failure to Run Cars.

264. The performance by a street railway company of its contract to run regular trains each day for a period of ten years, under penalty of forfeiting an extension of its road, to be conveyed upon demand, is not excused because of the bringing of a suit by a mortgagee to foreclose a mortgage upon a street railway, and the appointment of a receiver to take possession thereof, who failed and ceased to operate the road, the street railway company being enjoined from interfering with the possession and control of the road. (*Klauber v. San Diego Street-car Co.*, 95 Cal. 353.)

265. The obligor contracts that he can and will control the acts of third parties so far as necessary to enable him to perform his contract. (*Klauber v. San Diego Street-car Co.*, 95 Cal. 353.)

7. Railroad as Property; Repairing Street; Liability for Street Assessment.

266. The interest in the street of a street railroad company, authorized by statute to lay down a track in the streets of a city and run cars over it for the conveyance of passengers for hire, is an easement in the land; and the estate of such company in the street is real property. (*Appeal of North Beach etc. R. R. Co.*, 32 Cal. 499.)

Cited 48 Cal. 534; 60 Cal. 34; 80 Cal. 341; 90 Cal. 631; 5 Mont. 158, 167.

267. The estate of a street railroad company in the streets of the city is property capable of being enhanced in value by the widening of the street, and by such widening a sub-

stantial benefit may accrue to the railroad company. (Appeal of North Beach etc. R. R. Co., 32 Cal. 499.)

238. The acceptance by a street railroad company of its franchise, granted by a city under the authority of an ordinance providing that when any part of the street over which the road should run should be ordered improved or reImproved the railroad company should be held for the payment of its pro rata share of the cost thereof, the cost to be assessed and collected in the same manner as other street assessments, and to be a lien upon its roadbed, rolling-stock, and franchise, is equivalent to an express agreement by the company to pay its proportion of the cost of whatever improvement of the street the city should order, whether ordered under its then existing charter or under a subsequent act of the legislature authorizing such improvements, and the cost of the same may be collected, in the manner provided for the collection of other street assessments, at the time of the improvement. (Schmidt v. Market Street etc. R. R. Co., 90 Cal. 37.)

269. Under the provisions of such ordinance, the liability of the street railroad company is not limited to payment to the city for improvement, but it may be held liable to the person entitled to make the collection; and if the manner of collecting other street assessments is by a suit brought by the contractor in his own name to recover an assessment, that mode may be pursued against the street railroad company. (Schmidt v. Market Street etc. R. R. Co., 90 Cal. 37.)

270. Street railroads in San Francisco are only required to repair that part of the street lying between the rails along which the cars run and between which the horses travel. They are not required to repair the street lying between a double track. (Robbins v. Omnibus R. R. Co., 32 Cal. 472.)

Street assessment, effect on of railroad bound to repair. See Streets, XVI, 14.

Provision as to in contract relating to street improvements. See Streets, XIV, 7.

Title to portion of street taken for railroad. See Eminent Domain, 143.

Taxation of. See Taxation, 146, 147.

RAMIE.

Act to encourage cultivation is unconstitutional. See Constitutional Law, 164.

RAPE.

See Criminal Law, XXI, 49.

RATES.

Tolls, fixing rate of. See Turnpike Companies, VII.

Water rates. See Water Companies, III.

Interest, rate of. See Interest.

Tax rate. See Taxation, VII.

Tax rate, power of board of equalization to fix. See Taxation, VI, 2.

RATIFICATION.

Agents' acts. See Agency, III, 7.

Must be with knowledge. See Agency, III, 7, b; Election; Ordinances, 68.

Acts of officers of corporations. See Corporations, VI, 8, d, C.

Notes or mortgages of directors of corporation, ratification of. See Turnpike Companies, IV.

Unauthorized expenditure of treasurer. See Corporations, VIII, 3.

Creation of debt beyond capital stock, ratification of. See Corporations, X, 3.

Ratification of claims by corporation binds assignee in insolvency. See Bankruptcy and Insolvency, IX, 3.

Issuance of execution by sureties, ratification by principal. See Executions, I, 4.

Confirmation of void deed. See Deeds, VII, 4.

Superintendent of mining corporation, ratification of acts of. See Partnership, 69.

Acts or contracts of officers, ratification of. See Offices and Officers, IX.

Municipality, ratification of contracts by. See Municipal Corporations, XI, 8.

Invalid ordinance, ratification of. See Ordinances, IV, 5.

Act ratifying ordinance. See San Francisco, XIV, 7, b.

By appropriation of proceeds. See Ordinances, 72.

Application of payment by creditor, ratification of. See Payment, 71.

Unauthorized acts of bailee, ratification of. See Bailments, 16.

Pledge by one not owner, ratification of. See Pledges, V.

Acts of partner, ratification of. See Partnership, IX, 1.

Void contract, ratification of. See Supervisors, 42.

Will, ratification of title by. See Wills, 220.

REAL COVENANTS.

See Covenants, II: Landlord and Tenant, IV, 6.

REAL ESTATE AGENTS.

See Agency.

Liability for deposit. See Agency, VI, 1.

Oral agreement to share commissions. See Statute of Frauds, 2.

Contracts for services on commission. See Statute of Frauds, I, 3.

Commissions, fraud of agent. See Rescission of Contracts, 13, 15.

Rights as against one another. See Agency, VIII.

REAL PROPERTY.

Buildings. See Buildings.

Fixtures. See Fixtures.

Ditch, whether real estate. See Watercourses, XII, 1.

Interest in ditch and water right is interest in realty. See Statute of Frauds, 74.

Flume is realty. See Mortgages, 251.

Gold mine is real estate. See Statute of Frauds, 65.

Mining claim is. See Mines and Mining, 255.

Action concerning, what is. See Jurisdiction, 69, 70.

Severance of property from realty, effect of. See Mortgages, 369, et seq.

State can regulate tenure of. See Quieting Title, 125.

Right of turnpike company to hold. See Turnpike Companies, V.

Corporation, power to hold. See Corporations, VI, 2.

Gift may be made of. See Gifts, 4.

License to enter upon or use. See Licenses, I.

Contracts relating to, necessity of writing. See Statute of Frauds, I, 10.

Mode of selling on execution. See Executions, IX, 4.

Municipality, sale of land by. See Municipal Corporations, XII.

Partnership to deal in. See Partnership, V. Partners, conveyances of land to. See Partnership, IX, 7.

Partner, power of to convey. See Partnership, IX, 4.

Waste. See Waste.

Lands and interests therein, taxation of. See Taxation, IV, 5.

Real property, how attached. See Attachments, IV, 2.

Lien, how only created on. See Liens, 1, 2.

Action to recover. See Ejectment.

Partition of. See Partition.

Venue of actions relating to. See Venue.

Jurisdiction of district courts over actions concerning. See Jurisdiction, XI, 1, d.

Trespass to, jurisdiction over. See Justices of the Peace, IV, 5, b.

Limitation of actions in relation to. See Statute of Limitations, VI, 3.

REASONABLE DOUBT.

See Criminal Law, XVIII, 14, c.

Insanity, reasonable doubt. See Insanity, II, 2.

RECEIPTS.

Release. See Release.

Receiver's receipt. See Public Lands, IX, 4. Warehousemen. See Warehousemen.

1. The admission in a receipt that the property is attached or levied upon as the property of the debtor, and the promise of the owner to deliver it to the officer, constitute prima facie evidence of ownership in the debtor; and unless overcome by proof on the part of the claimant, must be decisive against him. (*Bleven v. Freer*, 10 Cal. 172.)

2. To overcome this prima facie ownership in the debtor, the receptor must prove two things: (1) That he claimed the property; (2) that it was in fact his own. (*Bleven v. Freer*, 10 Cal. 172.)

As evidence. See Fraudulent Conveyances, 244; Mines and Mining, 284; Suretyship, 81.

3. A receipt is not conclusive. (*Simmons v. Oullahan*, 75 Cal. 508.)

4. A receipt acknowledging payment of a debt, whether in money or some other medium, may be explained or contradicted by parol. (*Hawley v. Bader*, 15 Cal. 44.) Cited 23 Cal. 274.

5. A receipt in a broker's contract for the sale of stock, acknowledging the receipt of the first payment or the margin on the contract, is only prima facie evidence of the pay-

ment of the money, and may be explained by parol testimony. (*Winans v. Hassey*, 48 Cal. 635.)

Cited 79 Cal. 60.

6. A receipt is always open to explanations, and the purpose for which it was given may be shown. Receipts shown to have been given by a bookkeeper of the defendant as mere memoranda or vouchers, to be used as such by a third party who was dealing with the plaintiff, and to have been given in the name of the plaintiff instead of such third party, with the knowledge, authority, consent, or subsequent ratification of the defendants, cannot charge the defendants with liability for money received of plaintiff, on the admissions appearing upon the face of the receipts. (*Comptoir d'Escompte de Paris v. Dresbach*, 78 Cal. 15.)

In suit on an account, against B. & S. as a firm, a receipt to B. alone, signed by plaintiffs, "in full for acct's and demands due us at this date," was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on. Held, that the parol proof was admissible; that the term "all accounts" may be shown to cover firm as well as personal indebtedness. (*Hawley v. Bader*, 15 Cal. 44.)

8. Parol evidence is admissible to show that a receipt of money which recited that it was given on a contract of purchase was in fact given for money received as rent. (*Snodgrass v. Parks*, 79 Cal. 55.)

Conclusiveness of. See Master and Servant, 157, 158.

Estoppel by. See Estoppel, V, 2; Treasurers, 3.

Payment, evidence of usage to explain. See Usages, 7.

9. Receipts executed by third party, acknowledging payment of money, are but secondary evidence, as the party executing them is a competent witness to prove the payments, or any other person who saw the payments made. (*Ford v. Smith*, 5 Cal. 314.)

Payment by note, effect of receipt of payment in full. See Payment, 17.

Declaration of trust, receipt is not, when. See Trusts and Trustees, 4.

Recitals in. See Mechanics' Liens, 418, 419.

Lost, evidence of. See Evidence, 55.

Unauthorized use of. See Mechanics' Liens, 419.

Limitation of actions on receipts. See Statute of Limitations, VI, 4, h.

RECEIVERS.

I. Appointment of.

II. Powers, Duties, and Liabilities of; Property in Hands of.

III. Discharge of; New Trial or Appeal, Effect of; Compensation of Attorney.

I. Appointment of.

1. Courts of equity have power to appoint receivers. (*Ex parte Cohen*, 5 Cal. 494.) Cited 85 Cal. 36.

2. Court commissioner has no jurisdiction

to appoint receiver, and a bond given by a receiver so appointed is void. (Quiggle v. Trumbo, 56 Cal. 626.)

3. Subdivision 6 of section 564 of the Code of Civil Procedure is but declaratory of the equity jurisdiction conferred upon the district courts by the former constitution, in giving them jurisdiction of "all cases in equity," and includes only the suits in which it has been the usage of courts of equity to appoint a receiver; their jurisdiction in this respect would have been the same in the absence of the statutory provision. (Bateman v. Superior Court, 54 Cal. 285.)

4. Appointment of receiver rests in sound discretion of court upon a view of all the facts; one of which is that the party asking the appointment should make out a *prima facie* case. (Copper Hill Min. Co. v. Spencer (No. 1), 25 Cal. 11.)

5. If notice is given of application for injunction, and the petition prays for an injunction, the judge, on the hearing, may appoint a receiver, if the facts make out a proper case for a receiver and no objection is made on the ground of want of notice of the application. (Whitney v. Buckman, 26 Cal. 447.)

6. A receiver may be appointed in an insolvency proceeding (as well as in ordinary cases) by the judge at chambers upon an *ex parte* application. (Real Estate Associates v. Superior Court of the City and County of San Francisco, 60 Cal. 223.)

7. Purchaser at judicial sale of mining claim may, where judgment debtor remains in possession working claims, and is insolvent, have a receiver appointed to take charge of the proceeds during the period allowed by statute for redemption. (Hill v. Taylor, 22 Cal. 191.)
Cited 71 Cal. 596.

8. When allegations of bill are general in their nature, and equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver—the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally competent to manage the business. (Williamson v. Monroe, 3 Cal. 383.)
Cited 64 Cal. 623.

9. A suit for partition is an equity proceeding. It is therefore competent for the court in such actions, in some cases, to grant a receiver; and whether, in a particular case, the power of the court has been properly exercised cannot be determined upon certiorari. (Goodale v. Fifteenth District Court, 56 Cal. 26; Shimmings v. Fifteenth District Court, 57 Cal. 148.)

10. A suit for partition is a special proceeding, and not a case in equity, and the court below has no jurisdiction to appoint a receiver. Sharpstein, J., dissenting. (Goodale v. Fifteenth District Court, 56 Cal. 26.)

11. Whether the superior court has power to appoint a receiver in an action for partition, in the absence of facts of equitable nature, superadded to the facts justifying partition, or whether the absence of such

facts does not affect its jurisdiction to appoint a receiver, discussed, but not decided. (Woodward v. Superior Court, 95 Cal. 272.)

Appointment of on partition of growing crop. See Partition, 90.

12. An order appointing a receiver in a foreclosure suit, in so far as it confers the right to occupy or mine in land not included in the mortgage or trust deed sought to be foreclosed, is to that extent in excess of the jurisdiction of the court, and void. (Staples v. May, 87 Cal. 178.)

13. Section 564 of the Code of Civil Procedure authorizes the appointment of a receiver in an action to foreclose a mortgage, where it appears that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt. (Société Française v. Selheimer, 57 Cal. 623.)

Foreclosure, receivers in. See Mortgages, XIX, 13.

Mortgaged property, power to appoint receiver. See Mortgages, 367.

Where mortgage is by railroad. See post, 17.

14. The general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against the corporation by a private person, but such power, if it exist at all, must be derived from a statute conferring it upon the court. (French Bank Case, 53 Cal. 495.)
Cited 54 Cal. 288; 97 Cal. 350; 10 Cal. 473.

15. Section 564 of the Code of Civil Procedure does not confer it. (French Bank Case, 53 Cal. 495.)

Railroad, appointment of receiver on failure to pay interest on bonds. See Railroads, 106.

16. An action against a railroad company upon unsecured promissory notes of the company is essentially an action at law, and is not changed into a suit in equity, in which a receiver may be appointed, merely because the complaint contains allegations to the effect that the company is insolvent, and that other creditors are threatening to sue it, and that it has no property out of which the plaintiff will be able to satisfy any judgment it may obtain, and that the action is brought in behalf of the plaintiff and all other creditors of the company who are willing to come in as plaintiffs. (Smith v. Superior Court of Los Angeles County, 97 Cal. 348.)

Dissolution of corporation, receiver on. See Corporations, XII, 4, d.

17. Sacramento and Placerville Railroad Company executed a mortgage or deed of trust upon its property to two trustees, to secure the payment of the principal and interest of certain bonds, and it was provided that upon the default in the payment of the principal of the bonds or upon default for one year in the payment of the interest, the trustees should take possession of the property, and apply the net income to the payment of the principal and interest of the bonds. Default having been made, an action was brought by the surviving trustee to enforce the lien and trust, and to obtain posses-

sion of the property, and a receiver was appointed. Held, upon an application of the successor in interest of the mortgagor for a writ of prohibition, that the case came within the provisions of subdivision 6, section 564, of the Code of Civil Procedure, and that the court had jurisdiction to make the order. (*Sacramento etc. R. R. Co. v. Superior Court of San Francisco*, 55 Cal. 453.) Cited 85 Cal. 36.

18. Under the Code of Civil Procedure the district court had no jurisdiction to appoint a receiver in an action of ejectment; and an order making such appointment should be annulled. (*Bateman v. Superior Court*, 54 Cal. 285, cited 67 Cal. 76; *Scott v. Sierra Lumber Co.*, 67 Cal. 71, 76.)

19. After verdict and judgment for plaintiff, in an action to recover possession of real estate, and while a motion for a new trial is pending, a receiver of the rents and proceeds of the property in dispute may be appointed, if the facts of the case are such as warrant it. (*Whitney v. Buckman*, 26 Cal. 447.)

20. In an action to recover the possession of land, after verdict and judgment for the plaintiff, if the defendant in possession is receiving monthly large sums of money from the sale of the waters of mineral springs on the land, and is insolvent, a receiver may be appointed, pending the further litigation on motion for new trial and appeal. (*Whitney v. Buckman*, 26 Cal. 447.)

Appointment pending litigation. See *Injunctions*, 272.

Appointment and sale by pendente lite on foreclosure. See *Mortgages*, 1022.

Power to appoint pending motion for new trial. See *New Trial*, 513.

In supplementary proceedings. See *Supplementary Proceedings*, 14, 17, 18.

County judge, power of to appoint. See *Injunctions*, 264.

Appointment of on dissolution of firm. See *Partnership*, XII, 3.

Appointing in suit to dissolve mining partnership. See *Partnership*, 100, 101.

Right of firm creditors on suit for dissolution and appointment of receiver. See *Partnership*, IX, 12, e.

Appointment of on rescission. See *Rescission of Contracts*, 136, 137.

Action concerning mining claim, receiver in. See *Mines and Mining*, X, 8.

Directing receiver to take charge of insolvent's property. See *Bankruptcy and Insolvency*, VI, 10.

In bankruptcy, appointment of does not affect attachment. See *Attachments*, 232.

Bond given in place of appointment of, who may sue. See *Bonds*, 16.

Certiorari to review orders relating to. See *Certiorari*, III, 2, f.

II. Powers, Duties, and Liabilities of Property in Hands of.

21. The functions of a receiver depend very much upon the powers conferred by statute. A receiver has power under the general laws of this state to bring and defend actions in his own name as receiver, to take and keep possession of the property, to receive rents,

collect and compromise debts, to make transfers, and generally to do such acts respecting the property as the court may authorize. By means of a receiver, the superior court may, in an insolvency proceeding, fully take possession of and preserve the property of the insolvent, and protect the rights of creditors; and a receiver appointed in such proceeding may maintain an action to recover the assets of the insolvent, or any property which may have been fraudulently conveyed by him, and may apply for an examination of the insolvent touching his affairs. (*Denney v. Superior Court of Sacramento County*, 84 Cal. 7.)

22. A receiver is appointed in behalf of all the parties who may establish rights in the cause, and the money in his hands is in custodia legis. (*Adams v. Woods*, 8 Cal. 306.)

23. The property of a street railway corporation in the hands of a receiver is in custodia legis. His possession is the possession of the court, for the benefit of all persons interested, and cannot be disturbed by any person without permission of the court. He cannot dispose of the property without the sanction of the court, but with its permission can do anything the corporation might have done, to make the most out of the assets in his hands. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

24. Where, however, it appears that the partners, parties to the suit for dissolution, held a judgment against a third party, which was never reduced to the possession nor under the control of the receiver, the appointment of the receiver would not operate as an assignment or transfer of any property not so reduced to possession within a reasonable time. (*Adams v. Hackett*, 7 Cal. 187.)

25. Courts of equity have the power to order receivers to take possession of the property in controversy, whether in the immediate possession of the defendant or his agents; and in proper cases they can also order the defendant's agents or employees, although not parties to the record, to deliver the specific property to the receiver. (*Ex parte Cohen*, 5 Cal. 494.)

26. The specific description of property in an order appointing a receiver, even in case where a specific description is appropriate, does not give the receiver a right to take the property from the possession of a stranger to the action who claims to be a purchaser in good faith. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

27. A conveyance by a railroad company of a portion of its property to parties with whom it had contracted to convey such portion upon the breach of a condition cannot disturb the possession of a receiver appointed by the court, in an action against the company for the foreclosure of a mortgage, or embarrass him in the discharge of his duties. (*Klauber v. San Diego Street-car Co.*, 95 Cal. 353.)

28. An order appointing a receiver in a foreclosure suit must be construed with reference to the pleadings upon which it is based, and cannot confer color of authority upon the receiver to extract ores from lands not covered by the securities involved in the suit. (*Staples v. May*, 87 Cal. 178.)

29. If the receiver works ores in the lands of the mortgagor which are not included in the securities involved in the foreclosure suit, he becomes liable to the mortgagor as a trespasser for the net proceeds of the ore extracted; and the general creditors of the mortgagor may avail themselves of such liability by proceedings supplemental to execution. (*Staples v. May*, 87 Cal. 178.)

30. The fact that the part of the adjoining lode from which the ores were taken by the receiver was connected by a common system of working with the mortgaged premises, which were worked at a loss, does not relieve the receiver from liability for the net proceeds of the ores taken. (*Staples v. May*, 87 Cal. 178.)

31. Where the orders appointing the receiver were made ex parte, and it is not shown that their terms, or the proceedings of the receiver under them, ever came to the knowledge of the mortgagor, and it appears that the mortgagor was insolvent, and left its general creditors to recover what they could out of the property, without objection, the presumption is, that the mortgagor desired its property to go to its creditors according to their legal rights, and never approved the proceedings of the receiver in removing ores from the lode in the adjoining tract. (*Staples v. May*, 87 Cal. 178.)

32. A receiver appointed by the court of another state, for the benefit of creditors therein residing, can sue only in this state as such receiver on the ground of comity; and such comity will not be so extended as to sustain a suit by him to replevy property of the debtor which was attached in this state by a creditor residing therein, though the property when attached was in the actual possession of the receiver, and brought by him from the state where he was appointed in the course of business. *Thornton, J.*, and *McFarland, J.*, dissenting, hold that the lawful possession of the property acquired by the receiver in the state of his appointment gave him a special property, which precluded an attachment by a creditor of the original owner in any state while the property remained in the receiver's custody, and conferred a title upon which he could sue and recover the property, in his individual capacity, as a matter of right, in any state into which he might take the property in the course of lawful business. (*Humphreys v. Hopkins*, 81 Cal. 551.)

33. While it is, under certain circumstances, proper to direct the prosecution of an action at law against the receiver of a street railway corporation to determine the amount of compensation or damages against the corporation in favor of one having a claim against it, yet the better and more commonly recognized practice is to apply for relief by petition to the court in which the receiver is acting; and it is immaterial whether the damage was occasioned prior or subsequent to the appointment of the receiver. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

34. Upon the application of the receiver in the suit for dissolution, he can obtain the necessary proceedings for procuring a correct application of the balance of a judgment held

by the partnership against a third party, after paying the judgment creditor of the partnership. (*Adams v. Hackett*, 7 Cal. 187.)

35. A fund in the possession of a receiver can only be distributed by the order of the court in whose custody it is, and no party can, by adverse proceedings, acquire a lien over it. *Per Terry, J.* (*Adams v. Hackett*, 7 Cal. 187.)

36. A receiver was in possession of a wharf and of the adjacent land, having taken possession thereof from defendant, and received money from the use of the entire premises. The adjacent land only was adjudged to belong to plaintiff. Held, that upon the discharge of the receiver, it was error to direct the whole of said money to be paid to the plaintiff. (*Coburn v. Ames*, 57 Cal. 201.) Cited 58 Cal. 356, 360.

37. On an application to the court, after final judgment, or an order for a receiver to pay over to the prevailing party money in his hands as receiver, it will not be presumed that the receiver has transcended his duties and took possession of property to which he was not entitled, nor is the opposite party entitled to have issues framed and submitted to a referee or jury to ascertain the ownership of the money in the receiver's hands. (*Whitney v. Buckman*, 28 Cal. 447.)

38. An order decreeing that moneys collected by a receiver appointed to receive the rents and profits of land, pending appeal from a judgment in an action of ejectment, is the property of the party finally recovering in the action, is not a judgment for the rents and profits of the realty, or any part of the final judgment in the action of ejectment, or any judgment whatever upon which execution could issue. (*Garniss v. Superior Court*, 88 Cal. 413.)

39. The powers and duties of a receiver appointed to collect rents and profits pending an appeal in an action of ejectment are at an end when the rights of the parties are finally established, and he is then considered as holding for the benefit of the parties entitled to the property; and a specific decree of the court declaring the funds in the receiver's hands to be the property of the party finally recovering the possession of the land in controversy is not required to perfect the title of such party to them. (*Garniss v. Superior Court*, 88 Cal. 413.)

40. The assignment of the entire right of the prevailing party to the funds in the hands of the receiver cannot be objected to by the receiver on the ground that the money in his hands was subject to a lien upon it for his fees and costs of receivership, and that the assignment was for part of an entire demand. (*Garniss v. Superior Court*, 88 Cal. 413.)

41. Generally, a receiver can pay out nothing except on order of court, but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects to obtain the order, especially in a court of equity. (*Adams v. Woods*, 15 Cal. 206.)

Cited 88 Cal. 3; 84 Cal. 11.

42. Where a receiver was authorized, by order of the court appointing him, to prosecute suits for the recovery of assets of the estate he represents, and, certain important mercantile books belonging to such estate being lost, the receiver paid eleven hundred and twenty seven dollars for their recovery, without an order of court, held, that he was entitled to credit for this sum as part of the necessary or appropriate expenditures of his office. (*Adams v. Woods*, 15 Cal. 206.)

43. Receivers, or other custodians of money in the hands of a court, who are receivers except in name, as they are bound to obey the orders of the court in their relation to the fund, as well as regards its safe custody as its return, are correlatively entitled to the protection of the court against loss for disbursements which were necessary and proper, and such as a reasonable and prudent man, acting as receiver, would have been justified in expending. (*Adams v. Haskell*, 6 Cal. 475.)

44. An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow for all reasonable and proper expenses incident to the receivership. (*Adams v. Haskell*, 6 Cal. 475.)

45. And this, although the claim is for disbursements, etc., incurred by the custodian of the fund, under an appointment as assignee in a proceeding in insolvency, which was afterwards held to be void. (*Adams v. Haskell*, 6 Cal. 475.)

46. Question of liability of receiver of an insolvent street railway corporation properly belongs to the court appointing the receiver. (*Pacific Ry. Co. v. Wade*, 91 Cal. 449.)

Compensation of attorney. See post, III. Controlling actions of. See Prohibition, III, 5, e.

Action against by assignee of fund, jurisdiction over. See Justices of the Peace, IV, 5, a.

Of partnership property, writ of assistance against. See Assistance, 26.

Appearance to contest motion to deliver property to receivers. See Appearance, 47.

Attachment of fund in hands of. See Attachments, 114, 115.

Right of purchaser at foreclosure against. See Mortgages, 822, 833.

Mandamus to compel receiver to operate road. See Mandamus, 14.

Sale by, what circumstances justify. See Railroads, 109.

Issuance of certificates to pay debts, petition for supersedeas to stay. See Appeals, 1755.

Receipt or certificate of. See Public Lands, IX, 4.

Lien of. See Railroads, 107.

Sale of property in hands of. See Partnership, 117.

Disobedience of prohibition. See Contempt, 59, et seq.

Appointed in suit to dissolve partnership, account of. See Appeals, 218.

III. Discharge of; New Trial or Appeal, Effect of; Compensation of Attorney.

47. After an ex parte appointment has been made, the order may be vacated, either before or after the trial, upon a proper showing. (*Copper Hill Min. Co. v. Spencer* (No. 1), 25 Cal. 11.)

48. A motion to discharge a receiver ought only to be heard upon notice to all parties; but held, in this case, that a failure to give such notice was not such an irregularity as to justify a reversal of an order of discharge. (*Coburn v. Ames*, 57 Cal. 201.)

49. Counsel for the plaintiff, in a suit for a dissolution, cannot claim compensation as associate counsel for the receiver. (*Adams v. Woods*, 8 Cal. 306.)

50. A receiver having the right to stipulate with the counsel employed by him that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the court thereon, he can appeal therefrom. (*Adams v. Woods*, 8 Cal. 306.) Cited 6 Utah, 78.

51. In such a case, it would only be necessary for the court below to order the receiver to retain the amounts of the disputed items; and the interest of all parties concerned is better subserved by a single appeal upon the entire allowance. (*Adams v. Woods*, 8 Cal. 306.)

Attorney fee for. See Railroads, 107.

52. Where, pending an action, a receiver has been appointed, and on the trial judgment of nonsuit is rendered against the party at whose instance the receiver was appointed, a motion for a new trial suspends the operation of the judgment so as to prevent it from operating as a discharge of the receiver, unless an order is made discharging the receiver. (*Copper Hill Min. Co. v. Spencer* (No. 1), 25 Cal. 11.)

53. The functions of a receiver appointed after judgment for the purpose of carrying the judgment into effect are suspended by an appeal upon which a sufficient undertaking is given to stay proceedings upon the judgment; nor can a receiver be appointed to carry a judgment into effect after a stay bond has been given. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

Appeal, orders relating to receivers, how presented on. See Appeals, VII, 25.

Appeal, effect of on appointment or functions of. See Appeals, VIII, 11.

Appealability of orders relating to. See Appeals, II, 9.

Lien for fees and costs. See ante, 40.

Rights, when terminated. See ante, 39.

Payment over of money or property on discharge or termination of duties. See ante, 36, et seq.

Expenses, allowance of. See Railroads, 108.

Expenses of on partition. See Partition, 106.

Compensation where insolvent company's track is intersected by another road. See Railroads, 211, 212.

RECEIVING STOLEN GOODS.

See Criminal Law, XXI, 36, k.

RECITALS.

Deeds, recitals in. See Deeds, VIII, 10.
Deed, conclusiveness of recitals in. See Trusts and Trustees, VI, 2.
Sheriffs' deeds, recitals in. See Executions, XI, 4.
Tax deeds, recitals in. See Taxation, XIII, 4.
Bonds, recitals in, conclusiveness of. See Suretyship, IV, 3, f.
Mortgage, recitals in. See Mortgages, VII, 1.
Patent, recitals in. See Public Lands, XX, 8.
Pueblo grant, effect of recital of authority in. See Mexican Lands, II, 4, k.
Judgment, recitals in. See Judgments, XI.
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RECLAMATION.

See Swamp and Overflowed Lands, XVII.

RECOGNIZANCE.

Bail. See Bail.

RECONVEYANCE.

See Trust Deeds, IV.

Reconveyance to trustor. See Trusts and Trustees, IX.

Agreements for reconveyance. See Deeds, VIII, 8; Mortgages, II, 2, a.

RECORDERS.

See Registration.

1. The powers conferred upon county recorders by the act of March 28, 1851, to take and certify acknowledgments of deeds, is an incident of the office, and not personal to the incumbent. (Muller v. Boggs, 25 Cal. 175.)

May take acknowledgments. See Acknowledgments, 9.

Deputy may take acknowledgment. See Acknowledgments, 12.

2. In counties where offices of county clerk and county recorder are united, the officer performs the functions of auditor as recorder, and not as clerk. (People ex rel. Kimmel v. Darrach, 9 Cal. 324.)

3. It follows that where the offices have been separated in a county where they had been previously joined, the recorder becomes auditor. (People ex rel. Kimmel v. Darrach, 9 Cal. 324.)

Office of, and of county clerk are distinct. See County Clerk, 1.

Separation of offices. See County Clerk, 2; Offices and Officers, 123.

Statute separating from county clerk, construction of. See County Clerk, 2.

4. The ninth section of the act of March 28,

1851, enabling the deputy to perform the duties of recorder in case of a vacancy in the office, or the absence or inability of the recorder to perform his duties, is an enlargement of and not an abridgment of the powers of the deputy. (Muller v. Boggs, 25 Cal. 175.)

5. Act authorizing county recorder of Yuba county to be paid out of county treasury, for certain specified services, contains no words which raise the presumption that he was to be allowed a preference over other creditors. (People ex rel. Benham v. Williams, 8 Cal. 97.)

6. Under the act of March 21, 1876, all fees collected by the county recorder of San Luis Obispo county, for services rendered by him or his deputies in their several official capacities, must be paid into the county treasury to be applied to the payment of the current expenses of the county. (County of San Luis Obispo v. King, 69 Cal. 531.)

7. Prior to the Consolidation Act, the recorder of the city of Sacramento was entitled to collect the same fees as a justice of the peace for services in criminal cases; but he was bound to pay them over to the county treasurer. (Curtis v. Sacramento County, 13 Cal. 290.)
Cited 98 Cal. 411.

8. Such recorders are not within article VI, section 2, of the constitution, inhibiting judicial officers, except justices of the peace, from taking fees. (Curtis v. Sacramento County, 13 Cal. 290.)

9. The constitution, when it exempted justices from the operation of this restraint, meant to exempt, also, those, by whatever name called, who are intrusted with the duties assigned by the law to those officers. (Curtis v. Sacramento County, 13 Cal. 290.)

Monterey county, fees of, effect of new constitution on. See Constitutional Law, 90.

Acting as justice, fees of. See Justices of the Peace, 113.

Actions against for fees. See Statute of Limitations, 184.

San Luis Obispo county, compensation of. See Offices and Officers, 122.

Certificate of, sufficiency. See Evidence, 122.

Records of as evidence. See Evidence, III, 9, a.

City recorder acting as justice. See Justices of the Peace, IX.

Jurisdiction. See Forcible Entry and Unlawful Detainer, 150.

Jurisdiction of over assault. See Criminal Law, 1211.

San Francisco, recorders in. See San Francisco, V, 1.

Fees, effect of new constitution on act. See Offices and Officers, 163.

RECORDERS' COURTS.

Jurisdiction of. See Jurisdiction, XI, 9.

Fines, to whom payable. See Fines, 1, et seq.

Included in term "municipal courts." See Courts, 29.

RECORD OF TITLE.

Abstract of title. See Vendor and Vendee, VIII, 2.

RECORDS.

See *Recorders*; *Registration*.

Courts of record. See *Courts*, II.

Searchers of records. See *Searchers of Records*.

Filing papers or documents. See *cross-references* under *Filing*.

1. Nothing is included in the record of a suit but the judgment-roll. (*Sharp v. Daugney*, 33 Cal. 505.)

2. A written charge made to a board of supervisors, a board of directors, or trustees of a college or other state institution, upon being filed in the office of the custodian of their records, does not necessarily become a public record to which any citizen may have access at pleasure. (In the *Matter of Colnon v. Orr*, 71 Cal. 43.)

Engrossed copy of bill is not public record. See *Criminal Law*, 2499.

Entry in minutes is part of. See *Habeas Corpus*, 41.

3. Whether state books and records are subject to public inspection, query? (*State of California v. Wells, Fargo & Co.*, 15 Cal. 336.)

Compelling inspection of public records. See *Mandamus*, II, 12, m.

4. The records of courts are under the control of the judges so far as essential to the proper administration of justice, and this control is beyond the reach of legislation. (*Houston v. Williams*, 13 Cal. 24.)

Control of by clerk of court. See *Clerk of Court*, 2.

Transfer of, power of court on. See *Judgments*, IX.

Amendment of records after term. See *New Trial*, 529.

5. All courts of record have the inherent power to correct their records so that they shall conform to the actual facts and speak the truth of the case; and such correction may be made at any time, either upon the motion of the court itself without notice, or at the instance of any party interested; and when made, the corrected record, as well as the order making the correction, is conclusive upon any other court in which the record is offered in evidence. (*Orim v. Kessing*, 89 Cal. 478.)

6. The trial court has the power to amend its minutes *nunc pro tunc*, even pending appeal, so as to conform to the true state of facts. (*People v. McNulty*, 93 Cal. 427.)

Amendment of. See *Courts*, II.

Judgment-roll and amendment of. See *Judgments*, II, 9.

Appeal, power to amend records pending. See *Appeals*, VIII, 3.

7. Courts of such extended jurisdiction and grave responsibility as the district courts must, from the very nature of the case, be trusted as to the fidelity of their records, and their decision thereon is final and conclusive. (*People ex rel. Galvin v. Judge of Tenth Judicial District*, 9 Cal. 19.)

Conclusiveness of. See *Certiorari*, IV, 7

Courts, II.

Statute, record of, inquiring into. See *Statutes*, I, 1.

Estoppel by matter of. See *Estoppel*, III.

Admissibility of evidence to contradict. See *Executions*, 233.

Parol evidence affecting. See *Evidence*, VII, 3.

Date of, evidence as to. See *Evidence*, 384, 385.

Of street work, contradicting. See *Evidence*, 384, 385.

Evidence, records as. See *Evidence*, III, 9.

Public, parol evidence of contents of. See *Evidence*, 45.

Certified copies of. See *Evidence*, II, 7.

8. When jurisdiction has once been acquired it is not lost by a failure to preserve a record of the acts by which it was acquired, and the acts of a court in exercising its inherent power to amend its record, or to supply a lost record, will be presumed to have been properly exercised. (*Sichler v. Look*, 93 Cal. 600.)

Cited 94 Cal. 641.

9. If the judgment-roll or any part of the record in the district court has been lost, the district court, upon proper proofs, may supply its place by copies, and direct that the proved copies be substituted for the lost papers, and that they shall constitute the record or portions of it lost, and here the functions of the district court end. (*Buckman v. Whitney*, 28 Cal. 555.)

10. If either party is dissatisfied with an order of the district court in supplying a lost record, it may be reviewed by an appeal from the order. (*Buckman v. Whitney*, 28 Cal. 555.)

11. If a guardian of an infant was appointed by an alcalde in San Francisco, in 1849, and he afterwards acted as guardian, and was so recognized by the alcalde, and no bond or oath of the guardian is now found among the papers, a trial court may, from the fact of such recognition, and from the lapse of time, and the known loose way of keeping such papers, find that the bond was given and oath taken. (*Brady v. Reese*, 51 Cal. 447.)

12. The records of the place in which the testator lived and where his will was made having been scattered or destroyed by a public enemy, it must be presumed under the maxim, *Omnia præsumentur rite et solenniter esse acta*, that the will was duly registered in the proper book of records. Per *Bennett, J.* (*Panaud v. Jones*, 1 Cal. 488.)

Lost, presumption in favor of official acts in case of. See *Mexican Lands*, 29.

Lost, presumption of existence of. See *Executions*, 65.

Lost papers, how supplied. See *Pleading and Practice*, XIX.

Proceedings of supervisors, records of. See *Supervisors*, IV.

Neglect to record, effect of. See *Homesteads*, 51.

Public records, mutilation of. See *Criminal Law*, XXI, 42.

Interlineation in, effect of. See *Evidence*, 242.

Interlineation, expert evidence as to. See *Evidence*, 283.

Alcalde's entries on margin. See Evidence, 237, 238.

Mandamus to correct records of supervisors. See Mandamus, II, 13, i.

Minutes of the clerk. See Appeals, VI, 1, c. Striking statement on motion for new trial from the files. See New Trial, V, 7, i.

Appeal, record on. See Appeals, VI. Appeal from inferior court, record on. See Appeals, XIII, 4.

Appealability of entries in the minutes. See Appeals, II, 27.

Appeal, presumptions in favor of record on. See Appeals, XI, 24, b.

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Foreclosure of chattel mortgage, redemption from. See Mortgages, XXI, 8.

Foreclosure sale, redemption from. See Mortgages, XX.

Tax sale, redemption from. See Taxation, XII, 5, i.

Sale under trust deed, redemption from. See Trust Deeds, III.

Stockholder, redemption by. See Corporations, IV, 6, b.

Cotenancy, redemption by. See Cotenancy, II, 2.

Statute repealing, constitutionality of. See Constitutional Law, 366.

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4. Findings; How Stated; Conclusiveness; Striking Out; Construction of.

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X. New Referees, Appointment of; Second Reference.

Agreement to appoint referees, enforcement of. See Specific Performance, IV, 8.

Fees of referee. See Marriage and Divorce, III, 4, k.

Referee may testify as to declarations made under oath. See Evidence, 25.

1. Construction of Statute Relating to.

1. Our statute concerning referees is in aid of common-law remedy by arbitration, and does not alter its principles. (Tyson v. Wells, 2 Cal. 122.)

Cited 2 Cal. 325.

Statute applies solely to equity cases. See post, 2.

II. What may be Referred; Discretion of Court in Cases of Accounting.

2. Our statute as to referring cases applies solely to equity cases. The right of trial by jury in all common-law actions is secured by the constitution of this state. (Grim v. Norris, 19 Cal. 140.)

Cited 99 Cal. 423.

3. Power of court to refer case to referees depends upon pleadings, and a reference may be ordered in any equity suit, where either party alleges facts showing an accounting to be necessary. (Jones v. Gardner, 57 Cal. 641.)

4. In equity case, where trial of issue of fact is involved, requiring the examination of a long account on either side, the court may order a reference, with directions to the referee to report upon the account, or any issue of fact involved in the account. (Williams v. Benton, 24 Cal. 424.)

Cited 35 Cal. 552.

5. In action to dissolve partnership and obtain settlement of partnership accounts, the court has power to order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts, but it has no power, if objection is made, to order a reference of the trial of any other issue or issues in the case, nor to direct the referee to report a judgment. (Williams v. Benton, 24 Cal. 424.)

6. The court may order reference to ascertain damages sustained by reason of injunction issued without cause. (Russell v. Elliott, 2 Cal. 245.)

Cited 2 Cal. 261.

7. Where the taking of an account is re-

quired, it is in the discretion of the court to take the account, or to refer it to a commissioner or referee to state it. (*Hidden v. Jordan*, 28 Cal. 301.)

8. In an action for an accounting, the court may itself take or state the account, and when it does so, a refusal to order a reference for such purpose is not erroneous. (*Emery v. Mason*, 75 Cal. 222.)

Action for balance of account, reference of, consent to. See post, III.

9. Practice of court of first instance, sanctioned by custom and approved by profession, to refer causes to referees to hear and decide thereon, sustained. (*Gunter v. Sanchez*, 1 Cal. 45.)

Consent, necessity of, to reference. See post, III.

Divorce suit, reference of. See Marriage and Divorce, III, 4, k.

Partition, appointment of referees in. See Partition, VI, 8.

III. Consent, Necessity of, to Reference.

10. Order of reference cannot be made without consent of the adverse party. (*Benham v. Rowe*, 2 Cal. 261.)

11. The court has no power, where either of the parties object, to order a reference with directions to the referee to report a judgment. (*Williams v. Benton*, 24 Cal. 424.) Distinguished 7 Col. 150.

12. Reference cannot be ordered without the consent of the parties. (*Smith v. Polack*, 2 Cal. 92.) Cited 4 Cal. 6.

13. When the supreme court decided in *Smith v. Polack*, 2 Cal. 92, that a reference could not be ordered without the consent of the parties, it intended that decision to apply to a case at common law, in which the party was entitled to a jury trial, and not to extend to cases in equity. (*Smith v. Rowe*, 4 Cal. 6.)

14. The court has no power, without the consent of the parties, to order a reference for the trial of any other issue of fact than that involved in the examination of an account in an equity case. (*Williams v. Benton*, 24 Cal. 424.) Cited 5 Col. 215.

15. A jury was waived by the parties, and the case submitted to the court; the trial made some progress, when, on motion of plaintiff's attorney, the case was referred "to ascertain the damages sustained by plaintiff." Held, that this was not a case which would authorize a reference without the consent of the parties; that the case having been submitted to the court, it was the duty of the court to find upon the facts adduced by the parties, and not the facts presented in a referee's report. (*Geeseke v. Brannan*, 2 Cal. 517.)

16. Court has no power to send ordinary suit at law to referee for trial against the objection of either party; and this, whether the suit requires the examination of a long account or not. And a statute authorizing a reference in such case would be unconstitutional. (*Grim v. Norris*, 19 Cal. 140.) Cited 85 Cal. 645; 99 Cal. 423; 5 Col. 215.

17. An order by the court in an action to recover a balance of account for goods sold and delivered and work and labor performed, referring the cause to a referee "to state an account between the parties and report a judgment and findings" in the case, is, in effect, a reference of the whole case for trial, and is not authorized by the code, except upon agreement of the parties; but if the unsuccessful party did not reserve any exception to the order of reference, he cannot urge the error as a ground for the reversal of the judgment by the supreme court. (*Joshua Hendy Machine Works v. Pacific Cable Construction Co.*, 99 Cal. 421.) Cited 99 Cal. 487.

18. Action for balance of account. Defense, payment by a promissory note. Replication, that plaintiff was induced to receive the note by means of fraudulent representations. Held, that the case was not referable under the statute, without the written consent of both parties. (*Seaman v. Mariani*, 1 Cal. 336.) Cited 99 Cal. 423.

Consent, necessity of. See ante, 5.

Consent, how given. See post, VI.

Stipulating, consenting to, does not authorize second reference on. See post, X.

IV. Who may Act as Referee.

19. The fact that the referee in the proceedings supplementary to execution was the clerk of the attaching creditor is not any considerable evidence of fraud, when the limited duties of the referee are considered. (*Adams v. Hackett*, 7 Cal. 187.) Cited 10 Cal. 23; 65 Cal. 303; 7 Mont. 529; 9 Mont. 348.

V. Effect of on Jurisdiction of Court, or as a Discontinuance.

20. A reference in which there is no order of court, or agreement filed with the clerk or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the court, by which the court loses all control over the case, and has no authority to enter a judgment upon the finding, except by consent of parties. (*Heslep v. San Francisco*, 4 Cal. 1.) Cited 78 Cal. 380.

21. Reference of a suit to a referee to hear and decide thereon is not a discontinuance. (*Gunter v. Sanchez*, 1 Cal. 45.)

Submission to referees is not an arbitration. See Arbitration and Award, 10.

Reference does not deprive of power to dismiss. See Dismissal, 26.

VI. How Made; Swearing Referees.

22. Under section 1507 of the Code of Civil Procedure a reference to determine the correctness of a claim against the estate of a deceased person may be made in court, if the claimant and the personal representative of the deceased consent thereto. (*Hall v. Superior Court*, 69 Cal. 79.)

23. Where an entry upon the minutes recites that "the parties came by their attorneys, and defendant, by his attorney, moved the court that the cause be referred," held,

that such reference was made on the appellant's motion, and in one of the modes pointed out by law, "by oral consent, in open court, entered on the minutes." (*Bates v. Vischer*, 2 Cal. 355.)

24. The consent of a party to an order of reference must be in writing, or entered on the minutes. (*Smith v. Polack*, 2 Cal. 92.) Cited 2 Cal. 261; explained 4 Cal. 7.

25. The statute concerning references does not require that referees should be sworn. The imposition of an oath by the court would be of no effect, other than to put it in the power of the referee to commit a moral perjury, without becoming amenable at law. (*Sloan v. Smith*, 3 Cal. 406.)

26. If the legislature had intended that referees should be sworn, it would be presumed in this case that they were sworn, the contrary not appearing. (*Sloan v. Smith*, 3 Cal. 406.)

VII. Extent of Order of Reference.

27. Order of reference cannot go beyond pleadings of the parties. (*Branger v. Chevalier*, 9 Cal. 353.)

28. A reference, with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment-roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to the referee the question as to what amount, if any, is still unpaid on the judgment. (*Solomon v. Maguire*, 29 Cal. 227.)

VIII. Hearing; Manner of Trial Before Referees; Powers and Duties of.

29. Under a reference to try the issues and report a judgment, the referee can exercise all the powers of a judge in relation to the trial of the cause referred to him. (*Plant v. Fleming*, 20 Cal. 92.)

Powers of. See *Marriage and Divorce*, 144.

30. A referee appointed to try and determine a case is, quoad the trial of the case, in the place of the court, and his findings and report are the equivalent of the findings and decision of the court itself. (*Thompson v. Patterson*, 54 Cal. 542.)

31. When the court has decided the principles upon which an account should be taken and settled, upon an order of reference, it is not competent for the referee to review the action of the court; but it is his duty to take the account in pursuance of the principles thus settled. (*Smith v. Walker*, 38 Cal. 385.)

32. Referees have no power to allow the parties to alter the pleadings after a case has been submitted to them. (*De La Riva v. Berreyesa*, 2 Cal. 195.)

33. It is duty of referee to act upon questions committed to him, and to report whatever he is required to report by the order under which he acts. (*Hihn v. Peck*, 30 Cal. 280.)

Cited 8 Utah, 190.

34. Trials before a referee are conducted in the same manner as before courts; and ex-

ceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a court; and such exceptions must be embodied in the report of the referee, or made part thereof by his proper certificate. (*Phelps v. Peabody*, 7 Cal. 50.)

35. A trial before a referee should be conducted in the same manner as before a court, and the evidence should be embodied in a bill of exceptions, and certified by the referee. (*Goodrich v. City of Marysville*, 5 Cal. 430.)

36. Hearsay and irrelevant testimony should be excluded by referees. (*De La Riva v. Berreyesa*, 2 Cal. 195.)

37. Referees should exclude items barred by the statute of limitations, if objected to. (*De La Riva v. Berreyesa*, 2 Cal. 195.)

38. Exceptions must be taken to the rulings of the referee during the trial, and certified by him. (*Tyson v. Wells*, 2 Cal. 122.) Cited 7 Cal. 53.

39. If order of reference fails to direct a return of the evidence to the court, party objecting to report must see that such testimony as he relies on is properly certified. (*Goodrich v. City of Marysville*, 5 Cal. 430.)

40. When the referee excludes proper or admits improper evidence, or does any other act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. (*Branger v. Chevalier*, 9 Cal. 353.)

41. Where a referee admits the testimony of a witness against the objection of the defendant, such testimony cannot, after the case has been submitted, be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. (*Monson v. Cooke*, 5 Cal. 436.)

Discretion of to open case for further evidence. See *Appeals*, 2188.

Right to submit to nonsuit before. See *Nonsuit*, 3.

IX. Report.

1. Nature and Effect of Report.

42. When a referee reports his decision upon the whole case, his report stands as the decision of the court; when he reports the facts only, his report is a special verdict. (*Harris v. San Francisco S. R. Co.*, 41 Cal. 393.)

Cited 42 Cal. 196; 54 Cal. 546; 63 Cal. 509; 11 Mont. 567.

43. Report of referee upon facts of case will be considered same as verdict of a jury. (*Walton v. Minturn*, 1 Cal. 362.)

44. The report of a referee, under the statute, has the same legal effect as the award of an arbitrator. (*Headley v. Reed*, 2 Cal. 322.)

45. The report of a referee, and the award of an arbitrator, are in all essentials the same. (*Grayson v. Guild*, 4 Cal. 122.)

2. Time of Filing.

46. The provision of section 187 of the Practice Act, as to the time within which a referee must file his report, is merely direc-

tory. A failure to file within the time will not invalidate the report or the judgment rendered thereon. (*Keller v. Sutrick*, 22 Cal. 471.)

Report not made immediately after close of testimony deemed excepted to. See post, 60.

3. Amended Report.

47. A referee has no right to bring in and file an additional or amended report. Where such amended report is filed, the case will be reviewed with reference to the original report alone. (*Headley v. Reed*, 2 Cal. 322.)

4. Findings; How Stated; Conclusiveness; Striking Out; Construction of.

48. When the order of reference requires the referee to try the issues, and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect. (*Hihn v. Peck*, 30 Cal. 280.)

49. When the report of a referee found generally a sum of money for the plaintiff, without finding the facts out of which this finding arose, held, that it was error. (*Lambert v. Smith*, 3 Cal. 408.)
Cited 8 Utah, 190.

50. The report of a referee, like the finding of a court, should state the facts found, and the conclusions of law thereupon. (*Lambert v. Smith*, 3 Cal. 408.)
Distinguished 30 Cal. 285.

51. A finding of fact by a referee will not be set aside where the evidence is conflicting. (*Keller v. Sutrick*, 22 Cal. 471.)

52. Finding of a referee is conclusive as to the facts, on conflicting evidence. (*Knowles v. Joost*, 13 Cal. 620.)

53. The decision of referees upon a question of fact will be regarded on appeal as conclusive as the verdict of a jury, and will not be interfered with. (*Gunter v. Sanchez*, 1 Cal. 45.)

54. Where a cause is tried by a referee, and the testimony is conflicting, the supreme court will not disturb his findings of fact. (*Muller v. Boggs*, 25 Cal. 175.)

55. The facts found in the report of a referee are conclusive in the absence of the testimony, or where the testimony is not properly brought before the court. (*Goodrich v. City of Marysville*, 5 Cal. 430.)

56. The decision of a referee upon a question of fact will not be set aside where the evidence upon such question is conflicting, and where the testimony of some of the witnesses, if credited, supports the finding. (*Brady v. Brown*, 20 Cal. 520.)

57. When a collateral question, not made an issue by the pleadings, is referred to a referee, his finding of the facts does not take the place of a special verdict, as provided in section 187 of the code, and is not binding on the court until adopted by it. (*Harris v. San Francisco S. R. Co.*, 41 Cal. 393.)

58. When a case has been tried by a referee, and he has reported a finding of facts, it is not good practice for the court to strike out a finding made by the referee and substitute one of its own. If, however, this is done, and

the appellant is not prejudiced by it, it does not furnish ground for a new trial. (*Pratalongo v. Larco*, 47 Cal. 378.)

Setting aside report and practice on. See post, IX, 5.

Setting aside conclusions of law. See post, 80.
Power of court to find facts. See post, 81.

59. A case was submitted to a referee to find the interest of R., and the value of such interest, in a vessel and cargo. He found such interest and value in the ship, but not in the cargo, and reported that he was unable, for want of evidence, to find the value of R's interest in the cargo. Held, that this was equivalent, for the purpose of legal adjudication, to finding no value whatever. (*Montifiori v. Engels*, 3 Cal. 431.)

Referee, findings of. See Replevin, 144.
What findings by, will not support execution after five years. See Executions, 32, 33.

Findings and report are equivalent to findings and report of judge. See ante, 30.

Finding facts by referee, practice on. See Marriage and Divorce, 145.

5. Exceptions to; Setting Aside; Practice on.

60. A report of a referee which is not made immediately after the close of the testimony, by the one hundred and ninety-first section of the Practice Act, is deemed as excepted to. (*Headley v. Reed*, 2 Cal. 322.)

61. Errors in report of referee must be taken advantage of by written objections to entering judgment on it, or by a motion for a new trial. (*Porter v. Barling*, 2 Cal. 72.)

Failure to object to entry of judgment is no waiver of exception. See post, 90.

62. It would be a gross abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge. (*Goodrich v. City of Marysville*, 5 Cal. 430.)

63. Decision of referee can only be set aside for fraud or gross error in law. (*Headley v. Reed*, 2 Cal. 322.)

64. Report of referee cannot be attacked, except for error or mistake of law, apparent on its face, or by motion for a new trial upon exceptions taken at the trial, or the evidence certified. (*Goodrich v. City of Marysville*, 5 Cal. 430.)

65. When a case is referred to a referee under the statute to hear and determine the issues of fact and of law, and report the same to the court, and he makes a report, on the face of which no errors of law or fact appear, or, if there have been any, no exceptions have been taken before him to point them out, or to show that his decision was objected to, it is erroneous in the court below to set aside the report and grant a new trial. (*Grayson v. Guild*, 4 Cal. 122.)

66. If there be no exceptions embodied in the report, showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot disturb the report, and an order granting a new trial in such case will be reversed. (*Tyson v. Wells*, 2 Cal. 122.)
Reversed 19 Cal. 608.

67. A court can interfere and set aside the report of a referee upon the same ground as it will proceed to set aside the verdict of a jury. (*McHenry v. Moore*, 5 Cal. 90.)

68. After the rendition of judgment upon a report of a referee, the court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the award of an arbitrator, and for no other. (*Headley v. Reed*, 2 Cal. 322.)

69. A court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence before the referee was insufficient to justify his decision. (*Cappe v. Brizzolara*, 19 Cal. 607.)

70. Where the report of a referee disclosed some hesitation and doubt in arriving at the conclusions of fact, and after the report had been made up, but before it was filed, the defendant applied to the referee for leave to introduce newly discovered evidence, which was refused, from a doubt as to his power—he at the same time intimating to the court, in a supplemental report, that if such newly discovered evidence had been adduced on the trial, the result would probably have been different—held, under the circumstances, it was error in the court below to refuse a new trial. (*Hoyt v. Saunders*, 4 Cal. 345.)

71. If commissioner, to whom case has been referred to take account, commits error at the threshold which unsettles the account, the court is not bound to go over the account and correct the error, but may set aside the report and again refer the case. (*Hidden v. Jordan*, 32 Cal. 397.)

72. Though plea would be bad upon demurrer, yet if no objection be taken at time, and the case be submitted to a referee, the defect of the plea is not sufficient reason to set aside the report. (*Ritchie v. Davis*, 5 Cal. 453.)

Cited 22 Cal. 235.

73. It is error for the court to set aside the report of a referee, upon an examination of testimony which was not properly before it. (*Goodrich v. City of Marysville*, 4 Cal. 430.)

74. The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend on the character of the reference, whether it be special, to report the facts, or general, to report upon the whole issue. (*Peabody v. Phelps*, 9 Cal. 213.)

Cited 16 Cal. 118; 30 Cal. 285; 9 Col. 312.

75. In the former case the report has the effect of a special verdict; in the latter it stands as the decision of the court, and judgment may be entered thereon, exceptions taken and reviewed, as if the action had been tried by the court. (*Peabody v. Phelps*, 9 Cal. 213.)

Cited 10 Cal. 527.

Notice of motion to set aside report, from what time dates. See post, 85, 86.

76. When the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report, and for a new trial. (*Branger v. Chevalier*, 9 Cal. 353.)

77. If a referee tries a question of fact raised by the pleadings, the court cannot review his action on such issues, unless a motion is made for a new trial. (*Harris v. San Francisco S. R. Co.*, 41 Cal. 393.)

78. If a referee tries a collateral question, not made an issue of fact by the pleadings, his action thereon may be reviewed by the court, by exceptions to the report, without a motion for a new trial, and his report is not binding on the court until adopted by it. (*Harris v. San Francisco S. R. Co.*, 41 Cal. 393.)

79. Is not the manner of bringing testimony before court in case of such exceptions to be regulated by rules to be adopted by the court, query? (*Harris v. San Francisco S. R. Co.*, 41 Cal. 393.)

80. If referee reports facts upon all issues, but draws erroneous conclusions of law from the facts found, and also reports a judgment in accordance with his conclusions of law, the court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered. (*Caldерwood v. Pyser*, 31 Cal. 333.)

Cited 38 Cal. 531; 42 Cal. 507; 8 Col. 188.

81. In a suit in chancery it is perfectly competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause. (*McHenry v. Moore*, 5 Cal. 90.)

Striking out findings. See ante, IX, 5.

82. Action of the district court in refusing to set aside the report of the referee will be sustained, where the evidence set forth in the record fully warrants the actions of the referee and court. (*Brooks v. Park*, 11 Cal. 406.)

83. Where there is a large mass of contradictory evidence reported, it will be presumed that the court below weighed the evidence properly, in setting aside the finding of the facts by the referee. (*McHenry v. Moore*, 5 Cal. 90.)

Cited 18 Cal. 449.

Second reference after setting aside report. See post, X.

6. Judgment on.

84. Judgment is entered upon report of referees as matter of course, and the only mode to take advantage of it is by moving to set it aside, as on motion for a new trial. (*Sloan v. Smith*, 3 Cal. 406.)

Cited 9 Cal. 225, 312.

85. Where an action is tried by the court without a jury, or the whole case is referred to a referee, judgment follows immediately as a conclusion of law upon the facts found, and the time within which the notice of the motion should be made dates from the entry of the judgment. (*Peabody v. Phelps*, 9 Cal. 213.)

86. Direct action of court must be invoked before judgment can be entered upon facts found, whether by report of the referee or special verdict of the jury. Hence, the time within which the notice of motion to set aside the report or verdict must be given should

date from the filing of the report, or the rendition of the verdict. (*Peabody v. Phelps*, 9 Cal. 213.)

87. The parties to the action entered into a stipulation for its reference, which authorized the referee to determine all the issues of law and fact, and provided that upon the filing of the report of the referee judgment should be entered by the court in accordance therewith. The court thereupon made an order of reference directing judgment to be entered upon the filing of the report of the referee. Held, that upon the filing of the report the clerk was authorized to enter judgment without any further order of the court. (*Bowie v. Borland*, 68 Cal. 233.)

88. If report under statute contain sufficient on which to base judgment it is the duty of the court below to enter judgment in accordance with the report, so far as it concerns the matter referred; and it has no right to entertain any objection whatever. (*Headley v. Reed*, 2 Cal. 322.) Cited 4 Cal. 125; 9 Cal. 225; 30 Cal. 287.

89. Judgment should be entered for plaintiff when the evidence reported by the referee sufficiently established the allegations of the complaint. (*Hyde v. Hyde*, 11 Cal. 406.)

90. Failure of party to object to rendition of judgment upon a report in the court below is no waiver of his right to have his exceptions to the report reviewed in this court. (*Headley v. Reed*, 2 Cal. 322.)

Judgment on report, objection to, when to be taken. See Appeals, 2435.

Mandamus to compel entry of judgment on report of. See Mandamus, 98, 97.

7. New Trial; Appeal, Right of, Question How Presented.

Time to move for new trial. See New Trial, V, 3, c, C.

New trial in cases tried before referee. See New Trial, 4.

Motion for new trial, effect of on reference. See New Trial, 516.

91. It is not necessary to make motion in court of first instance to set aside report of referees, before a party can appeal to this court. *Hastings, C. J.*, dissenting. (*Gunter v. Sanchez*, 1 Cal. 45.)

92. Report of referee upon conflicting testimony must be treated in light of verdict of a jury, and will not be disturbed in this court upon an appeal from an order refusing to grant a new trial in the court below. (*Ritchie v. Bradshaw*, 5 Cal. 228.)

Failure to object to entry of judgment is no waiver of exception. See ante, 90.

Right of appeal from order appointing referees. See post, X.

Appealability of orders relating to. See Appeals, II, 9.

Mandamus to compel referee to settle statement. See Appeals, 982.

Appeals, findings on report of referees, how presented on. See Appeals, VII, 15.

Errors in relation to report of, correcting on appeal. See Appeals, 1928.

Appeals from order of reference, effect of. See Appeals, VIII, 13.

Appeal, objection to order first raised on. See Appeals, XI, 14, k.

Presumptions in favor of findings. See Appeals, 2819, 2913.

Findings not disturbed where evidence conflicting. See Appeals, 2595.

Affirmed on appeal, when. See Appeals, 2550.

X. New Referees, Appointment of; Second Reference.

93. The superior court may appoint new referees in an action of partition in place of those who have resigned, in order to carry its interlocutory decree into effect, and their action, and the action of the superior court upon their report, may be reviewed upon appeal from the final judgment; but no direct appeal can be taken from the order appointing such referees. (*Fallon v. Brittan*, 84 Cal. 511.)

94. When a case has, by the stipulation of the parties, been referred to a referee, and he reports a judgment, which is entered, and the court grants a new trial, it cannot, without a new consent of the parties, again refer the case to the same or any other referee. Upon the report of the referee, and the entry of the judgment, the stipulation ceased to have further effect. (*Daverkosen v. Kelley*, 43 Cal. 477.)

Setting aside report and referring case again. See ante, 71.

REFORMATION OF CONTRACTS.

I. Power to Reform.

II. Grounds for.

III. Particular Contracts, Reformation of Procedure; Rights of Third Persons.

I. Power to Reform.

1. Of the power of a court of equity to reform a mortgage by going back to the original mistake, and correcting all subsequent mistakes which grow out of it, there can be no doubt. (*Donald v. Beals*, 57 Cal. 399.)

2. Courts of equity have jurisdiction to correct an error in any material particular of a written agreement, either executory or executed, so as to make the instrument conform to the intention of the parties. And it matters not whether the error be in the insertion or omission of a material stipulation, or in an inaccurate description of the subject matter of the agreement. Nor does it make any difference whether the error be the result of fraud in one of the parties, or be committed under a mutual mistake, contrary to the intention of both parties. (*Lestrade v. Barth*, 19 Cal. 660.) Cited 23 Cal. 124.

II. Grounds for.

3. The mere fact that the insured did not know that his policy contained a certain provision is not ground for reformation. (*McCormick v. Orient Ins. Co.*, 86 Cal. 260.)

4. When, by the mistake of a draftsman, some of the terms of an agreement are omitted in reducing it to writing, it should be reformed

by the court, and be enforced as reformed. (*Murphy v. Rooney*, 45 Cal. 78.)

5. Deed including the wrong tract of land by mistake of the parties may be corrected so as to give effect to the intention of the parties. (*Kocher v. Hayford*, 59 Cal. 316.)

6. The mutual mistake for which a deed may be reformed relates to the time of making the agreement for the conveyance, and not to the execution and delivery of the deed, which merely carried the agreement into effect. But a mistake of one party at the date of a conveyance which is known or suspected by the other party, without reference to a prior mutual mistake in the agreement, is ground for a reformation of the deed, under section 3399 of the Civil Code, if no rights of third parties are involved. (*Oleghorn v. Zumwalt*, 83 Cal. 155.)

7. When it appears that one of the parties to a written agreement knew at the time of its execution that it did not truly express the intention of the parties, and also knew that the other party signed it supposing the intention to be correctly expressed, a case for revision is made out under section 3399 of the Civil Code. The right of revision does not depend upon the fact that he might have discovered the mistake before signing the instrument. (*Higgins v. Parsons*, 65 Cal. 280.) Cited 88 Cal. 212, 213; 99 Cal. 161.

8. A written instrument executed by parties between whom there is no special relation of trust or confidence will not be reformed so as to omit a particular clause, on the ground that the same was inserted through the mutual mistake of the parties, when the party against whom the reformation is sought knew of the insertion of the clause at the time of the execution, and the party seeking the reformation might have known such fact had he read the instrument. (*Metropolitan Loan Assn. v. Esche*, 75 Cal. 513.) Cited 78 Cal. 225; 92 Cal. 181; distinguished 88 Cal. 213.

9. If a lease was executed under a mistake of the lessor as to the contents of the lease, known or suspected by the lessee, the lessor will not be precluded from obtaining a reformation of the lease because of inattention to the reading of the lease by the notary who took the acknowledgment of the lessor. (*Wilson v. Moriarty*, 88 Cal. 207.) Cited 99 Cal. 161.

10. A mortgage of the separate real property of a married woman, properly executed and acknowledged by her, may be reformed so as to correct clerical mistakes in the description of the mortgaged premises, when such mistakes are confessed by the mortgagor. (*Savings and Loan Society v. Meeks*, 66 Cal. 371.)

11. When the grantor of a conveyance of all her interest in certain land was erroneously advised by her attorney that she owned but an undivided fifth of the premises conveyed, and the bargain and estimate of value forming the basis of the price related only to one undivided fifth thereof, and proceeded upon a mutual mistake of the parties at the time of the agreement as to the extent of ownership, the grantor is entitled to a reformation of

such conveyance to make it conform to the agreement, and truly express the intention of the parties, notwithstanding the grantee was advised before the execution of the deed that the grantor owned three-fifths of the premises. (*Oleghorn v. Zumwalt*, 83 Cal. 155.) Cited 88 Cal. 212, 213.

12. Where a written contract for the exchange of land, made in San Francisco, provided for the conveyance of four city lots in Los Angeles, described as containing about two hundred feet front, with seven houses thereon, and the defendant represented to the plaintiffs that the property he was to convey had a frontage of two hundred feet, and each of the lots had a frontage of fifty feet, and the deed of the lots described them as three lots and part of a fourth, "containing about two hundred feet front," with the seven houses thereon, upon the delivery of which for examination the defendant stated to the plaintiffs that the description therein was according to the written agreement, the plaintiffs are not precluded by examination and acceptance of the deed from obtaining a rescission and correction thereof to correspond with the written contract, on the ground of mistake, upon subsequent discovery that the deed did not embrace all the land which the defendant had agreed to convey to them. (*Sullivan v. Moorhead*, 99 Cal. 157.)

13. Where the evidence was sufficient to satisfy the court that the deed did not express the intention of the parties, and that the plaintiffs had been mistaken in supposing that it did, the fact of his having read the instrument would not prevent the court from finding that it was made under a mistake; nor was the court bound to accept the statement of the defendant as to his intention in direct contradiction of the written contract, and from his statement to plaintiffs that the deed was intended to be in execution of the agreement, the court was authorized to find that the mistake was mutual, and that his failure to include the whole of the four lots in his deed, in accordance with the written agreement, without showing a release from his obligation, was either a mistake on his part or a fraud upon the plaintiffs. (*Sullivan v. Moorhead*, 99 Cal. 157.)

14. Whether, if the See Yup Company were in possession of the property at the time of the sheriff's sale under execution against A, the grantee in the deed, and the deed on which they rely as creating an equity in their favor were drawn in its present form by mistake, this mistake may now be corrected so as to conform it to the original design, and thus secure the property against the plaintiff here, query? (*Eldridge v. See Yup Co.*, 17 Cal. 44.) Cited 23 Cal. 124.

15. Whether the deed could be corrected, and with such effect, if the purchaser at the sheriff's sale had express notice of the claim or title of the company, query? (*Eldridge v. See Yup Co.*, 17 Cal. 44.)

16. If the deed in this case was not so drawn as to represent the real facts and intention of the parties, the See Yup Company must institute a different proceeding to get the benefit

of such facts. (*Eldridge v. See Yup Co.*, 17 Cal. 44.)

Mistake, reformation for, evidence. See Mistake, 20, et seq.

Mistake, revision for. See Mistake, 18, et seq.

Deed with erroneous description, reformation of. See Deeds, 189.

Reformation for clerical error is unnecessary, when. See Contracts, 63.

Fraudulently inducing vendee to accept part for whole. See Specific Performance, 110.

III. Particular Contracts, Reformation of Procedure; Rights of Third Persons.

17. A court of equity will reform a mortgage by correcting a mistake, and, after it has been merged in a decree of foreclosure and the mortgaged property has been sold, will, if the mistake in the mortgage has been carried into the decree and sheriff's deed, reform them. It will go back to the original mistake and correct all subsequent mistakes which grow out of it. (*Quivey v. Baker*, 37 Cal. 465.) Cited 57 Cal. 405.

18. If there was a mistake in the mortgage in the description of the property, and the same mistake exists in the decree and sheriff's deed, equity will go back to the original transaction and reform all three so as to make them conform to the original intention of the parties. (*Quivey v. Baker*, 37 Cal. 465.)

19. Where in reducing an agreement to writing a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing. (*Pierson v. McCahill*, 21 Cal. 122.)

20. In an action to reform an agreement for the sale of land, an averment in the complaint, to the effect that by mistake a description of the land different from that intended by the parties to the agreement was inserted therein, is, in the absence of a demurrer, a sufficient allegation that the mistake was a mutual mistake of the parties to the agreement, and a finding in the language of the complaint is sufficient to support the judgment. (*Newton v. Hull*, 90 Cal. 487.)

21. A cross-complaint in an action of ejectment which prays for a reformation of a deed from the plaintiff's grantor to the defendant, relied upon for recovery in the action so as to make it include the land sued for, and which alleges, substantially, that it was the mutual understanding and intention of the parties to the deed that the land in controversy should be described in and conveyed by the deed set out, and that the property was conveyed to the plaintiff with knowledge on his part of the defendant's possession, sufficiently avers, as against a general demurrer, an agreement to

convey, and that the failure to describe the land in the deed was through a mutual mistake, and is sufficient to support a judgment reforming the deed, and decreeing a conveyance from the plaintiff to the defendant of the land sued for, there being no allegation or proof that there was any consideration for the deed to plaintiff. (*Seegelken v. Corey*, 93 Cal. 92.)

Complaint for reformation of declaration of trust, sufficiency. See Intervention, 26.

22. Where the judgment reforms the lease on the ground of mistake of the lessor, known to the lessee, the fact that the complaint seeks the alternative relief of rescission of the lease for fraud of the lessee in procuring the lease will not make averments in the complaint of fraud, inadequacy of consideration, or weakness of mind material to the relief granted, but the sufficiency of the findings must be tested as if the case was simply one to reform the lease. (*Wilson v. Moriarty*, 88 Cal. 207.)

23. Inadequacy of consideration and weakness of mind of the plaintiff are immaterial averments in a complaint to reform a lease, on the ground of mistake of the lessor, known or suspected by the lessee, and no findings need be made thereupon. (*Wilson v. Moriarty*, 88 Cal. 207.)

Limitation of action to reform partition deeds for mistake. See Statute of Limitations, IX, 7.

Limitation of action to reform trust for mistake. See Statute of Limitations, 299.

Venue of actions to reform. See Venue, 1, 3, c.

24. A written instrument will not be reformed by a court of equity on the ground that there was a mistake in drafting it, unless the evidence of such mistake is clear, satisfactory and free from reasonable doubt. (*Cox v. Woods*, 67 Cal. 317, cited 85 Cal. 503; *Leonis v. Lazzarovich*, 55 Cal. 52, cited 85 Cal. 503.)

25. To justify a court in decreeing the reformation of an instrument on the ground of mistake, the proof of the mistake must be clear, convincing, and satisfactory to the court, yet a mere conflict of testimony as to the mistake does not necessitate a denial of the relief, and the decision of the trial court upon such conflict is conclusive upon the appellate court. (*Sullivan v. Moorhead*, 99 Cal. 157.)

26. In an action to reform a written instrument on the ground of mistake, the relief prayed for will not necessarily be refused merely because there is a conflict of testimony as to the mistake, if, upon all the evidence, the mistake is established in a clear and convincing manner to the entire satisfaction of the court. (*Huchinson v. Ainsworth*, 73 Cal. 452.) Cited 99 Cal. 161.

27. It is sufficient to justify the findings and judgment reforming a lease, if the evidence is conflicting as to the mistake of the lessor, and tends to show that the lessee knew or suspected the plaintiff's mistake. (*Wilson v. Moriarty*, 88 Cal. 207.)

28. In an action to reform a mortgage and to foreclose the same, the court found that it

was the intention of the parties to include in the mortgage certain land, that the same was left out by mutual mistake, and that the appellant, who was a purchaser from the mortgagors, took with notice of the mistake. Held, the finding is sustained by the evidence. (*Jarnatt v. Cooper*, 59 Cal. 703.)

29. General rule that parol testimony is inadmissible to contradict, add to, or vary a written contract, does not exclude proof by parol testimony of fraud or mistake in the execution of the contract, when a reformation of the instrument is sought. (*Murray v. Dake*, 46 Cal. 644.)
Cited 59 Cal. 637; 77 Cal. 472.

30. In action to recover land the answer alleged a mistake in drawing a deed from the plaintiff to the defendant, whereby the land sued for was omitted by mistake, admitted title in the plaintiff and prayed for a reformation. Held, if a mistake was made in drawing the deed, that fact should have been found in clear and unmistakable language, and being found would constitute a defense to the action whether the court went further and actually reformed the deed or not. (*Walker v. Brem*, 67 Cal. 599.)

Parol evidence to show mistake or fraud. See Evidence, 395.

31. A covenant entered into by all the tenants in common, who as such own a block of land, in which they intend to lay out a street through the middle of the block, but which is so drawn as to locate the street at a place not in the middle of the block, cannot be enforced according to the intention of the covenantors, without first reforming it so as to make it express the real intention of the parties. (*De Witt v. Duncan*, 46 Cal. 342.)

32. If a lease is drawn of all of a brick building, but before it is signed by the lessor the parties agree verbally that it shall only cover the building as it then is, and that the lessor may erect and use a second story, the lessee cannot recover in ejectment a second story afterwards erected; but a court of equity will prevent such fraudulent use of the lease, and reform it so as to make it correspond with the verbal agreement of the parties. (*Murray v. Dake*, 46 Cal. 644.)

33. Lease cannot be reformed by incorporating in it subsequent parol agreement with reference to additional improvements upon the leased premises and an increase of monthly rental on account thereof. (*Wilson v. Moriarty*, 88 Cal. 207.)

34. Defective deeds and acknowledgments of married women cannot be reformed in chancery. (*Selover v. American etc. Co.*, 7 Cal. 266; *Barrett v. Tewksbury*, 9 Cal. 13; *Leonis v. Lazarovich*, 55 Cal. 52, cited 6 Mont. 610, distinguished 66 Cal. 373.)

Acknowledgment of married women, correction of. See Acknowledgments, V, 3.

Acknowledgments, reformation of. See Acknowledgments, IV.

35. In an action to foreclose a mortgage executed by a married woman, and to reform the certificate of the notary before whom the same was acknowledged, the notary is not a

necessary party defendant. (*Hutchinson v. Ainsworth*, 73 Cal. 452.)
Cited 91 Cal. 611.

36. A complaint in equity to have a deed absolute on its face reformed so as to become a deed of trust, which avers that the deed does not express the trusts and conditions upon which it was agreed the property should be transferred, but that such conditions were by the defendants fraudulently suppressed, without any statements of what acts of fraud were practiced, does not state facts sufficient to constitute a cause of action. (*Kent v. Snyder*, 30 Cal. 666.)

37. A judgment reforming a lease is supported by findings that when the plaintiff executed the lease she did not understand it to be a lease for ten years, with the privilege of renewal, but understood it to be for a single term of five years, and that the defendant well knew that she so understood it, and fraudulently induced her to misunderstand it, and to execute it under such misunderstanding. (*Wilson v. Moriarty*, 88 Cal. 207.)

38. The only fraud necessary to sustain the judgment reforming the lease is such as may be inferred from the failure of the lessee to correct the mistake of the lessor, known or suspected by the lessee at the time of the execution of the lease. (*Wilson v. Moriarty*, 88 Cal. 207.)

39. If, by mistake, the parties to a lease have failed to express their intention in the making of the instrument, as to the removal of buildings by the lessee, it may be revised and reformed, as between the parties thereto, upon proper showing of the fact, but it cannot be so done as to prejudice the rights of lienholders, acquired in good faith and for value, without notice of the mistake; and if there is no attempt at such reformation, in an action to enforce a lien upon the land for materials furnished for the erection of such buildings, the written lease of the land and appurtenances must be considered as merging and superseding all oral negotiations or stipulations concerning the subject matter of buildings which preceded or accompanied the execution of the instrument. (*West Coast Lumber Co. v. Apfield*, 86 Cal. 335.)

Rights of third persons. See Mistake, 13.

40. A judgment creditor, who seeks to reach an equitable interest of the judgment debtor by virtue of an attachment levied subsequently to the trust agreement under which the property is held, cannot object to a reformation of such trust agreement to conform to a prior agreement between the debtor and another beneficiary that the proceeds of sale of such equitable interests should be applied in payment of a debt due to such other beneficiary, on the ground that an assignment of the equitable interest for the security of such debt had become extinguished by lapse of time, before the trust agreement was executed, and that the agreement sought to be enforced was for the payment of a debt which was barred by the statute of limitations, the plea of the statute being a personal privilege of the debtor, which he might waive by a new agreement for security, as against the plaintiff, who had no enforceable right or lien at the date of the

creation of the trust. (*Ward v. Waterman*, 85 Cal. 488.)

41. It is not necessary that the reformation be in fact made, in order to constitute defense to an action upon a contract upon which no recovery can be had, if it was properly reformed. It is enough for the defendants to set up and establish facts entitling them to the relief demanded. *Works, J., dissenting. (Eva v. McMahon, 77 Cal. 467.)*

Instrument, how only can be reformed. See Evidence, 365.

Trust, reformation of. See Trusts and Trustees, IV.

Decree in divorce, reformation of. See Marriage and Divorce, III, 7, f.

Defective execution of power. See Equity, III, 3, g.

42. A judgment reforming a declaration of trust proceeds upon the theory that it ought to have been so written in the first instance, and must, if sustained, cause the instrument to read and operate as reformed, as and from the original date of the declaration of trust, in accordance with the principle that equity presumes that that which ought to have been done was done, and gives it force and effect as if done. (*Ward v. Waterman*, 85 Cal. 488.)

REFORMATORIES.

Act creating Whittier Reform School, validity of. See Constitutional Law, 496.

Act establishing Whittier Reform School, title of is sufficient. See Constitutional Law, 249.

State Reform School, conflict between act creating and Penal Code. See Statutes, 156.

Sentence to. See Criminal Law, XVIII, 19, b, H.

Committing minor to, jury trial. See Jury and Jurors, 23.

REGISTERS.

State lands, register of. See Public Lands, XVIII, 3.

Land-office, register of. See Public Lands, XVIII, 3.

Land-office, mandamus against register of. See Mandamus, II, 12, i.

REGISTRATION.

I. Object of Registry Act; Whether Applies to Prior Conveyances.

II. Instruments Entitled to Record; What are "Conveyances" Within Registration Act; Recording Particular Instruments.

III. Official Register, What is.

IV. How Made; Record of Recorder Under Void Election.

V. Record as Notice or Evidence; Effect of Mistake or Neglect.

VI. Withdrawal of Deed Before Registration.

VII. Presumption of Due Execution from Registration.

VIII. Unrecorded Deeds or Mortgages; Rights of Grantees or Mortgagees and Third Persons.

See Records.

Recorders. See Recorders.

Filing papers or documents. See cross-references under Filing.

Filing of return, proof of. See Sheriffs, 89, et seq.

Compelling inspection of public records. See Mandamus, II, 12, m.

Statute of enrollments. See Statute of Enrollments.

Mutilating public records. See Criminal Law, XXI, 42.

Parol evidence affecting records. See Evidence, VII, 3.

Deed, when presumed not to have been registered. See Judgments, 670.

Voters, registration of. See Elections, VII.

I. Object of Registry Act; Whether Applies to Prior Conveyances.

1. The evident intention of the statute providing for the proof and registration of conveyances is to protect subsequent purchasers, without notice, either actual or constructive. (*Call v. Hastings*, 3 Cal. 179.)

2. The intention of the Recording Act of this state was to protect the purchaser of the legal title against latent equities, or mere executory agreements, and to abolish the presumption of notice arising from possession. (*Mesick v. Sunderland*, 6 Cal. 297.) Cited 7 Cal. 306, 489; 10 Cal. 107; 15 Nev. 110.

Registry statute, nature and validity. See Constitutional Law, 389, et seq.

Conflict between articles of code relating to. See Statutes, 155.

3. The twenty-sixth section of the Act of April 30, 1850, requires conveyances made before its passage to be recorded. (*Graff v. Middleton*, 43 Cal. 341.)

4. Under section 41 of the act concerning conveyances, a deed made prior to the passage of the act, whether before the passage of the act it was acknowledged or proved or not, must be first recorded, in order to have priority over a subsequent deed from the first vendor to a bona fide purchaser for value, without notice. (*Anderson v. Fisk*, 36 Cal. 625.) Cited 38 Cal. 221; 43 Cal. 343.

5. The forty-first section of the Recording Act requires conveyances made before the passage of the act to be recorded, and the penalty of failing so to do is the same as with conveyances made after the act was passed. (*Stafford v. Lick*, 7 Cal. 479.) Cited 36 Cal. 634; 43 Cal. 343.

6. Mortgage made anterior to the passage of the act of April, 1850, concerning conveyances, was not recorded in accordance with the forty-first provision of the act. Held, that it lost its priority as against a subsequent purchaser without notice. (*Call v. Hastings*, 3 Cal. 179.)

7. The doctrine of *Call v. Hastings*, 3 Cal. 179, and *Stafford v. Lick*, 7 Cal. 474, that a

deed executed before the passage of the act concerning conveyances must, in order to prevail against a subsequent deed taken in good faith and for a valuable consideration, be first recorded, affirmed on the principle of *stare decisis*. (*Clark v. Troy*, 20 Cal. 219.)

8. The only penal section of the Registry Act is the twenty-sixth section, which is, by its own express limitation, confined to conveyances "thereafter made." Had it been intended to apply its provisions to conveyances theretofore made, language equally explicit would have been used; no such application can be adopted by mere inference and implication. (*Stafford v. Lick*, 7 Cal. 479.)

9. It cannot be said that the registry statute intended to allow a reasonable time for the recording of past conveyances, for it specifies the time, viz., before a subsequent purchaser shall record his deed, which might be immediately after the passage of the act. (*Stafford v. Lick*, 7 Cal. 479.)

10. It seems that it was the intention of the Registry Act to procure the recording of past conveyances by offering rewards, and not by inflicting penalties. (*Stafford v. Lick*, 7 Cal. 479.)

Mortgage executed before statute. See Mortgages, 174.

II. Instruments Entitled to Record; What are "Conveyances" Within Registration Act; Recording Particular Instruments.

11. A mortgage not executed under seal is not entitled to record. (*Racouillat v. Rene*, 32 Cal. 450.)

Unsealed instrument is not entitled to. See Mortgages, 168.

Unsealed instrument, record of is not notice. See Mortgages, 397.

12. No law authorizes a recorder or clerk of a county to record a copy of a deed in the Spanish language so as to make it evidence, without further proof. (*Wilson v. Corbier*, 13 Cal. 166.)

13. By the act of 1850 concerning conveyances, powers of attorney which do not authorize the agent to make an absolute conveyance of real estate, but which authorize him to make a lease of the principal's land for a term exceeding one year, or to make any other instrument affecting the real estate of the principal, except executory contracts for the sale thereof, are entitled to record. (*Jones v. Marks*, 47 Cal. 242.)

14. Duplicate certificates of sale of real property by a sheriff are entitled to be recorded without acknowledgment, and after being recorded are constructive notice to all the world. (*Foorman v. Wallace*, 75 Cal. 552.)

15. Section 1160 of the Civil Code relates only to the recording of letters patent affecting real property, and an assignment of letters patent for an invention is not entitled to record under the law of this state. (*People v. Harrold*, 84 Cal. 567.)

16. A lease of land is a "conveyance" thereof within the meaning of section 1215 of

the Civil Code, requiring a record of all conveyances of land, and the interest thereby created in the lessee, though limited to a right to receive the products of the land, is equally as void against a subsequent purchaser of the land, with no notice of the lease by reason of the failure to have it recorded, as if it were an unrecorded conveyance in fee. (*Garber v. Gianella*, 98 Cal. 527.)

17. A lease for a term exceeding one year is a "conveyance" within the definition of that word, as used in sections 27 and 38 of the Recording Act of 1850. (*Jones v. Marks*, 47 Cal. 242.)

18. The words "conveyance of real property," as used in sections 1213 and 1214 of the Civil Code, include mortgages. (*Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 603.)

19. A notice of lis pendens is not a "conveyance" within the meaning of sections 1213, 1214, and 1215 of the Civil Code, nor is it an "instrument" within the meaning of section 1217 of the same code. (*Warnock v. Harlow*, 96 Cal. 298.)

20. The lien of a judgment is not a "conveyance" within the meaning of the Registry Act. (*Wilcoxson v. Miller*, 49 Cal. 193.) Cited 10 Mont. 197.

Conveyance, whether includes assignment. See Mortgages, 428.

Declaration of homestead is not conveyance. See Homesteads, 49.

Maps, registration of. See Maps, 1.

Survey of road need not be registered. See Highways, 51.

Record of public road is not necessary. See Highways, 8.

Executory contract for deed, registration of is not authorized. See post, 50.

Street assessments, recording of. See Streets, XVI, 10.

Power of attorney, recording of. See Agency, II, 2, c.

Power of sale in mortgage, registration of. See Mortgages, 256.

Patent, recording of. See Public Lands, XX, 3.

Notice of location, registration of. See Mines and Mining, 123, et seq.

Mining claims; recording of. See Mines and Mining, VI, 11.

Vessels, registration of. See Shipping, XII.

Chattel mortgage, registration of. See Mortgages, XXI, 4, d.

Mortgage, recording of. See Mortgages, IV.

Ordinances, recording of. See Ordinances, II, 6.

Verdict, recording of. See Verdict, XIV.

Building contract, registration of. See Building Contracts, I, 3.

Homestead declaration, recording of. See Homesteads, IV, 7.

Warrants, registration and priority of. See Counties, IX, 3.

Certificate of sale, recording of. See Executions, IX, 6, b.

Assignments for benefit of creditors, necessity of registration of. See Assignments for the Benefit of Creditors, IV.

Trademarks, recording with secretary of state. See Trademarks, II.

Entry and filing of stipulations. See Stipulations, IV.

III. Official Register, What is.

21. To entitle book to character of official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept. (*Kyburg v. Perkins*, 6 Cal. 674.)

Official register, what is. See Registration, III.

Power to register before act creating recorder's office. See San Francisco, 19.

IV. How Made; Record of Recorder under Void Election.

22. Map recorded in recorder's office in pencil is not recorded within the spirit and meaning of the Recording Act. (*Caldwell v. Center*, 30 Cal. 539.)

23. Omission, in record of deed, to make copy of seal, or some mark to indicate the seal, does not vitiate the record. It is sufficient if it appear from the record that the instrument copied is under seal—as, for instance, where the deed purports to be under seal, and to be signed, sealed, and delivered in the presence of the notary before whom it was acknowledged. *Terry, C. J.* (*Smith v. Dall*, 13 Cal. 510.)

Cited 36 Cal. 203; 16 Nev. 305, 306.

Recording declaration, where land in two counties. See Homesteads, IV, 7.

Filing, presentation for filing is sufficient. See Taxation, 762.

Instrument, when deemed to be recorded. See Mortgages, 169, 953.

24. A deed, recorded January 30, 1850, by a person acting as recorder, by virtue of an election by the people, without authority of law, is not properly recorded. (*Smith v. Brannan*, 13 Cal. 107.)

V. Record as Notice or Evidence; Effect of Mistake or Neglect.

25. The doctrine of constructive notice has always been regarded as a harsh necessity; and the statutes which create it have always been subjected to the most rigid construction. (*Call v. Hastings*, 3 Cal. 179, cited 7 Cal. 294, 304, 309, 20 Cal. 223; *Chamberlain v. Bell*, 7 Cal. 292.)

26. Party dealing with land is bound by record, and is entitled to any rights which may accrue to him under it, and his position with reference to it is the same, whether or not he examines it himself. (*Miller v. Hicken*, 92 Cal. 229.)

27. A finding that one took, in good faith and without notice of rights under a deed, cannot be sustained where the deed was recorded. (*Farmer v. Ukiah Water Co.*, 56 Cal. 11.)

28. Where a deed executed in pursuance of a power is on record and the purchaser in possession, a subsequent grantee of the donor takes with notice, and is bound by a recital of fact in the deed of the donee. (*Simson v. Eckstein*, 22 Cal. 580.)

29. Where deed, as recorded, is valid upon its face, the record is notice to all the world of its contents. (*People v. O'Brien*, 96 Cal. 171.)

30. The design and intention of the Registry Act was to give constructive notice of the facts which appeared upon the face of the record. (*Chamberlain v. Bell*, 7 Cal. 292.)

31. The record of a deed not properly acknowledged does not give constructive notice to subsequent purchasers in good faith. (*Hurlbutt v. Butenop*, 27 Cal. 54; *McMinn v. O'Connor*, 27 Cal. 238.)

32. The act of April 30, 1860, entitled "An act supplementary to an act entitled an act concerning conveyances," applies to all instruments in writing then copied into the proper books of record of the proper county, and is not limited to such as by reason of non-compliance with some provision of the Registry Act failed to impart notice. (*Wallace v. Moody*, 26 Cal. 387.)

33. The record of a deed acknowledged by an officer not authorized by the laws of this state to take and certify acknowledgments of conveyances, copied into the proper book of record of the office of the county recorder, prior to the passage of the act of April 30, 1860, entitled "An act supplementary to an act entitled an act concerning conveyances," imparts constructive notice of its contents, so far as they are copied, to purchasers and encumbrancers subsequent to the passage of said act. (*Wallace v. Moody*, 26 Cal. 387.) Cited 27 Cal. 245.

34. Instruments in the acknowledgment or certificate of acknowledgment to which there was a defect or omission, and which were copied into the proper book of record in the proper county prior to the thirtieth day of April, 1860, impart to purchasers and encumbrancers becoming such after said date notice of their contents, the same as though the acknowledgment and certificate had been in due form of law. (*Landers v. Bolton*, 26 Cal. 393.)

35. The record of a mortgage not under seal does not give constructive notice of its contents, and a subsequent purchaser, unless he has actual notice of such mortgage, is not affected by it. (*Racouillat v. Rene*, 32 Cal. 450.)

36. The statute requires the seal of the officer taking the acknowledgment to be attached, as preliminary to fitting the deed for registration, and without conforming strictly to the statute, the registration will not be of such a character as to charge constructive notice. (*Hastings v. Vaughn*, 5 Cal. 315.)

37. Where the defendant bought the property in question and recorded his deed, but by mistake the number and description of the lots were omitted in the record, and plaintiff subsequently bought the same lots of the same grantor, and afterwards the common grantor of both procured the record of defendant's deed to be amended by interlineation of the description, held, that the plaintiff had no notice of the previous conveyance of the property to defendant. (*Chamberlain v. Bell*, 7 Cal. 292.)

Cited 31 Cal. 320.

38. The interlineation could only impart notice from the time it was made. (*Chamberlain v. Bell*, 7 Cal. 292.)

39. Record of deed void as to any person is not notice to such person of any thing except the existence of such void deed. It is not notice of an unrecorded valid deed. (*Vassault v. Austin*, 36 Cal. 691.)

40. The execution of a conveyance of land by the owner, in his rightful name, though different from that in which he acquired it, when duly recorded, will operate as constructive notice of the sale and transfer of the title, and will take precedence of a subsequently recorded deed to the same land, executed in the name by which it was acquired. (*Fallon v. Kehoe*, 35 Cal. 44.)

41. Does the record of a deed, executed by the grantor by his attorney in fact, which is duly acknowledged and recorded, impart notice without a record of a power of attorney, query? (*Landers v. Bolton*, 26 Cal. 393.)

42. The intention of the Registry Act of 1851, in requiring conveyances to be recorded, was to give notice to subsequent purchasers that the owner had parted with or encumbered his estate by a conveyance in his own name, or by his attorney in fact. (*Hager v. Spect*, 52 Cal. 579.)

43. The record of a power of attorney, not given by the owner, is not within the Registry Act of 1851. (*Hager v. Spect*, 52 Cal. 579.)

44. Only effect of recording act is to give notice of contents of instrument by which land of grantor is conveyed or may be affected,—that is to say, of some right, title, or interest conveyed to or vested in the party to whom the instrument is made. (*Hager v. Spect*, 52 Cal. 579.)

45. Where deed of trust conveys both real and personal property, the recording thereof as a conveyance of real estate does not operate as constructive notice of the transfer of the personal property. (*Scott v. Sierra Lumber Co.*, 67 Cal. 71.)

46. Registration of conveyance upon condition precedent is sufficient to put a subsequent purchaser on inquiry as to the performance of conditions. (*Brannan v. Mesick*, 10 Cal. 85.)

47. Records are only constructive notice of title, of which they enable party to obtain actual knowledge by means of a search. (*Garber v. Gianella*, 98 Cal. 527.)

48. Matter constituting estoppel in pais is not within the Registry Act. (*Hager v. Spect*, 52 Cal. 579.)

49. When a deed and a defeasance thereof are recorded, and together constitute a mortgage by legal construction, any subsequent grantee of the property is conclusively presumed to have had notice of the real nature of the transaction, and is put upon inquiry as to whether the mortgage was or was not paid, in whole or in part. (*Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34.)

50. Where the plaintiff in ejectment claimed under a subsequent deed from the grantor, who had made a prior deed in which the passing of title was made contingent on payment of the price, and the defendants held

under the grantees named therein, held, that the record of said instrument, in the county recorder's office, made June 20, 1850, imparted no notice to the plaintiff, who purchased July 9, 1855, the registration of executory contracts not being authorized or made notice by statute. (*Mesick v. Sunderland*, 6 Cal. 297.) Cited 7 Cal. 303; 76 Cal. 140.

51. The doctrine of constructive notice by registry of deeds has application only to subsequent purchasers or encumbrancers. (*Kearns v. Olney*, 80 Cal. 90; *Dennis v. Burritt*, 6 Cal. 670; *McCabe v. Grey*, 20 Cal. 509, cited 6 Nev. 391.)

52. The provisions of recording acts are for the protection of subsequent purchasers and encumbrancers from the common grantor, and do not affect the rights of strangers to the claim of title. (*Garber v. Gianella*, 98 Cal. 527.)

53. If the recording act imparts notice to prior purchasers or mortgagees, it is but constructive notice, and insufficient to charge a prior mortgagee with fraud, in releasing portions of the mortgaged premises, retaining a lien on the balance (of which part had been sold after the mortgage), but before his releases, so as to justify a court of equity to set the act aside. (*Dennis v. Burritt*, 6 Cal. 670.)

Records as notice. See *Husband and Wife*, 334, 335.

Notice, docketing gives. See *Judgments*, 249.

Recording of void deed does not give notice. See *Taxation*, 843.

Purchaser takes with notice of recorded deed. See *Lis Pendens*, 21.

Notice of recorded certificate. See *Executions*, 199.

Notice, registration of instrument acknowledged by one person only is. See *Watercourses*, 182.

Record of unsealed instrument is not notice. See *Mortgages*, 397.

Withdrawal of deed before registration. See *post*, VI.

Certified copies as evidence. See *Evidence*, II, 7.

Records as evidence. See *Evidence*, III, 9.

Mistake of recorder, effect of. See *Mines and Mining*, 127.

Certificate recorded in wrong place, as notice. See *Executions*, 202.

Mistake of clerk in docketing judgment, effect of. See *Judgments*, 248.

Conflict between dates of registration. See *Mortgages*, 169.

Neglect of recorder, effect of. See *Homesteads*, IV, 7.

VI. Withdrawal of Deed Before Registration.

54. If after deed is filed for record, but before it is recorded, it is withdrawn from the recorder's office by the grantee, and kept away from the said office some time and then returned for record, during the time the deed is away from the office the law making the filing of a deed for record notice to subsequent purchasers is suspended. (*Lawton v. Gordon*, 37 Cal. 202.)

VII. Presumption of Due Execution from Registration.

55. If an instrument be duly recorded, it furnishes sufficient prima facie evidence that it was duly executed. (*Mayo v. Mazeaux*, 38 Cal. 442.)

Recording is equivalent to delivery of possession. See *Mortgages*, 961.

Registration of deed as evidence of its delivery. See *Deeds*, 86.

Record of deed as evidence of its due execution. See *Deeds*, 23.

Forged deed, registration of, effect of. See *Forgery*.

VIII. Unrecorded Deeds or Mortgages; Rights of Grantees or Mortgagees and Third Persons.

56. At common law, negligence in a prior purchaser or mortgagee, such as leads to imposition upon an innocent party, is regarded as a legal fraud. (*Call v. Hastings*, 3 Cal. 179, 182.)

57. Grounds on which registry acts are based, are, that the party who fails to record his deed places it in the power of his grantor to commit a fraud upon others, and the law holds him responsible as assisting the fraud. (*Bird v. Dennison*, 7 Cal. 297.) Cited 7 Cal. 416.

58. The penalty for failing to record conveyances declared in the statute must be limited to conveyances as defined by the statute, and cannot, by implication, be extended to instruments for the recording of which it makes no provision. (*Bird v. Dennison*, 7 Cal. 297.) Cited 9 Cal. 128; 10 Cal. 191.

59. A mortgage of real property is void, as against a subsequent mortgage of the same property which is first recorded, and is taken in good faith and for a valuable consideration and without actual notice of the preceding mortgage. (*Odd Fellows' Savings Bank v. Banton*, 46 Cal. 603.)

60. The above rule is not affected by section 2937 of the Civil Code, which prescribes that the mortgagee is allowed one day for every twenty miles between his residence and the recorder's office, and that during such time the mortgage has the same effect as if recorded. (*Odd Fellows' Savings Bank v. Banton*, 46 Cal. 603.)

Effect of failure to record mortgage. See *Mortgages*, IV.

Mortgagee failing to record his mortgage is postponed. See *Executions*, 204.

Unrecorded mortgage, priority of homestead over. See *Homesteads*, 185, et seq.

Unrecorded mortgage, rights and liabilities. See *Swamp and Overflowed Lands*, 121.

Priority of mortgage over unrecorded deed. See *Mortgages*, 271.

Unrecorded deed, effect of mortgage. See *Mortgages*, 584, et seq.

Unrecorded deed prevails over attachments. See *Attachments*, 166, 177.

Bona fide holder of quitclaim prevails over prior unrecorded deed. See *Deeds*, 410.

Conveyance, what interest passes where

vendor's deed unrecorded. See *Vendor and Vendee*, 50.

61. The rule that a subsequent purchaser in good faith and for a valuable consideration, and whose deed is first recorded, will hold the land conveyed, as against a prior purchaser, only applies where both parties claim under the same grantor. (*Long v. Dollarhide*, 24 Cal. 218.)

Cited 98 Cal. 529; 6 Nev. 391.

62. A deed which has been recorded is not conclusive evidence of title in the grantee, as against a grantee in a prior unrecorded deed who is in possession. (*Fair v. Stevenot*, 29 Cal. 486.)

63. The true construction to be given to the Registration Act is, that the failure of a grantee to record his deed does not absolutely and without exception avoid the deed as to third persons. The failure to register only protects bona fide purchasers for a valuable consideration. (*Hunter v. Watson*, 12 Cal. 383.)

Cited 10 Mont. 197.

64. In a suit to try the title to land between two who are purchasers from the same grantor, where the oldest deed is neither acknowledged nor recorded, the one claiming under the prior unacknowledged and unrecorded deed will prevail, unless the fact appears that the second purchaser bought without notice for a valuable consideration. It is not sufficient for the second purchaser that there is no finding of fact or evidence on the subject, but the fact must be made to appear affirmatively. (*Landers v. Bolton*, 26 Cal. 393.)

Cited 79 Cal. 127.

65. Subsequent purchaser of premises is not protected against a prior unrecorded deed if he has not paid a valuable consideration. (*Morse v. Wright*, 60 Cal. 280; *Colton v. Seavey*, 22 Cal. 496, cited 34 Cal. 98.)

66. The burden of showing that he is a purchaser in good faith and for a valuable consideration is cast upon the one claiming under a second deed but recorded first in point of time, and the deed itself is not evidence of these facts, but they must be shown by other testimony. (*Long v. Dollarhide*, 24 Cal. 218.)

Cited 26 Cal. 86; 85 Cal. 9.

67. The evidence tending to establish that the grantee under whom the defendants claim had no notice of the prior deed of the plaintiffs, held, sufficient to justify the finding that such grantee was a bona fide purchaser of the premises in controversy. (*Gassen v. Hendrick*, 74 Cal. 444.)

68. The finding that the plaintiffs took the land in controversy free from any trust in favor of the defendant arising from a prior unrecorded agreement to convey to it, held, supported by the evidence. (*Gray v. African Methodist Episcopal Zion Church of America*, 76 Cal. 576.)

69. The object of laws which require deeds and mortgages to be recorded is to prevent imposition upon subsequent purchasers and mortgagees in good faith, and without notice of the prior deed or encumbrance, but not to

protect them when they have such notice. *Per Bennett, J. (Woodworth v. Guzman, 1 Cal. 203.)*

70. A subsequent purchaser from the grantors with notice of the prior deed is bound by all the equities of the plaintiff, and holds the legal title in trust for him. (*Cannon v. Handley, 72 Cal. 133.*)

71. One who buys real estate from another, with the actual knowledge at the time of his purchase that his grantor had before that time made some kind of a conveyance of the same property to another person whose deed has not been recorded, is not a purchaser in good faith, although he did not know the kind of conveyance which had been made. This rule is the same in an action at law as in a suit in equity. (*Galland v. Jackman, 26 Cal. 79.*)

Cited 10 Mont. 197.

72. Where notice of a mortgage is had by a subsequent purchaser or mortgagor he is not protected by our statute of frauds. (*Mitchell v. Steelman, 8 Cal. 363.*)

73. Notice of prior unrecorded conveyance must be clearly brought home to a subsequent purchaser whose conveyance is first recorded, before the unrecorded deed will prevail over the one first recorded. (*Smith v. Yule, 31 Cal. 180.*)

Cited 66 Cal. 110.

74. The Registry Act abolished all constructive notice of unrecorded conveyances; but it did not do away with notice in fact. Possession, therefore, is not constructive notice of title, but it may be admitted in evidence, along with other facts, to establish fraud or actual notice. (*Stafford v. Lick, 7 Cal. 479.*)

Cited 24 Cal. 640.

75. The burden of proof rests upon one in possession under an unrecorded lease, who seeks to avoid the protection given by section 1214 of the Civil Code to a bona fide purchaser for value, whose conveyance is first duly recorded, to show that at the time of the purchase he was in the open, notorious, and exclusive possession of the premises in controversy; but if he shows such a possession not consistent with a former lease of record, which covered only a portion of the premises purchased, it is sufficient to put the purchaser on inquiry, and the latter is chargeable with actual notice of the terms of the unrecorded lease under which such possession of the remainder of the premises was held, if no inquiry as to the tenant's right of possession was pursued with proper diligence; and he cannot maintain an action to eject the tenant from any part of the premises covered by the unrecorded lease before the expiration of his leasehold interest. (*Dreyfus v. Hirt, 82 Cal. 621.*)

Notice of unrecorded deed, possession as. See Notice, II, 3.

Notice of prior unrecorded mortgage. See Mortgages, 289.

Evidence of notice of unrecorded deed. See Notice, II, 4.

Notice to vendor as to unrecorded deed, whether binds vendee. See Notice, IV.

Possession by entry under unrecorded deed. See Possession, 36.

Possession under unrecorded deed as notice. See Notice, II, 3, a.

76. No constructive notice is given of the rights of a lessee under an unrecorded lease by reason of the record of a lease from him to a second lessee, and a grantee of the original lessor is not affected with constructive notice of the rights of such first lessee, although her deed is expressly subject to the second lease, no lessor being named in the deed. (*Garber v. Gianella, 98 Cal. 527.*)

77. A lessee under an unrecorded lease, who has leased to a second lessee, and claims an interest in the crops under such lease, has the burden of proving actual notice of his rights to a grantee of his lessor, who takes merely subject to the second lease, without being informed as to the name of the lessor of such lease. (*Garber v. Gianella, 98 Cal. 527.*)

78. A conveyance to one who has notice of a prior unrecorded deed, given by his grantor to a third person, passes no title to the grantee, and an innocent purchaser from such grantee does not acquire any title, except through the Registry Act, in getting his deed recorded before the record of such prior deed. (*Mahoney v. Middleton, 41 Cal. 41.*)

Cited 48 Cal. 143.

79. A beneficiary who sues to enforce a trust, and obtains a commissioner's deed from the clerk in the action, in which a *lis pendens* is filed, is not a subsequent purchaser within the meaning of the statute regulating the record of deeds, and cannot claim priority over an unrecorded deed from the trustee, executed before the filing of the *lis pendens*, and recorded thereafter. (*Warnock v. Harlow, 96 Cal. 298.*)

80. The Registry Act does not make an unrecorded deed void as against subsequent attaching creditors. (*Plant v. Smythe, 45 Cal. 161.*)

81. The Registration Act only protects purchasers; creditors, as such, are not included within its provisions. But a judgment creditor, purchasing at his own sale, without notice, is a bona fide purchaser within the act. (*Hunter v. Watson, 12 Cal. 363.*)

Cited 75 Cal. 554.

82. A judgment creditor who, without notice of a prior unrecorded deed from the judgment debtor, purchases the land of the latter at the execution sale, is a bona fide purchaser, and if his certificate of sale be first recorded, is entitled to priority over the grantee under the prior deed, notwithstanding the latter deed is recorded before the issuance of the sheriff's deed. (*Foorman v. Wallace, 75 Cal. 552.*)

83. Judgment creditors of the vendor in a deed, who become such after the execution and delivery of the deed, cannot object to the operation of the deed against their judgment that it was not on record, unless a sale has been made under such judgment before the deed is recorded. But if a sale has taken place, the purchasers at such sale, without notice, actual or constructive, of the deed, may invoke the protection of the Registry Act. (*Pixley v. Huggins, 15 Cal. 127.*)

Cited 10 Mont. 197.

84. A judgment creditor who buys at sheriff's sale the land of the judgment debtor, and receives a sheriff's deed without knowledge of a prior unrecorded mortgage given by the judgment debtor on the land, must show that his sheriff's deed was first recorded, before he can claim to be a purchaser in good faith and for a valuable consideration. (*Thomas v. Vanlieu*, 28 Cal. 616.)
Cited 10 Mont. 197.

85. A deed executed before a judgment is recovered against the grantor, but which is not recorded until after the judgment is docketed, is good as against a sheriff's sale made on the judgment, if recorded before the record of the sheriff's deed. (*Wilcoxson v. Miller*, 49 Cal. 193.)

86. If the owner makes a written sale of land before the docketing of a judgment recovered against him, and after the judgment is docketed executes to the purchaser and acknowledges a conveyance which is recorded before a sheriff's deed made under the judgment is recorded, the purchaser's title will prevail over the title acquired under the sheriff's sale. (*Packard v. Johnson*, 51 Cal. 545.)
Cited 10 Mont. 197.

87. An unrecorded deed is valid as between the parties thereto and those who have notice thereof, and is only void as against subsequent purchasers in good faith and for a valuable consideration, and is not void as against a prior record of its pendency in an action to enforce a trust against the grantee of the deed. (*Warnock v. Harlow*, 96 Cal. 298.)

Omission to record, effect of. See Homesteads, 51.

Failure to register declaration of homestead, effect of. See Homesteads, 49.

REGULATIONS.

Land department, regulations of. See Public Lands, XVIII, 2.

Power of municipalities to make. See Municipal Corporations, IX, 3.

Reasonable. See Common Carriers, 97, 102.

Mining law prevails over. See Mines and Mining, 159, 160.

Mining. See Mines and Mining, VI.

REHEARING.

See Appeals, XII, 12.

Habeas corpus, rehearing on. See Habeas Corpus, III, 6.

Effect of. See Law of the Case, IV.

REINSTATEMENT.

See Unincorporated Associations, IV.

REINSURANCE.

See Insurance, I, 16.

REJECTION.

Claims, rejection of. See Estates of Deceased Persons, VI, 6; Municipal Corporations, 180.

RELATION.

Doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice. (*Shay v. McNamara*, 54 Cal. 170.)
Cited 68 Cal. 238; 90 Cal. 6.

Doctrine not applied so as to make judgment binding. See Judgments, 400.

Amendment, relation of. See Pleading and Practice, XI, 21.

Amendment of affidavit, relation of. See Venue, 157.

Assignment in insolvency, relation of. See Bankruptcy and Insolvency, 203, et seq.

Attachment, relation of. See Attachments, 153.

Certificate of physician, relation of so as to entitle to compensation. See Physicians, 8.

Deed delivered in escrow, relation of. See Deeds, 107.

Deed, relation of. See Deeds, IV, 3; Mortgages, 274; Municipal Corporations, 153, 154.
Sheriff's deed, relation of. See Executions, XI, 5; Mortgages, 808, 809.

Judgment of dismissal, relation of. See Dismissal, VII.

Judgment of reformation. See Reformation of Contracts, 42.

Judgment in ejectment, relation of to commencement of action. See Cotenancy, 169.

Mortgage, relation of to inception of contract. See Mortgages, 162.

Ratification of sale, relation of title on. See San Francisco, 300, et seq.

Patent, relation of. See Mexican Lands, I, 25, c; Mines and Mining, 181; Public Lands, XX, 6.

Pre-emptor, relation of rights of. See Public Lands, 212.

Ratification of agent's acts, relation of. See Agency, 178.

Sureties, relation of liability of where new bond filed. See Appeals, 1797.

Tax, lien of, relation of. See Taxation, 507.

Title of state to lands, relation of. See Public Lands, 46.

Title of United States to land in California, relation of. See Public Lands, I.

Title of state, relation of where lien land listed to State. See Public Lands, 34.

Title of purchaser under sale for street assessment, relation of. See Streets, 720.

Title of purchaser at foreclosure, relation of. See Mortgages, 806.

Title to water acquired by appropriation, relation of. See Watercourses, XIV, 2, i.

Title of executor, relation of. See Executors and Administrators, 187.

Title of one purchasing mortgaged property from executor, relation of. See Estates of Deceased Persons, 212.

RELATIONSHIP.

Disqualification of judge because of. See Judges, I.

RELEASE.

See Accord and Satisfaction.

Receipts. See Receipts.

Waiver. See Waiver.

Contract must be written. See Mortgages, 474.

Release and payment are dependent covenants, when. See Contracts, 283.

1. A covenant not to sue cannot operate as a release or otherwise, unless it had a consideration. The provision of section 1541 of the Civil Code, that a written release is good without a consideration, applies only to formal releases purporting to be such, and not to things which might operate as such in a roundabout way. (*Upper San Joaquin Irr. Canal Co. v. Roach*, 78 Cal. 552.)

Lien, release of, consideration for. See Vendor and Vendee, 285.

2. It is a principle in the construction of releases, and the reason of the rule extends to grants and conveyances of lands, that a release in general words shall be restrained to the particular occasion; and that where there are general words alone in a deed of release, they shall be taken most strongly against the releasor; but when there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital. (*Hayes v. Wetherbee*, 60 Cal. 596.)

3. Where there is no estate in a releasee to support a release or upon which it can operate, a release is void. (*Branham v. Mayor and Common Council of San Jose*, 24 Cal. 585.)

4. A release, unless the releasee is in possession, is void. (*Branham v. Mayor and Common Council of San Jose*, 24 Cal. 585.)

5. A release executed to the defendant by the plaintiff, in consideration of its caring for him at the hospital until he should have sufficiently recovered to resume labor, is not binding on him when it is shown that he could not read the instrument, and that he did not read it when he signed it, but signed it at the request of his wife, who could not read it, and who when it was read and explained to her by one of the defendant's employees understood that it was simply a receipt. (*Smith v. Occidental and Oriental Steamship Co.*, 99 Cal. 462.)

6. Although it is a general rule that when a person with the capacity of reading and understanding an instrument signs it, he is, in the absence of fraud and imposition, bound by its contents and is estopped from saying that its provisions are contrary to his intentions or understanding, still, if the circumstances of the transaction are such that he is not estopped from setting up his want of assent, he can be relieved from the effect of his signature if it can be made to appear that he did not in reality assent to it. (*Smith v. Occidental and Oriental Steamship Co.*, 99 Cal. 462.)

7. The award being void, a release of action, filed by one of the parties in pursuance of the submission, is also void. (*Muldrow v. Norris*, 12 Cal. 331.)

8. The plaintiff executed a release to the defendants from all claims for damages on account of such injuries on the day following the accident. At the trial the plaintiff was permitted, against defendant's objection, to write his name on a piece of paper for the inspection of the jury, to show, by comparison

with the name signed to the release, the nervous condition of the plaintiff at the time of the accident. Held, error. (*Gulzoni v. Tyler*, 64 Cal. 334.)

9. In an action for damages for the death of the plaintiff's minor son—alleged to have been killed by the negligence of defendant—the defendant pleaded in bar a release in writing by the plaintiff of all demand for the damages sued for, and in his answer inserted a copy of the release. The execution of the release was not denied by the plaintiff, in the mode required by section 448, of the Code of Civil Procedure but the evidence was offered by the plaintiff, and admitted without objection, tending to show that at the time he signed the release he was incompetent to contract. The verdict was for the plaintiff. Held, under such circumstances, the defendant cannot be allowed to raise the point in this court, that the verdict of the jury is against an admission made by the pleadings. (*Crowley v. City R. R. Co.*, 60 Cal. 628.)

Cited 8 Cal. 200.

10. Where a defendant sets forth in his answer a written release as a bar to the plaintiff's cause of action, and on the trial introduces evidence showing that such release had never been delivered, he is estopped from claiming the benefit of the admission arising out of the plaintiff's failure to deny by affidavit the genuineness and due execution of the instrument. (*Clark v. Child*, 66 Cal. 87.)

11. In an action by a partner to enforce a partnership demand, the defense of a release of the demand, given by another partner, although not pleaded in the answer, may be taken advantage of by the defendant, when the complaint contained averments in reference to the release, and the plaintiff himself proved the partnership and introduced the release in evidence. (*Hawn v. Seventy-Six Land etc. Co.* 74 Cal. 418.)

Partner, power of to release. See Partnership, IX, 3.

12. Release of one joint debtor is a release of the others, but it must be a technical release under seal. (*Armstrong v. Hayward*, 6 Cal. 183.)

Cited 38 Cal. 531, 537.

13. A receipt given to one joint debtor on a note, for a part payment, coupled with the words "which is in full on his part on the within note, and the said A B is hereby discharged from all obligations on the same," is not such a release as will discharge the others. (*Armstrong v. Hayward*, 6 Cal. 183.)

Cited 12 Cal. 324.

14. Under section 1543 of the Civil Code, the release of several persons jointly liable on a promissory note, who are not mere guarantors, does not release the other co-obligors. (*Wristen v. Curtiss*, 76 Cal. 6.)

15. Roberts owned personal property, and offered to sell it to Ellsworth, but his offer was not accepted. More than six months afterwards Ellsworth went with a servant of Evans and took the property, and delivered it to Evans, who kept and used it, and paid Ellsworth for it. Roberts afterward

wrote to Ellsworth to pay him for the property, but not being paid sued Evans for its value. Held, that Roberts' right of action against Evans was not waived by his offer to accept of pay from Ellsworth, and that his purchase from Ellsworth did not release him from liability to Roberts for the value of the property. (*Roberts v. Evans*, 43 Cal. 380.) Cited 55 Cal. 23.

16. A covenant not to sue made to a portion only of joint debtors does not release any of them. (*Matthey v. Gally*, 4 Cal. 62.)

17. In action against two persons for damages, resulting from personal injury, the jury found that the plaintiff had received satisfaction for the injury alleged in the complaint from one of the defendants. Held, that he could not recover from the other defendant. (*Urton v. Price*, 57 Cal. 270.) Cited 66 Cal. 167; 93 Cal. 199.

Effect of. See *Partnership*, IX, 12, c.
Fraud, release obtained by. See *Sheriffs*, 108.

Release of part of sureties, exoneration of surety by. See *Suretyship*, IV, 5, f.

Release of one partner, effect of on others. See *Partnership*, 243.

Release of one carrier jointly liable, effect of. See *Negligence*, 46.

Of one executor does not discharge the other. See *Executors and Administrators*, 495, 496.

Dismissal as to one party. See *Dismissal*, 69.

Appeal, duty of sheriff to release property pending. See *Sheriffs*, IV, 3, j.

Attachment, release of. See *Attachments*, VI; *Exemptions*, III.

Attachment, bond to release. See *Attachments*, VI, 3.

Equitable interest, writing, necessity of. See *Statute of Frauds*, I, 10, g.

Execution, release of property on. See *Executions*, VIII.

Habeas corpus, release on. See *Habeas Corpus*.

Judgment, release of. See *Judgments*, XIX.

Mortgage, release of. See *Mortgages*, XV.

Negligence, liability for, release of. See *Negligence*, IV.

Surety, exoneration of by release of property. See *Suretyship*, IV, 5, d.

Stockholder's liability, release of. See *Corporations*, IV, 7, e.

Sheriff, what amounts to release of. See *Sheriffs*, IV, 3, q.

Vendor procuring release from defaulting vendee. See *Vendor and Vendee*, XI, 3.

Vendee, release from to vendor, effect of. See *Vendor and Vendee*, XI, 3.

Witness, interest of, release of. See *Witnesses*, V, 8, c, L.

RELETTING.

Street contract, reletting of. See *Streets*, XV, 4.

RELEVANCY.

Evidence, relevancy of. See *Evidence*, IX.

RELIEF ACTS.

Validity of. See *Constitutional Law*, VIII, 6, b.

RELIGIOUS BELIEF.

See *Witnesses*, V, 1.

RELIGIOUS SOCIETIES.

1. By section 288 of the Civil Code the provisions of the act of April 22, 1850, relating to corporation, were continued in force as to corporations created under them. (*Estate of Eastman*, 60 Cal. 308.)

2. Section 209 of the Civil Code, requiring a certified copy of the copy of the articles of incorporation filed with the secretary of state to be filed in the county where the corporation owns land, applies only to corporations a copy of whose articles were required by statute to be filed with the secretary of state, and does not apply to a religious corporation established before the code, under a statute requiring only the filing of its articles with the county clerk. (*Mora v. Murphy*, 83 Cal. 12.)

Corporations sole. See *Corporations*, 3, 4.
Certificate of incorporation for mora purposes. See *Corporations*, 29, et seq.

3. The missions established in California prior to its acquisition by the United States were political establishments, and in no manner connected with the church. (*Nobili v. Redman*, 6 Cal. 325.)

4. Prima facie, the governor of California under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to a complaint setting forth such grant, on the ground of want of authority in the governor, is not sustainable. (*Den v. Den*, 6 Cal. 81.)

5. The fact that monks or priests were at the head of the California missions proves nothing in favor of the claim of the church to universal ownership. (*Nobili v. Redman*, 6 Cal. 325.)

6. The lands settled by the missions were not conveyed to any one, but remained the property of the government; and even the church buildings thereon did not become the property of the church corporate, until the decree of secularization of 1833. (*Nobili v. Redman*, 6 Cal. 325.)

7. The Catholic church can only claim any of the mission property under the decree of secularization, and subject to its limitations. (*Nobili v. Redman*, 6 Cal. 325.)

8. It seems that, in the year 1833 or 1834, the property of the missions in California was confiscated by the Mexican government, with the exception of limited portions reserved for religious purposes; and that, in carrying into execution this law of confiscation, the officers of the Mexican government took possession of the lands and property of the Mission Dolores, except a small portion reserved. (*San-tillan v. Moses*, 1 Cal. 92.)

9. It seems that the priest at the Mission Dolores had no authority to lease lands appertaining to the Mission after the cession of California to the United States, and that a

title thus derived is invalid. (*Brown v. O'Connor*, 1 Cal. 419.)

10. The position of the priest of the Mission Dolores being analogous to that of a sole corporation in England, he may, in his character of priest, maintain an action in his own name to recover possession of lands of the mission which have been reserved. (*Santillan v. Moses*, 1 Cal. 92.)

Corporation sole cannot enjoin sale, when. See Injunctions, 284.

Variance in action on promise to pay money to. See Variance, 10.

11. The proceeding was brought by the plaintiffs, claiming to be the duly elected vestrymen of St. Mark's parish, to compel the defendants to surrender the temporalities and church building belonging to the parish, and to restrain them from further acting as the vestrymen thereof. The parish in question is a voluntary religious association, subject to the constitution, canons, and regulations of the Protestant Episcopal Church of the United States, and of the diocese of California. A canon of the church requires that the election of vestrymen shall be held on Easter Monday of each year, or as soon thereafter as practicable, and that notice of the election shall be given during divine service upon the Sunday previous thereto. The election under which the plaintiffs claim was not held on Easter Monday, and the notice thereof was given on the preceding Sunday, at a meeting of the congregation which took place several hours before the regular time for divine service. Held, that the notice was insufficient, and that the election was void. (*Dahl v. Palache*, 68 Cal. 248.)

12. If the rules of a church require its trustees to be elected on a particular day in the year, after notice given on the preceding Sunday by the pastor, a board of trustees elected on a different day without the notice are not trustees de jure. (*Zion Methodist Episcopal Church v. Hillery*, 51 Cal. 155.)

13. Trustees de facto of a church may rightfully eject from the church persons who claim to be its trustees and who have taken possession of it, but who are neither trustees de facto or de jure, and are mere intermeddlers with its temporalities. (*Zion Methodist Episcopal Church v. Hillery*, 51 Cal. 155.)

14. If several persons claim to be trustees of a church, and, under such claim, enter into and take possession of it, and serve a notice of dismissal on the pastor, these acts do not constitute them trustees de facto of the church. (*Zion Methodist Episcopal Church v. Hillery*, 51 Cal. 155.)

15. A note, stating that "We, the undersigned trustees of the First African Methodist Episcopal Church, in behalf of the whole board of trustees of said association, promise to pay," etc., and signed, without qualification, by two persons having authority, is the note of the church, and not of the signers. (*Haskell v. Cornish*, 13 Cal. 45.) Cited 28 Cal. 265.

16. In an action to recover for the use of members of the First Reformed Church of the city of Stockton a lot of land with the dwell-

ing-house thereon, which was purchased and formerly used as a parsonage of the church, a complaint stating, in substance, that the plaintiffs and their associates, for whose benefit the action is also prosecuted, are a religious society in full membership with a national religious society known as the Reformed Church in the United States; that they were organized for the purpose of teaching the gospel according to the particular tenets of that church, as embodied in the Heidelberg Catechism, and were duly incorporated, under the name of the First Reformed Church of the city of Stockton; that the said corporation purchased the property with donated funds for a residence for its pastors, and for no other purpose; and that the defendants had fraudulently conspired to change the name of said corporation to that of the First German Evangelical Lutheran Zion Society of Stockton, for the purpose of repudiating the tenets of said Reformed Church, and of diverting the property from the use to which it was dedicated, for the support of the Lutheran Church, which has a different doctrine, different church government, and different laws from those of the Reformed Church, and that defendants are now holding and using the same, as trustees of said Lutheran Church, as a residence for the pastors of said Lutheran Church, states a cause of action, and is not indefinite and uncertain in not stating particularly wherein the doctrinal standards of the two churches differ. (*Baker v. Ducker*, 79 Cal. 365.)

17. The complaint in such action averring that plaintiffs, together with a large number of other persons, are associated together for religious purposes, and are members of the First Reformed Church of the city of Stockton, and that they prosecute the action for all the members of the church as well as themselves, shows the question to be one of common or general interest of many persons, and that the action was authorized by section 382 of the Code of Civil Procedure. (*Baker v. Ducker*, 79 Cal. 365.)

18. When, in such action, it appears from the evidence that the original constitution and by-laws of the First Reformed Church were written by the minister thereof in its record book, and that the church had always acted on them and considered them as its constitution and by-laws, they are admissible in evidence, without proof of any direct vote of the congregation adopting them. (*Baker v. Ducker*, 79 Cal. 365.)

19. In such action, evidence that certain individual members of the Reformed Church were Lutherans in their religious belief, and that many Lutherans had contributed money for the purchase of the parsonage, is properly excluded as irrelevant and immaterial; it appearing that the subscription was made for a parsonage for the Reformed Church, and that the deed of the property was made thereto, whereby the property was dedicated to the use of that church. (*Baker v. Ducker*, 79 Cal. 365.)

20. When property is held by a religious society in trust for its members, none of the members, though they constitute a majority, have any right or power to divest the prop-

erty to the use of another and different church organization; and the fact that they procure a change of the name of the corporation by order of court cannot aid them in such diversion. (*Baker v. Ducker*, 79 Cal. 365.)

Roman Catholic archbishop, adverse possession by. See Adverse Possession, III, 4, f.

Roman Catholic archbishop, right to sue. See Quieting Title, 85.

Communication between parishioner and priest. See Privileged Communications, V, 2.

Power to take by will. See Charitable Uses, 16.

Bequest to must not exceed one-third. See Charitable Uses, 14, 15.

Deed does not create trust for, when. See Deeds, 255, 256.

Exemption of church property. See Taxation, 189.

RELOCATION.

Mining claims, relocation of. See Mines and Mining, V, 8.

REMAINDERS.

See Reversion.

REMEDIAL STATUTES.

See Statutes, VIII, 22.

REMEDIES.

See cross-references under Actions.

Power of legislature as to. See Constitutional Law, 487.

Laws affecting. See Constitutional Law, VIII, 8, d.

Statutes regulating construction of. See Pleading and Practice, 6.

Adequacy of. See Specific Performance, II.

Plain, speedy, and adequate remedy, what amounts to. See Mandamus, II, 3.

Plain, speedy and adequate, effect of on prohibition. See Prohibition, III, 3.

Legal, effect on equity jurisdiction. See Equity, III, 2.

Concurrent. See Quieting Title, II, 1.

Concurrent right of appeal and right to move for dismissal of injunction. See Appeals, 209, 210.

Election. See Election.

Creation of right without remedy. See Pleading and Practice, V; Statutes, VIII, 17.

Appeals, how taken where no mode provided by legislature. See Appeals, V, 2.

Procedure on appeal where no mode provided. See Appeals, XIII, 3, a.

Authentication where no mode provided by statute. See Appeals, VI, 6, c.

Misuse of power in eminent domain. See Eminent Domain, XI.

Dismissal, remedy for. See Dismissal, VIII.

Breach of warranty, remedy for. See Sales, VII, 4, b.

Where title defective on sale of land. See Vendor and Vendee, VIII, 9.

Fraud or deceit, remedies for. See Vendor and Vendee, III.

Wrongful severance of fixtures, remedies for. See Fixtures, IV.

Where stock sold under assessment without authority. See Corporations, 318.

Nonpayment of license, remedy for. See Licenses, II, 10.

Where compensation not paid in eminent domain. See Eminent Domain, X, 10.

Infringement of trademark, remedies for. See Trademarks, VI.

Contract void under statute of frauds, remedies on. See Statute of Frauds, VI.

Delinquent taxes, remedies for collection of. See Taxation, XII, 4, b.

Failure to issue execution, remedy on. See Executions, I, 2.

Defective findings, remedies for. See Findings, V.

Remedy by appeal in case of erroneous or void street contract. See Streets, XIV, 10.

Remedy by appeal is exclusive. See Appeals, 474.

Street assessment, remedy by appeal and effect of failure to appeal. See Streets, XVI, 20.

REMISSION.

Tax, remission of. See Taxation, X.

REMOTE CAUSE.

See Damages, IV; Negligence, II, 5.

REMOVAL.

Officers, removal of. See Corporations, VIII, 5.

Action to remove directors. See Corporations, X, 7, e.

Trustees, removal of. See Trusts and Trustees, VII, 10.

Guardian, removal of. See Guardian and Ward, V, 9.

Office, removal from. See Offices and Officers, XVI.

Vacancy, removal from district, whether causes. See Offices and Officers, XIV, 1, f.

REMOVAL OF CAUSES.

Change of venue. See Venue.

1. No cause can be transferred from state court to any court of the United States. (*Johnson v. Gordon*, 4 Cal. 368.)

2. Under the act of Congress of 1789 and the statute of this state of 1855 respecting the transfer of actions from a state to a United States court, the court to whom the application is made must, before granting it, be satisfied that the application is founded upon facts which entitle the applicant to the order, and for this purpose has the right to inquire into the truth of the facts set forth in the petition, as well as to investigate the sufficiency of the security. (*Orosco v. Gagliardo*, 22 Cal. 83.)

Doubted 36 Cal. 288.

3. The federal constitution and acts of Congress do not authorize the removal, from a state court to a federal court, of an action brought by the state to recover taxes levied against the property of a corporation organized under its laws. (*People v. Southern Pac. R. R. Co.*, 65 Cal. 553.)

Action to recover tax. See Prohibition, 60.

4. Whether the fact that defendant was marshal of the United States, and the trespass was committed by his deputy, under cover of

his office, gives him the right to have the cause transferred to the courts of the United States, not decided. (*Hirsch v. Rand*, 39 Cal. 315.)

5. One of several parties, defendants to a cause pending in one of the courts of this state, filed his affidavit for its removal to the United States district court, on the ground that he was an alien. Held, that it must appear that the contest was between a citizen of this state and citizens of a foreign state. (*Welch v. Tennent*, 4 Cal. 203.)

6. All the defendants in an action in a state court must be aliens or citizens of another state, to authorize the removal of the cause to a federal court for trial. (*Calderwood v. Braly*, 28 Cal. 97.)

7. To authorize a transfer of an action, in which there are several defendants, from a state court to the United States court, under the provisions of the Judiciary Act of 1789, on the ground of the alienage of parties defendant, all of the defendants must be within the description of the persons entitled to a transfer, and all must join in the application. (*People ex rel. Calderwood v. Hager*, 20 Cal. 167.)

8. Thus, where in an action of ejectment commenced in a state court against several defendants, some of whom were citizens of the United States and of this state, and one of whom was an alien residing in this state, an application was made by the alien defendant alone for a transfer of the case to the United States circuit court, under the provisions of said act, which was denied, held, that the denial was proper. (*People ex rel. Calderwood v. Hager*, 20 Cal. 167.)

9. O., being one of four defendants in ejectment, moved to transfer the action to a United States court on the ground of his alienage, and an order was made staying all proceedings until the motion could be heard. Before the hearing of the motion plaintiffs dismissed the action as to C. and one other defendant, and took judgment against the other two, who had made default. O. afterwards insisted upon his motion, and filed affidavits tending to show that the defaulting defendants were occupying the premises as his tenants, and were colluding with the plaintiff. The motion was denied, and O. having appealed from that order and from the judgment, held, that the denial of the motion was proper, as after C's dismissal it could not properly be entertained. (*Reed v. Calderwood*, 22 Cal. 463.)

10. In an action by citizens of the state, against a citizen and an alien, upon a joint and several obligation (the amount in controversy being over five hundred dollars), the alien defendant applied to the court, in due form and time, for a removal of the cause to the United States circuit court, and, his motion being refused, applied to this court for a writ of prohibition. Held, that he was entitled to the writ. (*Sheehy v. Holmes*, 55 Cal. 485.)

Not followed 63 Cal. 614.

11. No appeal lies from order made before final judgment refusing to transfer a cause from a district court of this state to the cir-

cuit court of the United States for trial, because of the alienage of defendant. (*Hopper v. Kalkman*, 17 Cal. 517.)

No appeal lies from order refusing to transfer cause to federal court. See Appeals, I, 4.

Appealability of orders on motions for. See Appeals, II, 19.

12. The remedy in such case, if any, is by mandamus from the supreme court to the district court. (*Hopper v. Kalkman*, 17 Cal. 517.)

Transfer from police to superior court. See Taxation, 600, et seq.

Police court, removal of cause from to district court. See Police Courts.

Trial pending motion for. See Prohibition, 59.

Jurisdiction on transfer of cause. See Jurisdiction, III.

RENDITION.

Judgments, rendition of. See Judgments, II.

RENEWAL.

Renewal of note, effect of on mortgage. See Statute of Limitations, XII, 5.

Barred debt, revival of. See Statute of Limitations, XII.

Mistake, renewal of barred debt by. See Statute of Limitations, XII, 6.

What does not amount to renewal of rescinded contract. See Witnesses, V, 8, c, L.

Bills and notes, renewal of. See Bills and Notes, V.

License, renewal of. See Ferries, IV, 1; Licenses, II, 5.

Mortgage, renewal of. See Mortgages, XVI.

Policy of insurance, renewal of. See Insurance, I, 12.

Lease, renewal of. See Landlord and Tenant, XV.

Motion for nonsuit, renewal of. See Nonsuit, IX.

Motions, renewal of. See Pleading and Practice, XVII.

RENTS AND PROFITS.

See Ejectment, XVIII; Landlord and Tenant, IX; Use and Occupation.

Action for use and occupation survives. See Abatement, 37.

Rents of land on which easement is imposed. See Easements, 3.

Whether separate or community property. See Husband and Wife, II, 2, k.

On foreclosure. See Mortgages, XIX, 18, j.

Where mortgagee in possession. See Mortgages, X, 1, e.

On execution sale. See Executions, IX, 6, g.

Rights of purchaser at tax sale. See Taxation, XII, 5, f, D.

Duty and power of executors. See Executors and Administrators, VI, 3, b, B.

Action for, between cotenants. See Cotenancy, II, 8.

Allegations as to. See Ejectment, V, 3, d.

Limitation of actions for. See Statute of Limitations, VI, 2, c.

RENUNCIATION.

Right to administer, renunciation of. See Executors and Administrators, IV.

Request in payment of services, renunciation of. See Wills, XI, 19.

Pueblo grant, renunciation of. See Mexican Lands, II, 4, p.

REOPENING.

See Defaults, IX.

Re-examining case after rendition of judgment. See Pleading and Practice, XX, 16.

REORGANIZATION.

Reclamation district, reorganization of. See Swamp and Overflowed Lands, XVIII, 3, 1.

REPAIRS.

See Landlord and Tenant, VIII.

Easement, repairing. See Easements, VI.
Where mortgagee in possession. See Mortgages, X, 1, f.

Streets, duty to repair. See Streets, IV.

Duty of street railroad as to. See Railroads, X, 7.

Ditch, repairs to. See Watercourses, XII, 8.

Wharves, keeping in repair. See Wharves, V.
Care required in repairing building. See Negligence, III, 6.

REPEAL.

Charter, effect of repeal of on contracts. See Municipal Corporations, XI, 5.

Statutes. See Statutes, IX.

Saving clause in statute. See Statutes, IX.
Ordinances, repeal of. See Ordinances, VI.

REPLEVIN.

I. Nature and Object of.

II. In What Cases and by Whom Lies.

III. Demand and Notice.

IV. Bond; Effect of; Possession Under; Liability of Sureties.

V. Pleadings.

VI. Jurisdiction Over.

VII. Lien of Third Person as Defense.

VIII. Inconsistent Positions in.

IX. Evidence and Instructions.

X. Damages in.

XI. Verdict.

XII. Judgments.

XIII. Findings.

XIV. Execution and Costs; Appeals.

Action, when an abuse of process of court. See Contempt, 46.

Justification of constable seizing property in. See Sheriffs, 130.

Sheriff rightfully seizing property, not liable. See Sheriffs, 41.

Failure to appear as waiver of jury trial. See Jury and Jurors, 30.

Trover for the value of property recovered in replevin. See Trover, VII.

I. Nature and Object of.

1. Claim and delivery is statutory remedy provided to enable one to recover the posses-

sion of personal property wrongfully detained, with an alternative remedy if possession cannot be had. (*Riciotto v. Clement*, 94 Cal. 105.)

2. Primary object of replevin suit is the recovery of the thing itself. The value is recovered only in the alternative that the property is not returned. (*Hunt v. Robinson*, 11 Cal. 262.)

3. The action for the "claim and delivery of personal property" under our practice, is at least commensurate with the action of detinue at common law. (*McLaughlin v. Piatti*, 27 Cal. 451.)
Cited 2 Dak. 252.

4. In an action for the delivery of personal property, under the code, the plaintiff may or may not, at his election, seek its immediate delivery. (*Wellman v. English*, 38 Cal. 583.)

Distinction between trover and replevin. See Trover, I.

II. In What Cases and by Whom Lies.

5. One who has no title to personal property, except by virtue of a contract with the owner to own it on the performance of certain conditions, cannot maintain an action to recover possession of it. (*Cardinell v. Bennett*, 52 Cal. 476.)

6. To sustain an action of claim and delivery the plaintiff must have the right to the immediate and exclusive possession of the property at the time of the commencement of the action. (*Fredericks v. Tracy*, 98 Cal. 658.)

7. Where personal property is wrongfully detained, the owner may assign his title thereto, and the assignee may maintain an action therefor. (*Lazard v. Wheeler*, 22 Cal. 139.)
Cited 32 Cal. 594.

8. A right of action for the wrongful taking and conversion of personal property is assignable, and under the provisions of the code the assignee can recover upon the same in his own name. (*Lazard v. Wheeler*, 22 Cal. 139.)

9. The complaint averred that defendant wrongfully took and detained from one Johnson certain county warrants owned by the latter; that subsequently Johnson assigned to plaintiff his right in the warrants and the moneys which might be made on the same; and that after this assignment plaintiff demanded the warrants from defendant, who refused to deliver them. Held, that this complaint stated a sufficient cause of action; that as assignee of Johnson plaintiff was entitled to recover the warrants, or their value, with damages for detention accruing after the assignment. (*Lazard v. Wheeler*, 22 Cal. 139.)

10. Replevin lies for all goods and chattels unlawfully taken or detained, and may be brought whenever one person claims personal property in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right to the possession. (*Lazard v. Wheeler*, 22 Cal. 139.)

11. Replevin is proper remedy to recover

package of gold coin sealed up in a leather bag. (Skidmore v. Taylor, 29 Cal. 619.) Cited 63 Cal. 235.

12. A defendant in an action of claim and delivery, from whose possession the property is wrongfully taken by a constable, in pursuance of a direction from the plaintiff, may maintain an action against the officer to recover its possession. (Laughlin v. Thompson, 76 Cal. 287.)

13. The action was replevin to recover money seized by the defendant as sheriff of the city and county of San Francisco, under an execution against one Little. The money was drawn by Little from the Bank of California on a check signed by one Dobinson in the name of the plaintiff, and at the time of the seizure it was sealed up in a canvas bag marked with a tag on which was written the name of Little, and deposited in one of the vaults of the Safe Deposit Company. Little was an agent or employee of the plaintiff, and the money was furnished to pay taxes due from the latter. Held, that the authority of Dobinson to sign the check was an immaterial matter, that the money belonged to the plaintiff, and that replevin was a proper remedy to recover it. (Sharon v. Nunan, 63 Cal. 234.)

14. A safe in the possession of McC., belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum, four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized eighteen hundred dollars of the money in the safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting. Held, that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff. (Griffith v. Bogardus, 14 Cal. 410.) Cited 29 Cal. 622.

15. At least, there was evidence enough to go to the jury on the question of severance between the money of W., F. & Co. and the money of plaintiff. (Griffith v. Bogardus, 14 Cal. 410.)

16. An action of claim and delivery will not lie against a constable who has sold the goods under execution and parted with the possession of them before the commencement of the action. (Riciotto v. Clement, 94 Cal. 105.)

17. An action cannot be maintained to recover grain sown and harvested by defendant upon lands to which he claimed title, and of which he had the actual adverse and exclusive possession. (Martin v. Thompson, 62 Cal. 618, cited 62 Cal. 623, 63 Cal. 4, 67 Cal. 263, 83 Cal. 148; Martin v. Durand, 62 Cal. 622.)

18. The true owner cannot maintain replevin for crops raised on his land by others who are holding the possession of the land adversely to him. (Pennybecker v. McDougal, 46 Cal. 661.) Cited 67 Cal. 263; 72 Cal. 374.

19. While the owner may recover for use and occupation, he can in no case be held to

be the owner of the crops grown and actually harvested on the land by the defendant while in possession. (Page v. Fowler, 39 Cal. 412.) Cited 1 Wash. 145.

Prior possessor of public land, replevin for crop against pre-emptor. See Public Lands, IX, 1.

20. Where lumber is drifted down a stream and lodges upon adjacent land, if the owner of the land disclaims damages the owner of the lumber is not bound to tender damages in order to maintain replevin for the lumber. (Flanders v. Locke, 53 Cal. 20.)

Cotenant, replevin by. See Cotenancy, II, 11.

Foreign receiver, replevin by. See Receivers, 32.

By assignee of insolvent. See Bankruptcy and Insolvency, 233.

Executor may maintain for timber cut. See Executors and Administrators, 268.

Action by husband to recover community funds. See Executors and Administrators, 328.

Action for ties on which plaintiff has a lien. See Liens, 4.

Cordwood cut on another's land, replevin for. See Growing Trees, 4.

Lies to recover building, when. See Fixtures, 9.

Will lie for fixtures wrongfully severed. See Fixtures, 40.

Demand, necessity of in actions against sheriff. See post, III.

III. Demand and Notice.

21. Where it appears that property came lawfully into possession of defendant in an action to recover personal property or its value, a demand and refusal to deliver must be shown. (Bacon v. Robson, 53 Cal. 399.)

22. If original possession of property is acquired by tort, no demand previous to the institution of a suit is necessary. (Sargent v. Sturm, 23 Cal. 359.) Cited 38 Cal. 584; 55 Cal. 560.

23. It is a general rule that when the possession of property is originally acquired by a tort, no demand previous to the institution of the suit for its recovery is necessary. It is only when the original possession is lawful, and the plaintiff relies upon the unlawful detention, that a demand is required. (Paige v. O'Neal, 12 Cal. 483.) Cited 23 Cal. 360.

24. If tortfeasor has parted with possession of goods tortiously obtained, in payment of a pre-existing debt, or if they have been sold on an execution against him and bid in by a creditor, no demand of the purchaser is necessary before the institution of a suit; nor can the purchaser who has obtained them in such manner hold them against the original vendor. (Sargent v. Sturm, 23 Cal. 359.)

25. In an action to recover the possession of personal property, which originally came rightfully into the possession of the defendants, proof of any circumstance showing that a demand would have been unavailing—as a refusal by the defendant to listen to one, or a statement in advance that he will not deliver

—is sufficient to excuse proof of a demand. (*Wood v. McDonald*, 66 Cal. 546.)
Cited 85 Cal. 196; 88 Cal. 542.

26. In an action to recover the possession of personal property proof of a demand is unnecessary, where the answer alleges that, had one been made, the defendant would have refused to deliver the possession. (*Wood v. McDonald*, 66 Cal. 546.)
Cited 88 Cal. 542.

27. In an action against a sheriff to recover property seized, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. (*Killey v. Scannell*, 12 Cal. 78.)
Denied 3 Nev. 563.

28. No demand was necessary before commencing the action. (*Sharon v. Nunan*, 63 Cal. 234.)

29. It is not necessary that defendant should specially plead want of notice and demand, in order to make such a defense. (*Killey v. Scannell*, 12 Cal. 78.)

30. The allegation that the defendant "has failed, refused, and neglected so to return" the property sued for is not an averment of the special and formal demand and refusal to deliver required in actions of this kind. (*Campbell v. Jones*, 38 Cal. 507.)

31. A complaint is fatally defective when it appears that the defendant came rightfully to the possession of the property, and there is no allegation of demand and refusal to deliver the same. (*Campbell v. Jones*, 38 Cal. 507.)
Cited 63 Cal. 395.

32. If the complaint in replevin avers a demand made for the property, and the answer admits it, a demand need not be proved. (*Jones v. Spears*, 47 Cal. 20.)

Demand of return of property by defendant. See post, 68.

Demand is not necessary before suit for fixtures wrongfully removed. See Fixtures, 41.

IV. Bond; Effect of; Possession Under; Liability of Sureties.

33. Possession obtained by plaintiff in replevin is only temporary. It does not divest the title or discharge the lien. (*Hunt v. Robinson*, 11 Cal. 262.)

34. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and, on the trial, the jury found a verdict for the defendant, on which the court rendered judgment against the plaintiffs for costs, which were paid, held, that the payment of the judgment, as taken, was a complete discharge of plaintiffs' sureties on the undertaking. (*Chambers v. Waters*, 7 Cal. 390.)
Cited 21 Cal. 279.

35. When the same property came into the hands of the sheriff under other executions, the condition of the replevin bond, to return the property, was fulfilled. (*Hunt v. Robinson*, 11 Cal. 262.)

36. Where a replevin bond substantially conforms to the act, and no variation is pointed

out, the assignees of the defendants can maintain an action upon it. (*Wingate v. Brooks*, 3 Cal. 112.)

37. In an action against the sureties on an undertaking given in a replevin suit, where there has been a trial and judgment in the replevin suit, the complaint does not state facts sufficient to constitute a cause of action, unless it aver that the value of the property was found by the jury, and that an alternative judgment was rendered, as provided in section 200 of the Practice Act. (*Clary v. Rolland*, 24 Cal. 147.)
Cited 1 Mont. 592.

38. In an action against the sureties on a replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. (*Nickerson v. Chatterton*, 7 Cal. 568.)
Cited 9 Cal. 285; 38 Cal. 604; 57 Cal. 308.

39. Fact that defendant had commenced his action before tribunal incompetent to try the matter in dispute is no defense, and the plea that the title to the property so replevied is in him is bad. (*McDermott v. Isbell*, 4 Cal. 113.)
Cited 2 Or. 149, 319.

Liability of sheriff on taking insufficient bond. See Sheriffs, IV, 3, i.

40. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. (*Hunt v. Robinson*, 11 Cal. 262.)
Cited 1 Mont. 578-80.

41. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original. (*Nickerson v. Chatterton*, 7 Cal. 568.)

42. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. (*Nickerson v. Chatterton*, 7 Cal. 568.)
Cited 11 Cal. 278.

43. Where the plaintiff in replevin gives the statutory undertaking and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property and for costs, held, that his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods; but not for damages for the original taking and detention, the value of the goods not having been found by the jury. (*Ginica v. Atwood*, 8 Cal. 446.)
Cited 21 Cal. 280; 24 Cal. 150; 1 Wash. Ter. N. S., 307.

44. If an undertaking in an action of replevin commenced in a justice's court limits the liability of the persons who executed it to a judgment for a return of the property rendered by the justice, and such judgment is not recovered in the justice's court, a recovery cannot be had on the undertaking, even if, on appeal, such judgment is rendered by the county court. (*Mitchum v. Stanton*, 49 Cal. 302.)

45. If the statutory form of the undertaking is followed, the defendant can recover the value of the property and costs, upon a judg-

ment in his favor in the appellate court. (*Mitchum v. Stanton*, 49 Cal. 302.)

46. The sureties in an undertaking in replevin are not liable to the defendant for the value of the property, unless he recovers a judgment for the return of the property. A judgment in favor of the defendant which does not award him a return of the property does not impose any liability on the sureties. (*Mitchum v. Stanton*, 49 Cal. 302.)

47. The one hundred and seventy-seventh section of the Practice Act and the decisions under it, to the effect that the sureties upon the undertaking given by the plaintiff in a replevin action to procure a delivery of the property are not responsible for a return of the property or its value unless a return was claimed in the answer and awarded by judgment, do not apply to cases where the action is dismissed by the plaintiff before trial. (*Mills v. Gleason*, 21 Cal. 274.) Cited 61 Cal. 99.

48. The dismissal of a replevin action by the plaintiff before trial leaves the parties to settle in an action upon the undertaking those matters, including the right of defendant to a return of the property, which, had the original suit been prosecuted, must have been determined therein in the first instance. The opportunity to obtain a judgment for the return having been taken away by the failure to prosecute, defendant is entitled to recover, in an action on the undertaking, compensation in damages. (*Mills v. Gleason*, 21 Cal. 274.) Cited 6 Mont. 343; 1 Wash. Ter. N. S. 307.

49. Where the replevin action is dismissed before trial, the liability of the sureties on the undertaking for a return of the property is not affected by the fact that before the dismissal an answer had been filed in which no return of the property was claimed. (*Mills v. Gleason*, 21 Cal. 274.)

Judgment must be in alternative to bind sureties. See post, 120.

V. Pleadings.

Joinder of actions to recover property and damages. See Joinder and Severance of Actions, I, 2, e.

Allegation of right of possession at commencement of action. See Pleading and Practice 50.

Supplemental complaint in. See Supplemental Pleadings, 8.

50. In an action to recover possession of personal property, it was averred in the complaint that the plaintiff "was and is in the possession of the property." Held, that the complaint did not state a cause of action. (*Carman v. Ross*, 64 Cal. 249.)

51. A complaint in an action to recover the possession of personal property which only avers ownership and right of possession in the plaintiff at a time more than four years before the commencement of the suit is clearly bad. A complaint, to be good, must show a cause of action in favor of the plaintiff and against the defendant existing at the time the action is commenced. (*Afflerbach v. McGovern*, 79 Cal. 268.) Cited 98 Cal. 660.

52. A complaint in an action of replevin, averring that on a day two days prior to the commencement of the action, plaintiff was the owner and entitled to the immediate possession of the property, and that defendants refused to deliver the property upon demand made on the day of the commencement of the action, and unlawfully withhold possession, etc., does not state a cause of action. (*Fredricks v. Tracy*, 98 Cal. 658.)

53. A complaint in an action of claim and delivery, which alleges that the defendants, as warehousemen, executed a storage receipt and contract for the delivery of the property upon the return of the receipt and payment of charges, that the plaintiff demanded the delivery of the property, offering to surrender the receipt and pay the storage charges, and that the defendants refused to deliver it, without giving any excuse therefor, sufficiently alleges, as against a general demurrer, the defendants' possession at the time of the commencement of the action, which follows as matter of legal presumption from the facts stated, and the wrongful detention thereof follows as a necessary conclusion from the refusal to deliver under such circumstances. (*Visher v. Smith*, 91 Cal. 280.)

54. A complaint in an action of claim and delivery, which states the particular facts entitling the plaintiff to the immediate and exclusive possession of the property claimed, sufficiently pleads his title thereto, although it contains no general allegation that he is the owner and entitled to the possession of the property. (*Visher v. Smith*, 91 Cal. 280.)

55. In action for the claim and delivery of personal property, the plaintiff should not state in his complaint the particular facts upon which he claims the title and right of possession, and if he avers the title and right of possession to be in him, and a wrongful detention, and also avers the particular facts upon which his title and right of possession are claimed, a denial of the first averments is sufficient, without a denial of the latter. (*Nudd v. Thompson*, 34 Cal. 39.) Cited 12 Col. 536.

56. Replevin for a crop of wheat cut and taken by defendants on land in possession of the plaintiff; the complaint, besides the proper allegations, alleging that the plaintiff was in possession of said land and crop, and entitled thereto by virtue of certain specified instruments of record in the recorder's office of Kern county. Held, that the last allegation was mere surplusage, and the complaint therefore not open to demurrer on account of the omission of the instruments. And held, further, that, had the defendants demanded oyer of the instruments (which the record failed to show), they would not have been entitled to it, because the plaintiff did not count upon the instruments. (*Conner v. Bludworth*, 54 Cal. 635.)

57. Allegation in complaint of place where property was taken, in an action to recover possession of personal property, is surplusage. (*Lay v. Neville*, 25 Cal. 545.)

58. Where recovery of property is primary object of suit, as in some cases where damages will not compensate plaintiff, he should

frame his bill in equity, specifying the reasons therefor, and then a decree can be made to compel a specific delivery. (*Nickerson v. Chatterton*, 7 Cal. 568.)

59. The action was to recover possession of certain grain and hogs of which plaintiff claimed ownership. The defendant, a sheriff, denied the ownership of the plaintiff, and justified his possession under certain writs of attachment. He also alleged that after his levy under these writs, the plaintiff took the property from his possession by a writ of replevin, and he asked for its return. At the trial the court permitted the plaintiff to amend his complaint by striking out all allegations in relation to the hogs, upon the oral statement of his counsel that the hogs had not been levied upon by the defendant, and also struck out from the answer all reference thereto. Held, that this was error, for if the averments of the answer were true, the effect of the action of the court would be to give possession of the hogs to the plaintiff, without affording the defendant an opportunity to try the question of his right to their return. (*Howell v. Foster*, 65 Cal. 189.) Cited 85 Cal. 508.

60. A complaint which alleges that the plaintiff is the owner of certain goods and chattels on a certain ranch; that the defendant wrongfully and fraudulently took them; that the defendant promised and agreed to buy them at what they were reasonably worth; that he afterwards refused to negotiate, and that the defendant, by force and threats, prevented the plaintiff from removing the goods from the ranch, is ambiguous and uncertain. (*Buell v. Cory*, 50 Cal. 639.)

Judgment is not authorized by pleading, when. See post, 112.

61. In an action to recover possession of personal property, a denial in the answer that the plaintiff is the owner, and the further allegation that the defendant "has not sufficient information or belief to enable him to answer" the allegation of plaintiff that he is entitled to the possession of the property; "and on that ground he denies the same," is sufficient to put in issue the ownership and right of possession of plaintiff. (*Cunningham v. Skinner*, 65 Cal. 385.)

62. The denial as to value, being based on the want of knowledge or information, is insufficient. (*Kuhland v. Sedgwick*, 17 Cal. 123.)

63. Where the complaint in replevin averred that on a certain day plaintiff was the owner and in possession of the property, and that its value was one thousand dollars, and the answer denied that on the day specified the "plaintiff was the owner and lawfully in possession," and, as to its value, averred, that the defendant has no knowledge, etc., and therefore denies that it is worth one thousand dollars, held, that the answer is insufficient, because it raises an immaterial issue as to time; and, as to the possession of property, that it amounts merely to a conclusion of law. (*Kuhland v. Sedgwick*, 17 Cal. 123.)

Cited 22 Cal. 168; 28 Cal. 418; 31 Cal. 194; 94 Cal. 172; 2 Dak. 252; 4 Or. 290.

64. Such an answer raises no issue as to the allegation of "possession," except in conjunction with the allegation of ownership, and as each of the allegations is sufficient to sustain the complaint, the issue presented by the conjunctive denial is irrelevant and immaterial. (*Kuhland v. Sedgwick*, 17 Cal. 123.)

65. If the complaint, in an action to recover the possession of personal property, avers that the "plaintiff was the owner and in possession of the property," this averment is not traversed by an answer which denies that the "plaintiff was the owner and entitled to the possession of the property." (*Richardson v. Smith*, 29 Cal. 529.) Cited 11 Or. 268.

66. If the plaintiff, in his complaint in an action to recover the possession of personal property, avers that the "defendant wrongfully took the property from the plaintiff's possession, and from thence to the time the action was commenced, wrongfully detained the same property from him," and the defendant, in his answer, denies "that the defendant at any time wrongfully took and detained the property from the plaintiff," the allegation in the complaint is to be deemed admitted. (*Richardson v. Smith*, 29 Cal. 529.)

Allegation as to continuance of defendant's possession. See Pleading and Practice, 50.

67. In an action for the recovery of personal property, a claim in the answer that the defendant is the owner of the property is merely a mode of denying the plaintiff's title, and presents only a legal issue as to the title of the property. (*Swasey v. Adair*, 88 Cal. 179.)

68. In an action for the recovery of personal property, where the property has been delivered to the plaintiff under proceedings in the action, it is not necessary, in order to entitle the defendant to a return, that he should allege affirmatively that he, or a third person, is entitled to the possession of the property. The general denial, if the plaintiff fails to prove his averments, determines that the property should be restored to the defendant. (*Pico v. Pico*, 56 Cal. 453.) Cited 63 Cal. 322.

69. A defendant cannot have judgment for a return of the property, or its value, unless he has claimed a return in his answer. But this, even if it be held to require a formal demand, is not because such demand is necessary in order to eke out the denials, or constitutes of itself an affirmative allegation, but because it is arbitrarily made the duty of the defendant to assert his formal claim for a return as a prerequisite to a judgment for the return of the property or its value. (*Pico v. Pico*, 56 Cal. 453.) Cited 91 Cal. 292.

70. To enable defendant to obtain value of property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross-judgment, and must be based upon proper averments. (*Gould v. Scannell*, 13 Cal. 430.) Cited 56 Cal. 459; 5 Mont. 500.

71. Answer which denies that plaintiff is owner of property is not demurrable upon the ground that it does not state facts sufficient to constitute a defense in an action to recover personal property. (*Carman v. Ross*, 64 Cal. 249.)

72. An answer in an action of claim and delivery, which denies the ownership of the plaintiff, is not obnoxious on a general demurrer, although other irrelevant matters are set up therein as a defense. (*Laughlin v. Thompson*, 76 Cal. 287.)

73. Action of replevin. It was alleged in the answer that in a certain action which the defendant at one time brought against the plaintiff to recover the same property in controversy, judgment of nonsuit was entered against the defendant in the present action, and it was further alleged that the plaintiff, at a time anterior to the commencement of this action, instituted a suit against one Wells to recover the same property, and obtained a judgment on the pleadings for its recovery with damages and costs. These allegations were, on motion, stricken out. Held, that the matters so alleged did not constitute a defense, and were properly stricken out. (*Fleming v. Hawley*, 65 Cal. 492.)

74. The subject matter of litigation in replevin is the property mentioned in the complaint, and the defendant cannot, in his answer, allege that the plaintiff has taken from him other property than that mentioned in the complaint, and ask or obtain judgment for its return. (*Lovensohn v. Ward*, 45 Cal. 8.)

75. A complaint, in an action to recover personal property, averred that the plaintiff was the owner and possessor of the property at the time of the taking by defendant. The answer denied this allegation, and in addition averred affirmatively that the property was at that time owned and possessed by a third person. Held, that this averment was but another form of denial, and not new matter which, under the system of replication formerly in force, was admitted by a failure to reply. (*Woodworth v. Knowlton*, 22 Cal. 164.)

Cited 81 Cal. 404; 7 Mont. 401; 1 Wash. 503.

76. A pleading by a defendant in an action of replevin which admits the taking complained of, but justifies under legal process, and prays judgment for a restitution of the property replevined, or for its value, contains only matter of confession and avoidance, and, under the fifty-sixth section of the Practice Act, is deemed controverted by plaintiff. (*Stringer v. Davis*, 35 Cal. 25.)

77. If, during the pendency of an action to recover the possession of personal property, and before the trial thereof, the defendant has been required to deliver and has delivered the property to another person entitled to its possession, as against both plaintiff and defendant, that fact may be set up in the answer, or in a supplemental answer, for the purpose of defeating a recovery of the possession or of the value of the property. (*Bolander v. Gentry*, 36 Cal. 105.)

Answer praying return of goods seeks affirmative relief. See Dismissal, 9.

Want of demand and notice, necessity of pleading. See ante, III.

Demand, pleading. See ante, III.

Complaint by assignee, sufficiency of. See ante, 9.

In action on replevin bond. See ante, IV.

VI. Jurisdiction Over.

78. In an action for the recovery of specific personal property, in a justice's court, the standard of jurisdiction is "the value of the property," and it would seem (though in this case held unnecessary to decide) that the justice's jurisdiction for the incidental damages for detention is unlimited; and at all events the demand for damages cannot oust the justice of jurisdiction, if the value of the property is less than three hundred dollars. (*As-tell v. Phillippi*, 55 Cal. 265.)

VII. Lien of Third Person as Defense.

79. In an action of claim and delivery, a defendant who has wrongfully taken possession of the property cannot set up as a defense that other persons who are not defendants have a lien on the property which entitles them to its possession. (*Laughlin v. Thompson*, 76 Cal. 287.)

VIII. Inconsistent Positions in.

80. The plaintiff in replevin cannot, in his complaint, for the purpose of enabling him to sue in replevin, aver that the defendant is in possession of the property, and then on the trial recover judgment against him on the ground that he was not in possession. (*Hawkins v. Roberts*, 45 Cal. 38.)
Cited 94 Cal. 108.

IX. Evidence and Instructions.

81. In an action of claim and delivery of personal property, the books of account of a third person, not a party to the suit, are inadmissible to prove the ownership of the property. (*Watrous v. Cunningham*, 65 Cal. 410.)

82. On the trial of an action by the owner to recover personalty from an officer levying on it under attachment against a third person, the ownership of the property being in issue, the plaintiff, after testifying to his ownership, and that the defendant in the attachment suit was in possession under an unexecuted contract of sale, was asked on cross-examination to describe the property which he sold to such defendant. Held, that the question was proper. (*Brichman v. Ross*, 67 Cal. 601.)

83. When the plaintiff in replevin claims title to a harvested crop by purchase, and a part of the consideration of the sale consisted of certain notes and a chattel mortgage upon the growing crop, such notes and mortgage are admissible in evidence in his favor in degrading his title to the crop. (*Byrnes v. Hatch*, 77 Cal. 241.)

84. Where, in an action to recover specific personal property, plaintiff relied exclusively upon his possession at the time of the taking by defendant, and defendant, having first established a prima facie title sufficient to destroy the presumption of title in plaintiff

arising from his possession, then went further and showed—plaintiff excepting—that plaintiff obtained the property by proceedings under a void judgment, held, that the introduction of this further evidence by defendant, showing the invalidity of the judgment, was of no advantage to him, as he had already rebutted plaintiff's case based solely on possession, and hence that it did not prejudice plaintiff, and is no ground of error. (*Lafontaine v. Greene*, 17 Cal. 294.)

85. Where the vendee replevied the goods from the attaching creditor, and only established title by proving a possession of several months, it was competent for the defendant in replevin, on cross-examination of plaintiff's witness, to ask in whose possession the chattels were at a certain period anterior to the possession proved by plaintiff, in order to draw from him, if possible, the fact that plaintiff's possession was a fraud to hide the debtor's property. (*Thornburgh v. Hand*, 7 Cal. 554.)

Cited 25 Cal. 213; 21 Nev. 86.

86. For the purpose of determining the value of the property at the place of detention—and where, also, delivery should have been made—evidence is admissible of its value at the place of market, the cost of transportation thither, and the usual expenses of sale. (*Hisler v. Carr*, 34 Cal. 641.)

87. In replevin evidence may be admitted of the highest market value of the property between the time of conversion and trial. (*Tully v. Harloe*, 35 Cal. 302.)

88. If answer in replevin admits value of property averred in the complaint, evidence should not be admitted as to its value. (*Tully v. Harloe*, 35 Cal. 302.)
Cited 7 Cal. 69.

89. In an action of replevin for lumber drifted upon the land of another, it is not the duty of the plaintiff to prove that the defendant did not suffer any damage. It is enough for him to show that the lumber is his, that it is in possession of defendant, and that the latter has refused to deliver it on demand. (*Flanders v. Locke*, 53 Cal. 21.)

90. Where the property in dispute in an action of replevin for property seized under execution was seized as the property of the husband, under a money judgment rendered in favor of the wife in a suit for a divorce, it is incompetent to prove that the husband had transmitted to his wife a loathsome disease and committed other acts of cruelty against her during their marriage. (*Thomas v. Black*, 84 Cal. 221.)

Demand, evidence of. See ante, III.

Evidence of severance of money in bulk. See ante, 15.

91. The plaintiff, in replevin, claimed to have acquired the property in controversy by purchase from L. The ownership of L. was put in issue, and also the good faith of plaintiff's purchase. Held, that it was error to instruct the jury that, unless the defendant showed by a preponderance of evidence the plaintiff was not a purchaser in good faith of the property, they must find for the plaintiff, as such instruction took from the jury the

consideration of the issue as to the ownership of L. (*Smith v. Arnold*, 56 Cal. 640.)

X. Damages in.

92. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the ad damnum of the writ. The value of the property is only one predicate of the recovery. (*Ooghill v. Boring*, 15 Cal. 213.)

93. Damages may be claimed and recovered in the action for both taking and detention, and when the verdict is for a sum certain as damages it will be presumed to cover both grounds, if both are alleged in the complaint. (*Ryan v. Fitzgerald*, 87 Cal. 345.)

94. When property is delivered and accepted pending suit, that is, before verdict, the damages should be merely nominal. (*Conroy v. Flint*, 5 Cal. 327.)

95. Where a party accepts the goods which are the subject of the suit, the only damages that he can recover are the value of the goods at any time between the detention and the delivery, with interest thereon. (*Conroy v. Flint*, 5 Cal. 327.)

96. Where delivery cannot be had, and only detention of property is complained of, the measure of damages, in respect of the value of property detained, is its value at the place of detention when the action was commenced. In such case the action bears a near resemblance to trover, in which the value of the property at the place of conversion is taken as the criterion. (*Hisler v. Carr*, 34 Cal. 641.)

97. In replevin for materials which, before their removal, composed a fence attached to and a part of the realty, the plaintiff can recover only the value of the materials after their removal, and not the value of the fence as it stood before the removal. (*Pennybecker v. McDougal*, 48 Cal. 160.)

98. Where, in replevin by general owner of property against one who has special interest therein, the property has been delivered to the plaintiff, the true value to be assessed and recovered by the defendant, where the suit goes in his favor, is the value of his special or limited interest in the goods recovered. (*Pico v. Martinez*, 55 Cal. 148.)

99. In an action to recover personal property or its value, interest on the value of the property is allowable, by way of damages for detention, from the date of the wrongful taking. (*Schmidt v. Nunan*, 63 Cal. 371.)

100. In an action to recover the possession of personal property, or the value thereof if delivery cannot be had, and damages for the detention, the plaintiff cannot recover damages in a gross sum, and also damages in the form of interest on the value of the property from the time it was taken. (*Freiborn v. Norcross*, 49 Cal. 313.)
Cited 54 Cal. 194; 63 Cal. 374.

101. If the plaintiff in replevin takes possession of the property when the suit is commenced, and the jury, on the trial, find for the defendant, and assess the value of the property at a time subsequent to the taking,

they cannot add to this value interest from the time of the taking up to the time the value was assessed. (*Atherton v. Fowler*, 46 Cal. 323.)

102. An action being for the recovery of possession of personal property, and not for its conversion, it was error for the court to include in the judgment the money expended by the plaintiff in the pursuit of the property. (*Redington v. Nunan*, 60 Cal. 632.) Cited 85 Cal. 193.

103. Section 2390 of the Political Code, which authorizes either of disagreeing parties as to damages for drifted lumber to select "two disinterested citizens of the county, who may hear proofs and determine" the damages, does not impose any duty on either party, because it does not propose an intelligible mode of selecting appraisers. (*Flanders v. Locke*, 53 Cal. 21.)

XI. Verdict.

104. In an action against a sheriff to recover personal property, or its value, and damages for the detention, the court instructed the jury to render a verdict for the plaintiff for the property, and to find the value of the property and the damages. The jury found and returned a verdict for the plaintiff for the value of the property and damages, but did not find for the plaintiff for the property. Held, this was error, as under this verdict and the judgment thereon the defendant could not have elected to deliver the property. (*Norcross v. Nunan*, 61 Cal. 640.)

105. In an action for the recovery of specific personal property, if the jury find that the plaintiff is entitled to the possession, they are not required to find the value of the property, if it has been delivered to the plaintiff. (*Caruthers v. Hensley*, 90 Cal. 559.) Cited 94 Cal. 316.

106. Where an action of replevin is tried by a jury, a verdict which fails to find the value of the property is insufficient, and cannot be corrected by reference to a note of the phonographic reporter in his report of the proceedings on the trial. (*Stewart v. Taylor*, 88 Cal. 5.)

107. The action was brought in a justice's court for the claim and delivery of certain personal property, or for its value in case a delivery could not be had, and for damages for the detention thereof. The jury returned a general verdict in favor of the plaintiff, less damages claimed, but did not find in their verdict the value of the property. The justice thereupon entered judgment in favor of the plaintiff for the return of the property, or for its value, as alleged in the complaint, in case a return could not be had. Held, that the judgment was not void, although the verdict was erroneous in not specifically finding the value of the property, and that a writ of mandate would lie to compel the justice to issue an execution thereon. (*Hogue v. Fanning*, 73 Cal. 54.)

108. In an action of claim and delivery, it is not necessary that the verdict shall provide for any delivery of the property, if such could be had. (*Ryan v. Fitzgerald*, 87 Cal. 345.)

109. When the verdict finds that plaintiff has the right of possession, the right to a delivery, if it can be had, or if not, to the value of the property as found by the jury, in the alternative, is a conclusion of law, which the judgment must contain, but not the verdict. (*Ryan v. Fitzgerald*, 87 Cal. 345.)

110. In an action of claim and delivery, where the defendant demands a return of the property, and the verdict of the jury, in favor of the defendant, is special as to the value of the property, and general upon all the other issues, it is sufficient to justify an alternative judgment for the return of the property, or for its value in case a delivery cannot be had, and is not rendered defective because not specially finding in the alternative "for the return of the property." (*Etchepare v. Aguirre*, 91 Cal. 288.) Cited 92 Cal. 225.

111. In an action to recover the possession of certain personal property, and for damages for its detention, when the answer denies all the material averments of the complaint, a verdict for the defendant for one-half of the property, which is silent as to the other half, does not respond to the issues, and is a nullity, and any judgment entered thereon should be set aside. (*Muller v. Jewell*, 68 Cal. 216.) Cited 87 Cal. 347.

Verdict in, when carries costs. See Costs, 12.

XII. Judgments.

112. Where, to an action by P. and R. against Putnam and others for the recovery of four mules, their harness, a wagon, and a saddle, or their value, Putnam, in answer, claimed title and right of possession of three of the mules, without designating which ones, and judgment passed for Putnam for the four mules, or their value, which were valued together only in a gross sum. Held, (1) that the judgment was not authorized by the pleadings; and (2) that as the judgment cannot be modified for want of data, it must be reversed, and a new trial granted. (*Putnam v. Lamphier*, 86 Cal. 151.)

113. In an action of claim and delivery, a judgment that the plaintiff have and recover "the possession of the personal property in the complaint herein described" is not void for uncertainty, if the complaint specifically describes the property sued for. (*Hogue v. Fanning*, 73 Cal. 54.)

114. A judgment for the possession of personal property, which merely describes it as "two stallion horses," and does not refer to any pleading or other paper for further description, is bad for uncertainty, and will be reversed. (*Cooke v. Aguirre*, 86 Cal. 479.)

115. In replevin, where the judgment for the plaintiff describes the property to be restored as "buckwheat, valued at three hundred and sixty-five dollars and seventy-five cents," the description is insufficient to sustain the judgment, unless the judgment refer for a fuller description to the complaint, and there is a more definite description in the complaint. (*Welch v. Smith*, 45 Cal. 230.) Cited 86 Cal. 483; 2 Idaho, 883.

116. The omission to specify the property of

which restitution is to be made is erroneous. (*Campbell v. Jones*, 38 Cal. 507.)
Distinguished 1 Idaho, N. S., 654.

117. A judgment in replevin must be in the form prescribed by section 667 of the Code of Civil Procedure. (*Berson v. Nunan*, 63 Cal. 550.)

Cited 67 Cal. 606; 68 Cal. 6; 78 Cal. 578; 85 Cal. 195; 86 Cal. 483; 89 Cal. 506; 91 Cal. 315, 316.

118. In an action under the code to recover possession of personal property, the judgment, if in favor of the plaintiff, must be entered in the alternative for the possession of the property, or its value in case a delivery cannot be had. (*McCue v. Tunstead*, 66 Cal. 486; *Campbell v. Jones*, 38 Cal. 507, cited 66 Cal. 487; *Stewart v. Taylor*, 68 Cal. 5, cited 86 Cal. 473; *Myers v. Moulton*, 71 Cal. 498; *Washburn v. Huntington*, 78 Cal. 573, cited 91 Cal. 292; *Cooke v. Aguirre*, 86 Cal. 479; *Claudius v. Aguirre*, 89 Cal. 501, cited 90 Cal. 561.)

119. In an action by the owner to recover personalty from an officer levying on it under attachment against a third person, the judgment, if in favor of the plaintiff, must be in the alternative form required by section 667 of the Code of Civil Procedure, although the property had been delivered to him. (*Brichman v. Ross*, 67 Cal. 601.)
Cited 85 Cal. 195; 89 Cal. 506; 91 Cal. 315, 316.

120. In an action of replevin, where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative, as required by sections 104, 177, and 210 of the Practice Act. (*Nickerson v. Chatterton*, 7 Cal. 568.)
Cited 7 Cal. 390; 8 Cal. 448; 24 Cal. 149; doubted 1 Mont. 592, 595.

121. A judgment for the return of the property or the value thereof, but which omits from the judgment for value the clause "in case a return cannot be had," is not sufficient in form or substance, under section 667 of the Code of Civil Procedure, and upon appeal therefrom the court below will be directed to set it aside and enter an alternative judgment in conformity with the statute, where the verdict is sufficient to authorize it. (*Etchepare v. Aguirre*, 91 Cal. 288.)

122. In an action to recover the possession of personal property, where there is nothing in the record that shows that a delivery cannot be had, and the verdict implies that the property is susceptible of delivery by the defendants, and finds for its return or value in a specified sum, a judgment for the plaintiffs merely for the value of the property, and not for the possession, or the value thereof in case a delivery thereof cannot be had, is not in conformity with the statute; but the error can be corrected by an amendment of the judgment to correspond with the verdict. (*Meads v. Lasar*, 92 Cal. 221.)
Cited 93 Cal. 531.

123. In an action of claim and delivery of several articles of personal property, a portion of which has been disposed of by the defend-

ant so that a return of all cannot be had, it is not necessary, in support of a judgment for the plaintiff, that the court should find the character or value of the articles which can be returned, or that the judgment should be entered in the alternative. In such a case, a judgment for the value of the entire property is proper. (*Burke v. Koch*, 75 Cal. 356.)
Cited 89 Cal. 505.

124. In an action to recover the possession or value of certain personal property, where the property has been delivered to the plaintiff, and the action is dismissed without trial, a judgment requiring merely that plaintiff return the property described in plaintiff's complaint to defendant without an alternative judgment for its value is not erroneous. A judgment in the alternative form prescribed by section 667 of the Code of Civil Procedure is required only in cases where judgment is entered after trial. And if an alternative judgment were proper, the plaintiff could not complain of the failure to give to the defendant an alternative judgment for the value of the property. (*Kneebone v. Kneebone*, 83 Cal. 645.)

125. If, on the trial of an action of replevin, it appears that the personal property in controversy has been hopelessly lost, or has been destroyed, so that a judgment for its delivery would be unavailing, judgment for damages alone, without judgment for its possession, is, at most, a technical error, for which the judgment will not be reversed. (*Brown v. Johnson*, 45 Cal. 76.)
Cited 61 Cal. 97, 100; 75 Cal. 359; 89 Cal. 505; 90 Cal. 560; 2 Idaho, 377.

126. Where such judgment was rendered, and the record does not show the contrary, the presumption is that the facts warranted the judgment. (*Brown v. Johnson*, 45 Cal. 76.)

127. In an action of claim and delivery, where the evidence shows that the goods were confused and mixed with other goods belonging to the defendant, so that they were not distinguishable, it is not necessary that a judgment for the plaintiff should be in the alternative form. (*Seligman v. Armando*, 94 Cal. 314.)

128. Where the action was replevin in the detinet, and the court found that the value of the property was six hundred dollars, that the plaintiff was its owner and entitled to its possession, and that the defendant detained it from him, and then gave judgment in favor of the plaintiff for the property, or for the sum of one hundred and seventy-six dollars and twenty cents, at the option of the defendant, held, to be error, (1) because it gave the defendant the option to retain the property by paying a named sum; and (2) because the sum to be paid was less than the value, as found. (*Cummings v. Stewart*, 42 Cal. 230.)
Cited 66 Cal. 487; 13 Or. 585.

129. In an action to recover possession of personal property, if the plaintiff takes the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before

trial, the judgment should leave the property in plaintiff's possession, but award costs to defendant. (*O'Connor v. Blake*, 29 Cal. 812.) Cited 36 Cal. 110; 56 Cal. 458.

130. Judgment of nonsuit in an action of replevin does not entitle the defendant to a return of the property. (*Fleming v. Wells*, 65 Cal. 336, 340.)

131. Section 177 of the Practice Act, relating to the verdict in replevin, applies only where the issues of the case have been submitted and passed on by the jury, and not to a case of judgment of nonsuit. (*Ginica v. Atwood*, 8 Cal. 446.)

132. Judgment for return of the property is only appropriate when in favor of defendant. (*Campbell v. Jones*, 38 Cal. 507.) Cited 66 Cal. 487.

133. A defendant who recovers a judgment in an action of replevin, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of all the property, and if it cannot be returned, then to a judgment for the value of the whole. It is not necessary to the validity of the judgment that the separate value of each article sued for be found by the court. (*Whetmore v. Rupe*, 65 Cal. 237.) Cited 75 Cal. 359; 89 Cal. 504, 505.

134. In an action of replevin by W., it appeared, on the trial, that the property sued for belonged to him and one F., a third party, and the jury returned a general verdict for the defendants, and the court gave judgment for a return of the property to the defendants. Held, that there was no error in the judgment. (*Waldman v. Broder*, 10 Cal. 378.) Cited 65 Cal. 237; 83 Cal. 648; 89 Cal. 505; 91 Cal. 292; 2 Idaho, 376; 3 Wash. 252.

135. The power of the court to refuse a return, where the defendant has lost his right to it pending the suit, does not depend upon allegations of the answer, but is employed upon equitable principles, and because it would not be advisable to return the property to defendant, merely that it might again be replevied by the plaintiff. (*Pico v. Pico*, 56 Cal. 453.)

136. A plaintiff, not being the owner of goods, who replevies them from the real owner, holds them in his own wrong and at his own risk, and when judgment is rendered against him for the return of the property or its value, he cannot be excused from satisfying the judgment under a plea that the property has been lost in his hands, even by act of God. (*De Thomas v. Witherby*, 61 Cal. 92.) Cited 65 Cal. 238; 89 Cal. 504.

137. In an action of claim and delivery against defendants who are sued jointly, a joint judgment in their favor is not erroneous, although each of the defendants answered separately. (*Myers v. Moulton*, 71 Cal. 498.)

138. An alternative judgment in the form usual in actions of claim and delivery of personal property is satisfied by a voluntary return of the property prior to the entry of the judgment. The party obtaining the judgment is not entitled to both property and value, and having received the property, equity, treating that as done which ought in justice to be done, will consider it as received in sat-

isfaction of the judgment, and enjoin its further execution. (*Thompson v. Laughlin*, 91 Cal. 313.)

Judgment of return of property, what allegations in answer necessary. See ante, 58.

Pleading, where specific delivery desired. See ante, 68, 69.

Pleading necessary to enable defendant to recover value. See ante, 70.

Judgment in, as evidence of title. See Judgments, 279; Trover, 34.

Alternative judgment, enjoining where property returned. See Injunctions, 73.

Judgment in is not a bar to trover. See Trover, 33.

Nonsuit in, effect of. See Nonsuit, 58.

XIII. Findings.

139. In an action of replevin the court must find upon the issue of value and damage. (*Thompson v. Corpstein*, 52 Cal. 653.)

140. In an action for the claim and delivery of a stated number of hogs, of which the aggregate value only is alleged in the complaint, a finding that each hog was of the value of four dollars is proper, and will be held supported by the evidence, when the only evidence of their value is that they were worth four or five dollars a head. (*Black v. Black*, 74 Cal. 520.)

Separate value of each article need not be found. See ante, 133.

141. In an action to recover the possession of personal property under section 667 of the Code of Civil Procedure, it is essential, to sustain a judgment for the plaintiff, that the court should find that he is entitled to a recovery of the property sued for. A finding that he is entitled to a judgment for a particular amount is not a compliance with the statute. (*Washburn v. Huntington*, 78 Cal. 573.)

142. Legal effect of finding for defendants, on question of plaintiff's right to property, was to entitle the defendants, from whom the property was taken, to its restoration. (*Waldman v. Broder*, 10 Cal. 378.)

143. In an action for the recovery of personal property, where the complaint alleged the plaintiff's ownership and right to immediate possession of the property, giving its value, and its wrongful taking and detention by the defendant, to his damage in a certain sum, and the defendant answered, denying all the allegations of the complaint except the value, if no findings are made upon the issues as to whether the plaintiff was entitled to the possession of the property or whether he was damaged by the taking, a judgment for the return of the property will be reversed upon appeal. (*Cooke v. Aguirre*, 86 Cal. 479.)

144. In an action for the recovery of personal property, where the property had been delivered to the plaintiff pending the suit, and the answer was a general denial, without any claim for a return of the property, the case was referred to a referee for trial, who found the value of the property, and that the plaintiff was not, at the commencement of the action, or at all, the owner or entitled to the possession of the property, and reported a

judgment for a return of the property or its value; and the court thereupon permitted the defendant to amend his answer by inserting a claim for the return of the property, and the judgment of the referee was entered, Held, (1) that the referee properly found the value of the property, because it was denied by the answer, and the jurisdiction of the court depended on it; (2) that the finding that plaintiff was not entitled to the possession was in effect a finding that defendant was so entitled; (3) that as to the question whether the right to the possession had passed from the defendant to the plaintiff pending the suit, that question was not presented by the pleadings, and that, if constructively put in issue by the original pleadings, it was disposed of by the findings; (4) that the facts found would have fully sustained the judgment entered, had the original answer contained a formal claim for a return of the property; (5) that a formal claim would not have broadened the issues, and that therefore the court did not err in permitting it to be inserted. (*Pico v. Pico*, 56 Cal. 453.)

XIV. Execution and Costs; Appeal.

145. In an action of claim and delivery, where a judgment is rendered in favor of the plaintiff for the return of the number of hogs sued for, or for their value at four dollars a head in case a delivery could not be had, and the sheriff returns such part only of the hogs as he is able to find, an execution for the value of the hogs not returned may be enforced against the defendant. (*Black v. Black*, 74 Cal. 520.)

146. If, in an action of replevin, the pleadings admit the property to be worth seven hundred dollars, and the jury award part of it to each party, and find the value of the part awarded to defendant to be such sum as deducted from seven hundred would leave over three hundred dollars, the court may allow the plaintiff his costs. (*Rohr v. McCaig*, 33 Cal. 309.)

Mandamus to compel issuance of execution. See ante, 107.

Costs on modification on appeal. See Costs, 47.

Percentage not recoverable on alternative judgment in. See Costs, 21.

Presumption in favor of judgment. See Appeals, 2807.

Modification of judgment in, on appeal. See Appeals, 3040.

Appeal, final judgment not directed, when. See Appeals, 3068.

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RESCISSION OF CONTRACTS.

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I. Contracts Against Public Policy.

1. There can be no rescission of a contract against public policy. Such contract is void at its inception, and there is nothing to rescind. (*Martin v. Wade*, 37 Cal. 168.)

II. Agreement to Rescind or Cancel.

2. A parol agreement to rescind a contract under seal is good, if such parol agreement is executed; and such agreement may be presumed from the acts of the parties. (*Green v. Wells*, 2 Cal. 584.)
Cited 4 Cal. 330.

3. Where the vendor of land agreed that if the purchaser should be dissatisfied with the purchase at the end of one year, when the balance of the purchase price became payable, he would return the money received, with interest, provided the purchaser gave him thirty days' notice and a surrender of the title to the land purchased, it is not premature for the purchaser, at a time more than thirty days before the end of the year, to give written notice of his dissatisfaction and demand the return of the purchase money, with interest, and offer to surrender the title, though the vendor could not be required to return the money before the end of the year. (*Herberger v. Husman*, 90 Cal. 583.)

4. W. enters into a contract with S. for the purchase from him of land for twenty-five thousand dollars, four thousand dollars cash, ten thousand five hundred dollars October 15, 1858, remainder in a year thereafter. Cash payment was made, and W. took and held possession for nearly a year. The parties then indorsed on the contract this agreement, to wit: "For value received, we hereby cancel the annexed and within agreement, and mutually agree and discharge each other

from all the covenants and agreements therein contained; and the said Winton, the purchaser, hereby surrenders possession of the within described premises to the said Spring." Held, that W. cannot recover the four thousand dollars paid; that the word "cancel," as used, is not equivalent to "rescind"; and that as nothing is said in the agreement about putting the parties in statu quo, and refunding the four thousand dollars, the true consideration is, that the parties meant to exclude what they did not directly express. (*Winton v. Spring*, 18 Cal. 451.)
Cited 86 Cal. 359.

III. Grounds of.

1. Construction of Code; Substantial Grounds Necessary.

5. There must be some substantial reasons shown when courts are called upon to set aside contracts, and a court of chancery, particularly, will not act when it is kept in the dark as to the reasons or purposes of a transaction, in reference to which relief is sought. (*Scanlan v. Gillan*, 5 Cal. 182.)

6. Sections 3406 and 3408 of the Civil Code, authorizing courts to rescind contracts upon application of the party aggrieved, give no rights to the parties not accorded by courts of equity prior to their adoption. (*Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490.)

Construction of code providing for rescission for failure of consideration. See post, 35.

2. Insolvency.

7. Equity can relieve by granting rescission of contract, upon the allegation of the insolvency of the grantor and his inability to respond in damages to an action upon the covenant, a permanent outstanding title in another, and an offer to redeliver possession and account for the rents and profits. (*Norton v. Jackson*, 5 Cal. 282.)

3. Fraud.

8. It does not require mutual consent of the parties to rescind a contract for fraud or mistake; but either party may rescind when consent was given by mistake or obtained by fraud. (*Loaiza v. Superior Court*, 85 Cal. 11.)

9. Party injured by misrepresentations of material facts may elect to rescind the contract, or proceed upon the covenants of his deed. (*Alvarez v. Brannan*, 7 Cal. 503.)
Cited 22 Cal. 604; 85 Cal. 30.

10. When the consent of purchasers to make a purchase of land, and to deliver moneys and securities in consideration thereof, is procured by fraudulent misrepresentations as to the value of the land, knowingly made by the vendor, and would not have been given but for such fraud, there is no valid and binding contract between the parties, and it may be rescinded by the defrauded party. (*Loaiza v. Superior Court*, 85 Cal. 11.)

11. Where the purchaser is induced by the fraudulent representations of the seller to make a purchase of mining stock, he may, within a reasonable time, by restoring the seller to the situation he was in before the sale,

rescind the contract, and resist the payment of the note given for the property. (*Gifford v. Carvill*, 29 Cal. 589.)
Cited 99 Cal. 226.

12. A misrepresentation of the value of a business and goodwill knowingly made by the vendors, the purchaser being ignorant of the true value, is fraudulent, and entitles the purchaser to a rescission of the whole contract, when it is an entire contract, and the fraud affects a material part of the consideration. (*Cruess v. Fessler*, 39 Cal. 336.)
Cited 85 Cal. 30.

13. An executed agreement for part payment in satisfaction of the commission of agents is subject to all the rules applicable to other agreements, and if the consent of the agents thereto was obtained by fraud of the principal, in misrepresenting a material existing fact, which induced them to enter into the agreement, it may be rescinded upon discovery of the facts entitling them to a rescission, coupled with an offer to restore what they had received. (*Dobinson v. McDonald*, 92 Cal. 33.)

14. Where, by means of a fraudulent misrepresentation of the principal that he had not sold the land, and had changed his intention as to selling it, the agents having an exclusive right of sale were induced to accept part payment of their commission in satisfaction of the obligation of the principal, they are entitled to rescind the agreement for satisfaction, and to recover the full amount of commission which had previously matured in their behalf by reason of a sale effected by the principal of which they were ignorant. (*Dobinson v. McDonald*, 92 Cal. 33.)

15. Whether a party can go into equity to set aside a contract for fraudulent representation as to title, when he has been let into and enjoyed peaceably the possession, and when the vendor has executed a warranty deed and there is no charge of insolvency, query? (*Fratt v. Fisk*, 17 Cal. 380.)

16. False representations by a vendor as to his fears respecting a criminal prosecution and imprisonment for selling property twice are not such representations as a purchaser can rely upon, and are not ground for rescission of a contract substituting other property for that first contracted to be sold. But a misrepresentation as to the fact that the property had been before sold is ground for such rescission, provided damage resulted from the substitution of other property for that first contracted. (*Marriner v. Dennison*, 78 Cal. 202.)
Cited 98 Cal. 257.

17. Where the mortgagor of a steamship, in an action to foreclose the mortgage, pleaded false and fraudulent representations upon the part of the mortgagee in regard to the speed and capacity of the steamship upon sale thereof, and pleaded an offer to return the steamship upon discovery of the fraud, and a demand for a return of the notes and mortgage, and sought to have the notes and mortgage canceled, but did not set up the fraud by way of recoupment to reduce the amount of recovery, or plead a failure of consideration,

and the finding of the court was against the defendants upon the issue of an offer to return the steamship, or to demand the return of the notes and mortgage, and that he had not "rescinded the notes or mortgage, or the said sale of said steamship," and the findings support a judgment for the plaintiff, and there is no evidence in the record upon appeal from the judgment to show any specific damage, or that defendants offered to amend the pleadings so as to permit a defense of recoupment or failure of consideration, the judgment must be affirmed upon appeal. (*Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490.)

18. There is a conflict of decisions upon the question as to whether a contract can be rescinded for an unintentionally false representation by a party to the contract, which was the result of an innocent mistake and made without due circumspection, if it appears that it was not the sole or controlling inducement to the contract, but was one of the inducements only, and a motive of action. But the rule in this state is settled by sections 1566, 1567, 1568 and 1689 of the Civil Code, the effect of which is to limit the remedy of rescission to cases where the consent would not have been given had the alleged cause of rescission not existed. A misrepresentation, in order to avoid a contract, though it need not be the sole cause of the contract, must be of such nature, weight, and force that the court can say, "Without it, the contract would not have been made"; and if the court properly finds it as a fact from the evidence, that the contract would have been executed by the plaintiff had the truth been known, and the defendant, upon being made aware of the facts, had still insisted upon the same contract, there is no basis for a rescission. (*Colton v. Stanford*, 82 Cal. 351.)
Cited 85 Cal. 30.

19. A mistaken representation of the defendant, not going to the main inducement to plaintiff in entering into the contract, but relating to a matter of comparatively small importance, will not justify a rescission of the contract by the plaintiff after large expenditures have been made by the defendant, on the faith of the agreement, which have materially enhanced the value of the property in litigation. (*Colton v. Stanford*, 82 Cal. 351.)

20. It must appear that misrepresentation complained of was as to a material fact by which the party was induced to make the contract to his injury, and in relation to which he placed confidence in the other by reason of his not having the means of knowledge within his own reach, where a party seeks the rescission of an executed contract for the sale of land on the ground of a false suggestion. (*Board of Commissioners v. Younger*, 29 Cal. 172.)

Cited 35 Cal. 726; distinguished 74 Cal. 563.

21. A naked misrepresentation, however wrong in point of morals, unaccompanied by actual damage, does not afford ground for relief against an executed contract for the sale of land. (*Board of Commissioners v. Younger*, 29 Cal. 172.)

Cited 70 Cal. 623; 78 Cal. 211.

22. A contract will not be rescinded on ac-

count of a suppression of a fact by one party, unless the concealment resulted in injury, and the concealed fact was material, and one which the party was under some legal or equitable obligation to disclose. (*Board of Commissioners v. Younger*, 29 Cal. 172.)

23. A party to a contract is not entitled to a judgment rescinding the same, on the ground of fraudulent representations, unless he has been injured by reason of his reliance on such representations. (*Purdy v. Bullard*, 41 Cal. 444.)
Cited 98 Cal. 257.

24. A false representation by a party to a contract will not entitle the other party to rescind or avoid the contract, unless he show, in addition, that he would be damaged by its performance. (*Morrison v. Lods*, 39 Cal. 381.)
Cited 74 Cal. 562; 78 Cal. 398; 85 Cal. 31; 98 Cal. 257.

25. In order to entitle a party to rescind a contract for fraud, he must show that some damage has resulted to him therefrom. In an action to rescind a partnership contract for fraudulent representations as to previous profits of the business, it is necessary to allege that plaintiff was induced thereby to pay more for the goods than he would otherwise have done, or that the business was not profitable after the purchase, or to show that plaintiff was in some way injured by the representations. (*Bailey v. Fox*, 78 Cal. 389.)
Cited 96 Cal. 282; 98 Cal. 257.

26. Courts of justice do not act as mere tribunals of conscience to enforce purely moral duties which involve no pecuniary or tangible injury; but when false representations are made use of to accomplish a fraudulent purpose, as against those having a right to rely upon their truthfulness, and who do so rely, and are thereby deceived and injured, the courts will intervene to redress the wrong and injury, and if any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury, but it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable. (*Wainscott v. Occidental Building and Loan Assn.*, 98 Cal. 253.)

27. In an action to rescind, upon the ground of fraud, the fraud is the essential thing, and while it must be coupled with loss, injury, or damage, the precise amount of the damage is of secondary importance. (*Wainscott v. Occidental Building and Loan Assn.*, 98 Cal. 253.)

28. In an action for the rescission of certain conveyances and instruments connected therewith, growing out of an exchange of property, where the complaint does not contain the word "damage," but the findings, which follow substantially the allegations of the complaint, show that the agent of the defendant represented to the plaintiff that the tract sold contained a greater number of acres than it actually did contain; that a portion of the land was planted with grapevines, which yielded an average of eight tons to the acre; that the vines were healthy and free from disease, and that the place had yielded an average income for ten years of two thou-

sand two hundred dollars per year net; whereas the truth was that the vineyard had not produced more than eighteen to twenty tons of grapes per annum for many years, that the vines were diseased and three-fourths of them were dead, and the gross yearly income for the last five or six years had gradually decreased from one thousand dollars to six hundred dollars, which was a little more than the expense of cultivation, and that the whole vineyard was practically valueless, and that such representations were made with intent to deceive, and were relied upon by the plaintiff, sufficient injury is shown to warrant a rescission of the contract. (*Wainscott v. Occidental Building and Loan Assn.*, 98 Cal. 253.)

29. A party who has entered into a contract for an exchange of lands, and who was subsequently induced by fraud of the other party to substitute a contract for the exchange of other lands in lieu of those first contracted for, cannot rescind the second contract, and recover for a breach of the first contract, unless he was actually damaged by the substitution of the last agreement for the first. (*Marriner v. Dennison*, 91 Cal. 555.)

30. Purchaser cannot rescind a contract releasing the vendor from an executory contract of sale, and substituting a new contract for other property, merely on account of fraudulent representations in procuring such release and substitution, unless damage or injury is shown, to authorize such rescission; nor can he maintain any action for damages in such case when, for aught that appears, he might have been benefited rather than injured by the second contract. (*Marriner v. Dennison*, 78 Cal. 202.)
Cited 78 Cal. 398; 92 Cal. 37.

31. Where, at date of deed, wife had sufficient notice of the prior transactions to put her upon inquiry, she is not entitled to rescind the contract of sale for fraud and inadequacy of consideration. (*Perkins v. Center*, 35 Cal. 713, 725.)

32. The defendant (who was the sole devisee under an alleged will of T. C.) obtained from the plaintiff—the father and sole heir of T. C.—a deed for his interest in the estate, the consideration paid being about one-sixteenth of its value. In an action to set aside the deed, the court below refused to allow the plaintiff a jury trial, or to prove that, on a trial of a contest of the will, occurring before the deed was made, the jury stood on the first ballot nine, and on the second ballot eleven, against the validity of the will; or to prove, by witnesses dealing in real estate, what they would have paid for the property with the will as a cloud upon it; or to prove that the testator was incompetent when he executed the will (the plaintiff excepting to all the rulings); and found that the deed was not procured by fraud or false representations. Held, on appeal, that there was no error, and judgment and order affirmed. (*Collins v. Sullivan*, 54 Cal. 238.)

Undue influence, rescission for. See post, III, 4.

Diligence required in rescission. See post, V, 3.

Restoration of consideration on rescission for fraud. See post, V, 2, a.

Sufficiency of restoration, and pleading of. See post, V, 2, b.

Complaint in suit to set aside for fraud. See post, VI.

Jurisdiction over suit and conflict of law as to. See post, VII.

Fraud, finding as to. See Fraud, IV, 11.

4. Inadequacy or Failure of Consideration; Weakness of Mind; Undue Influence.

33. Mere inadequacy of price is not alone sufficient to warrant a court in setting aside a sale. (*Hammond v. Wallace*, 85 Cal. 522.)

34. An executed conveyance cannot be set aside for a mere failure of consideration owing to the total nonperformance by the vendee of a contract made at the time of its execution as the consideration of the conveyance, if there were no false representations or fraud in fact, and the performance of the contract was not expressly made a condition affecting the validity of the conveyance. The fact that the vendee was to expend money in certain improvements cannot affect the right to rescind the conveyance for a mere breach of the contract. The only remedy is to recover damages for the breach. (*Lawrence v. Gayetty*, 78 Cal. 126.)
Cited 79 Cal. 529.

35. Section 1689 of the Civil Code, providing for the rescission of contracts for a failure of consideration through the fault of the party as to whom rescission is made, does not apply to a conveyance of land executed in reliance upon a future promise to pay the consideration, where the vendor waives actual performance as a condition of vesting the title. (*Lawrence v. Gayetty*, 78 Cal. 126.)

36. Under a contract for the sale of land, by the terms of which the vendor agreed to convey to the vendees a tract of land for a specified sum, payable in installments, for which the vendees executed promissory notes and the vendees were to plat, subdivide, and place all of the land in the market within thirty days after the execution of the contract, and the vendor agreed that as fast as the vendees sold any of the land he would convey the land so sold to the purchasers from them, and credit the payments therefor upon the notes of the vendees, the provision that the vendor would make conveyances of the land as fast as sold by the vendees, and that he would receive the proceeds of the sales as part payment of the notes of the vendees, clearly indicates an agreement on his part to make a conveyance of the whole tract upon demand of the vendees, and that such conveyance should transfer the title to the land to be conveyed; and the refusal or inability on the part of the vendor to make such conveyance is such a failure of consideration as to entitle the vendees to a rescission of the contract. (*Wilcox v. Lattin*, 93 Cal. 588.)

37. A contract may be set aside in equity where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, or where there is weakness of mind

and circumstances of undue influence and advantage. (*Hays v. Gloster*, 88 Cal. 560.)

38. The complaint alleged in substance that the plaintiff, though not entirely incapacitated, was an ignorant woman of great mental weakness, and could neither read nor write; that under the influence of the defendant, who acted throughout with a fraudulent intent, through her husband, who was his ignorant tool, she was fraudulently induced to execute and acknowledge a lease to the defendant for an inadequate consideration, for a rent less than one-half the value of the use and occupation, and for twice the term which her husband had induced her to agree to, and which, from the representations of the defendant, she understood was granted by the lease, and giving a right of renewal for another term of equal length, at the same rental, of which she was wholly ignorant, owing to her reliance upon the fraudulent statements of the defendants as to its contents; that after she discovered how she had been deceived, and had vainly tried to induce the defendant to have the lease reformed to correspond to what her husband had persuaded her to agree to, she rescinded the contract, and notified the defendant thereof at once. Held, that the complaint stated a cause of action for rescission of the lease, and was not demurrable for ambiguity or uncertainty in not showing whether the plaintiff was of unsound mind or irresponsible, or in not further particularizing the fraud of the defendant. (*Wilson v. Moriarty*, 77 Cal. 596.)

39. Where it properly appears from the pleadings and findings in an action to rescind a contract that the parties to the contract were husband and wife; that the plaintiff, at the time of her marriage, was the owner of certain real estate as her separate property; that the defendant afterward abandoned the plaintiff, who was suffering from nervous prostration, and on the evening of the day of his desertion, after leaving her, caused her to be served at her residence with a summons and copy of a complaint in a suit for divorce, brought by him against her; that the parties thereafter executed the contract sought to be set aside, by which the wife agreed to transfer a part of her property to him; that the transfer was executed without any pecuniary advantage to the wife, but that the husband received great pecuniary advantage therefrom, and the consideration recited therein was untrue; that the suit for divorce had been brought by him as a means of coercing her into a surrender of part of her separate property, and for no other reason, and had the effect to aggravate her bodily infirmity; that she was constrained to execute the instrument by reason of the moral pressure exerted upon her by the consideration of the effect upon her that would be produced by the prosecution of the suit, and that she had no independent advice concerning the legal effect and operation of the instrument,—a judgment that the defendant surrender to the plaintiff all the fruits of the contract, and that it be rescinded, will be affirmed. (*Dolliver v. Dolliver*, 94 Cal. 642.)

40. Where a woman nearly seventy years of age, with no children or relatives in this

state, made a deed reserving a life estate in herself, and granting a remainder in fee of her real estate to her nephew, who, at her request, came to this state from New Jersey, at his own expense, to live with her, take care of her, attend to her business, and improve her home, and make it more comfortable, in consideration of the deed, and it appears that she was, at the time of the making of the deed, of sound mind, and executed and delivered it voluntarily, in the absence of fraud or undue influence, and that the nephew and his wife in good faith came to this state to make their home with her, and cared for her, and spent four hundred dollars in repairing and enlarging the house, when she changed her mind, and would not permit them to remain, through no fault of theirs, and that after they left they offered to send her money if she needed it, or to return and rent the property, which offer she refused because she had remarried, the deed will not be set aside at suit of herself and husband. (*Creswell v. Welchman*, 95 Cal. 359.)

Inadequacy of consideration. See ante, 17.

Rescission for unsoundness of mind, restoring consideration. See post, 104.

Contract between attorney and client, necessity of rescission before suit by client. See *Attorney and Client*, 47.

Parol evidence to show mistake or fraud. See *Evidence*, 395.

5. Defect or Failure of Title.

41. In an action to rescind a contract for the purchase of real estate, and to recover money paid as a deposit and part payment, on the ground that the title to the land was defective, in order to entitle the purchaser to recover, he must allege and prove that he has performed all the conditions on his part to be performed, and that the vendor is in default as to the conditions to be performed by him. (*Dennis v. Strassburger*, 89 Cal. 583.) Cited 92 Cal. 41.

42. Under a contract for the sale of real estate, providing that fifteen days should be allowed for the examination of title, and if the title should be defective, thirty days would be allowed to perfect it, the purchaser is not entitled to rescind the contract and recover the amount paid as a deposit, on the ground of a defective title, until the expiration of the thirty days. (*Dennis v. Strassburger*, 89 Cal. 583.)

43. Where, at the date of a contract of purchase which provides that ten days are allowed for examination of title and completion of purchase, and that the title is to be proved satisfactory or a deposit made is to be refunded, it appears that the legal title to the property is in another, from whom the vendor is entitled to receive a conveyance upon payment of a balance of purchase money, and such fact is known to the purchaser, he cannot rescind the contract and recover the deposit merely because the vendor did not acquire the title until more than ten days after the date of the contract of purchase. (*Anderson v. Strassburger*, 92 Cal. 38.)

44. In such case, the purchaser must give notice of his approval of the title if satisfac-

tory, or of his objections to the title if not approved; and the vendor is entitled to a reasonable time after such notice in which to perfect his title, or to remedy any defects therein, and not until the giving of such notice, and an offer to perform the contract on the purchaser's part upon receiving a perfect title, and the refusal of the defendant thereafter to convey as agreed, would the purchaser have a right to rescind the agreement and recover the amount paid thereon. (*Anderson v. Strassburger*, 92 Cal. 38.)

45. In case of failure of title, whether the vendor is at fault or not, the purchaser may rescind a contract for the purchase of land, and recover the purchase money paid by him as part of the purchase price. (*Burks v. Davies*, 85 Cal. 110.)

46. When a vendor, in consideration of a specified payment, gives an option to a purchaser to buy at any time within a fixed period certain lands particularly described, a portion of which is known to the vendor to belong wholly to another party, and it is agreed that the amount paid is to be forfeited unless the purchase is made within the time fixed, the purchaser of the option may, upon discovery of the failure of title before the time fixed, rescind the contract, and demand repayment of the purchase money. (*Burks v. Davies*, 85 Cal. 110.)

47. In case of failure of title, discovered by the holder of an option to purchase, he is not required to tender the remainder of the purchase money, and to demand a conveyance before avoiding the contract, but may at once rescind the contract, and demand repayment of the amount paid for the option. (*Burks v. Davies*, 85 Cal. 110.)

Vendee, rescission by for defect of title, how effected. See *Vendor and Vendee*, VIII, 9.

6. Mistake.

48. Where a person, knowing that another has a lot for sale, goes to examine it, with a view to purchase, but by mistake of fact views the wrong lot, and contracts to purchase without knowledge of the mistake, such person may rescind the contract upon discovery of the mistake, if the property can be returned by the vendee in substantially the same condition as when he received it. (*Goodrich v. Lathrop*, 94 Cal. 56.)

49. The right of a vendee, under a contract for the purchase of land, to rescind the contract and to recover the money paid thereunder upon restoring possession of the land purchased in substantially the same condition as when he received it, upon the ground that the contract was executed through a mistake of fact, is not defeated by the fact that the land had largely depreciated in value between the making of the contract and the rescission. (*Goodrich v. Lathrop*, 94 Cal. 56.)

50. If, in equity and good conscience, the vendor in such a case is entitled to any relief from the vendee by reason of the mistake of the vendee, the court has full power to award compensation therefor under section 3408 of the Civil Code. (*Goodrich v. Lathrop*, 94 Cal. 56.)

51. Where the vendor, in the answer to the complaint for rescission, sets out various facts and circumstances tending to show that the mistakes of the purchaser in viewing the wrong lot and in making the contract, as alleged in the complaint of the purchaser, were occasioned by her own negligence, a finding by the court that "these mistakes were caused by the neglect of a legal duty on the part of the plaintiff," is not a finding of fact upon such allegations, but is a conclusion of law, and the failure of the court to make any other finding thereon is error for which a judgment in favor of the vendor will be reversed. (*Goodrich v. Lathrop*, 94 Cal. 56.)

52. If a board of commissioners, having the title of the land of a city in trust for sale, adopt a rule to sell to occupants in possession at a certain price, and one in possession of seventy-two acres petitions to buy a tract stated to contain about seventy-two acres, giving courses, distances, and monuments in the petition, and the tract contains the seventy-two acres, and eighty acres in the occupation of another, and the board have the means of ascertaining all the facts, and make a deed to the petitioner, a court of equity will not rescind the contract at the suit of the board. (*Board of Commissioners v. Younger*, (No. 1) 29 Cal. 172.)

Cited 29 Cal. 449; 20 Or. 229.

Consent is not necessary to rescission. See ante, 8.

Mistake, remedy for. See Mistake, 12.

Rescission of contract for mistake. See Banks and Banking, 34.

7. Inability or Failure to Perform.

53. It is only on the ground of the fraud of the vendor, either at the time of entering into the contract knowing that it was out of his power to perform, or by his subsequent acts in putting it out of his power to perform, that the purchaser is entitled to treat the agreement as rescinded, and to bring his action to recover the deposit. (*Easton v. Montgomery*, 90 Cal. 307.)

54. If one party to a contract for the sale of land refuses to perform a covenant which is a condition precedent or concurrent, but which is of minor importance, not going to the root of the matter, and the breach of which can be compensated in damages, the party injured cannot rescind the contract for said breach, but must perform his part of the contract and seek compensation in damages. (*Fountain v. Semi-Tropic Land etc. Co.*, 99 Cal. 677.)

55. Where time is of the essence of the contract, and the vendor fails and neglects to execute the conveyance required by the contract after demand therefor, and an offer in writing by the vendees to pay the last installment of purchase money, the vendees may rescind the contract, tender a reconveyance of their rights to the vendor, and surrender the possession, and demand and recover back the installments of purchase money paid. (*Woodruff v. Semi-Tropic Land etc. Co.*, 87 Cal. 275.)

56. R. purchased land in his own right, taking a deed therefor in his own name, but

before purchasing gave H. an agreement to convey the land to him upon the payment of the money which he had paid with interest, within eight months. H. failing to pay within the time, R. returned to him money received on account of purchase, and notified him that the contract was at an end. Held, that the rescission was valid. (*Henderson v. Hicks*, 58 Cal. 364.)

Cited 71 Cal. 229; 85 Cal. 31; 86 Cal. 361.

IV. Party Violating Contract or Preventing Performance; Waiver of Right to.

57. One party cannot violate contract himself, and then seek to rescind it on the ground that the other party has followed his example. (*State v. McCauley*, 15 Cal. 429.)

58. Party cannot ask rescission of contract on account of obstacle to its completion, caused by his own fault. (*Salmon v. Hoffman*, 2 Cal. 138.)

59. The failure of a vendor to release the mortgage for purchase money, under a contract by which he was to release any particular lot or subdivision upon payment of a proportionate amount, so far as it affects lots sold, does not warrant a rescission of the contract of purchase, where such vendor is not informed into how many lots the tract has been divided by the purchasers, and no offer is made to pay the amount due on account of the release requested, as provided by the terms of the mortgage. (*Delano v. Jacoby*, 96 Cal. 275.)

Prevention of performance. See ante, 40.

60. Where acts and omissions of purchasers of land recognize validity of notes and mortgages given by them for the purchase money, they thereby waive their right of rescission of the contract. (*Delano v. Jacoby*, 96 Cal. 275.)

Waiver of right to rescind by delay. See post, V, 3.

V. How Effected.

1. Rescission Must be Entire.

61. The rescission of a contract, to be effectual, must be a rescission in toto. (*Bohall v. Diller*, 41 Cal. 532.)

Cited 85 Cal. 32.

62. Where a contract is not severable, and there are good grounds for its rescission, one party is not at liberty to rescind one part of it, and leave the residue in full force. P. proposed to sell to B. a hotel, and to effect the sale, P. deeded the property to C., who paid him part of the purchase money, and C. contracted with B. to give him a deed when he was repaid the money thus advanced. B. then gave P. security for the remainder of the purchase money, and assigned his contract with C. to S. Held, that the whole matter constituted one entire contract. (*Purdy v. Bullard*, 41 Cal. 444.)

Cited 55 Cal. 41.

2. Restoring Consideration and Placing Party in Statu Quo.

a. Necessity of.

63. In case of rescission, each party to the contract must restore to the other every thing

of value received, and pay for labor performed for him under the contract, no matter at whose instance the rescission is made. (*Fountain v. Semi-Tropic Land etc. Co.*, 99 Cal. 677.)

64. If it becomes impossible to place parties in statu quo, there can be no rescission of a contract. (*Bailey v. Fox*, 78 Cal. 389.)

65. When the contract has been in part performed, and the parties cannot be restored to their original position, the right of rescission cannot exist. (*State v. McCauley*, 15 Cal. 429.)

Cited 13 Nev. 41.

66. Generally, a party seeking to rescind contract must restore the other party to the condition in which he was before the contract was made. (*Watts v. White*, 13 Cal. 321.)

Cited 85 Cal. 31; 10 Col. 491.

67. Party to contract cannot have it rescinded, without previous offer to refund the money received on account of the contract. (*Morrison v. Lods*, 39 Cal. 381.)

Cited 55 Cal. 41; 71 Cal. 229; 82 Cal. 196; 98 Cal. 257.

68. Contract for benefit of third person cannot be rescinded or revoked so long as the promisor continues to receive the consideration from the original promisee. (*Malone v. Crescent City M. & T. Co.*, 77 Cal. 38.)

69. Where executor sells land under power in a will, and a part of the purchase money has been paid down, it seems that the heirs could not rescind the contract of sale without first refunding the amount so paid. Per *Bennett, J.* (*Panaud v. Jones*, 1 Cal. 488.)

70. If vendor rescinds, he must put vendee in statu quo by returning the portion of the purchase money paid. (*Miller v. Steen*, 30 Cal. 402.)

Cited 86 Cal. 361.

71. When a vendee has so failed to perform the contract that the vendor may elect to treat the contract as rescinded, it is incumbent upon the vendor, in order to work that result, to restore to the vendee whatever he has paid on the contract. (*Bohall v. Diller*, 41 Cal. 532.)

Cited 58 Cal. 373; 59 Cal. 589; 70 Cal. 49; 71 Cal. 229; 85 Cal. 32, 532; 87 Cal. 451.

72. A vendor under a contract for the sale of land, who has received a part of the purchase price at the time of the execution of the contract, cannot rescind the contract on account of the nonpayment of the balance of the purchase price on the day stipulated in the agreement, without returning or offering to return to the vendee the money that he had received on account of the contract. (*Wilson v. Sturgis*, 71 Cal. 226.)

Cited 87 Cal. 60.

73. If the fact is that defendant was kept in ignorance by the obligee of the contract, that he was acting for a company, the defendant cannot avail himself of the fact as a defense, no fraud being alleged, while he retains the consideration paid for his contract. He cannot retain the consideration on the ground of fraud, and resist the payment of the penalty of an infraction of his contract on

the same ground. (*California Steam Nav. Co. v. Wright*, 8 Cal. 585.)

74. To a suit on a note and mortgage, the condition of which was a deed with warranty, defendants are not entitled to a rescission of the contract without placing plaintiff in statu quo. Plaintiff, having by his deed remitted all control over the land sold to defendants, could not have sold or rented it, and was therefore entitled to the value of the rents and profits of that portion of the land of which defendants were not in possession at date of the deed, upon rescission of the contract—at least, it should have been averred and proved that the use of the land was of no value to defendants, and would not have been of any value to plaintiff. (*Fratt v. Fisk*, 17 Cal. 380.)

75. As to the land of which defendants were in possession at the date of the deed in such case, equity, in case the contract were rescinded for fraud, would probably not allow plaintiff rents and profits. (*Fratt v. Fisk*, 17 Cal. 380.)

76. In an action by a purchaser to set aside a conveyance on the ground of fraud, the plaintiff is entitled to a return of the purchase money on obtaining a decree annulling the conveyance; and it appearing that a portion of the purchase money had been used by one of the defendants to satisfy a mortgage held by a third person on certain other land belonging to him, held, that the plaintiff was entitled to have the lien of the mortgage revived in its favor. (*Red Jacket Tribe No. 28 Improved Order of Red Men v. Gibson*, 70 Cal. 128.)

77. A rescission of a contract of purchase of the stock of a corporation, upon the ground that the purchase was induced by false and fraudulent representations as to the profits of its business and value of its stock, cannot be made without an offer to return or account for a dividend upon the stock received by the purchaser from the corporation. (*Marten v. Burns Wine Co.*, 99 Cal. 355.)

78. A person desiring to rescind a contract because of fraud must, so far as his action can do it, restore the parties to their former condition within a reasonable time. (*Bank of Woodland v. Hiatt*, 58 Cal. 234.)

Cited 85 Cal. 32, 532.

79. Where a deed is annulled for fraud, the plaintiff is entitled to a return of the money or its equivalent. (*Red Jacket Tribe No. 28 Improved Order of Red Men v. Gibson*, 70 Cal. 128, 131.)

80. A party entitled to rescind a contract on the ground of fraud can only do so by returning, or offering to return, every thing of value which he has received under it, and cannot maintain an action until he has done so. Held, accordingly, in an action to rescind a contract, where the proofs failed to show such a return, or offer to return, that the plaintiff was rightly nonsuited, although he was prepared to make, and did make, the offer at the trial. (*Herman v. Haffenegger*, 54 Cal. 161.)

Cited 78 Cal. 397, 398; 85 Cal. 31, 532; 11 Mont. 146.

81. A party cannot defeat an action on a

note given for the price of goods on the ground of rescission of the sale for misrepresentations, unless he has returned or offered to return the property sold. (*Upper San Joaquin Irrigating Canal Co. v. Roach*, 78 Cal. 552.)

82. There must be a tender back of the identical thing purchased as a condition of rescinding the contract of sale upon the ground of fraud. If the party complaining has parted with the thing purchased so that he cannot make such tender, he cannot rescind, but must resort to an action for damages. It is not sufficient to tender the proceeds of the sale of the thing purchased. (*Bailey v. Fox*, 78 Cal. 389.)

83. A demand by the purchaser of the stock as a condition of rescission that the vendor of the stock should return to the purchaser the amount of the assessment, which he voted for and voluntarily paid with full knowledge of the facts constituting the fraud, is fatal to the validity of the offer to rescind. (*Marten v. Burns Wine Co.*, 99 Cal. 355.)

Restoration of property in Mexico. See post, VII.

84. The plaintiff, before bringing an action to cancel a contract for satisfaction of a judgment, on the ground that such contract was obtained by fraud, is not obliged to return or tender to a third person property given by such third person to the judgment creditor, as one of the considerations for the cancellation of the judgment. (*Gilson Quartz Min. Co. v. Gilson*, 47 Cal. 597.)

85. If the judgment creditor agrees with the judgment debtor that the judgment shall be satisfied upon the performance of certain conditions by the judgment debtor, and the judgment is satisfied, and the judgment creditor afterwards sues to cancel the satisfaction on the alleged ground that it was fraudulently obtained before all the conditions were performed, he is not obliged, before bringing the action, to return money paid him in performance of the conditions, nor to place the debtor in statu quo. (*Gilson Quartz Min. Co. v. Gilson*, 47 Cal. 597.)

86. In such case, the judgment creditor is entitled to retain the money paid him, in any event. (*Gilson Quartz Min. Co. v. Gilson*, 47 Cal. 597.)

87. It is not necessary, in an action to rescind a lease for fraud, to offer to return the rents received under the lease, the defendant having occupied the premises for a rent greatly less than their rental value, and being already fully reimbursed for the payments made by him. (*Wilson v. Moriarty*, 77 Cal. 596.)

88. The cases where possession must be surrendered before action for the purchase money can be brought are those where a contract has been made, and possession has been taken thereunder, and the vendee seeks to rescind the contract on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these cases, the vendee must first offer to restore whatever he has received, be-

fore he can call upon the vendor to refund the purchase money. Where the contract is void, there is nothing to rescind; no rights are acquired, and there are, in consequence, no rights to restore. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Vendor rescinding, duty to return purchase money. See *Vendor and Vendee*, 171, 172.

Contract for water rights, placing party in statu quo. See *Watercourses*, 178.

Tender, when not necessary before rescinding contract of director with corporation. See *Corporations*, 529.

Purchaser from city, duty to place city in statu quo. See *San Francisco*, 176.

Action for money paid in cancellation. See ante, II.

b. Sufficiency of; Pleading of.

89. To enable a vendor of goods to rescind the sale, he must offer to return the notes given for the goods; but this offer can be made at, or any time before, the trial. (*Coghill v. Boring*, 15 Cal. 213.)

Time of return. See post, 80.

90. Section 3407 of the Civil Code, forbidding rescission to be adjudged for mere mistake, "unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made," employs the words "same position" with reference to the subject matter of the contract, and its requirements are fully satisfied if the property can be returned in substantially the same condition as when he received it. (*Goodrich v. Lathrop*, 94 Cal. 56.)

91. Upon an offer to rescind a sale for fraudulent representations, the tender of a reconveyance of the land, with an offer to surrender the possession of the land, and to redeliver the certificates of water stock which had been transferred to the purchaser by an indorsement in blank, is sufficient as to the land and water stock. (*Hill v. Wilson*, 88 Cal. 92.)

92. Under an agreement for the sale of land the vendee paid part of the purchase money, and gave his note, payable at a future date, for the balance; and the vendor executed a deed and placed it in escrow, to be delivered to the vendee on his payment of the note; but reserved the right to rescind on his default. The vendee, being in default, was notified by the vendor that, unless he paid the note within ten days, the contract would be rescinded; and at the same time the vendor tendered to him the money paid and the note, and informed him that they were subject to his order, and, after the expiration of the ten days, the note being still unpaid, gave him written notice of rescission. Held, the contract was rescinded. (*Gethin v. Walker*, 59 Cal. 502.)

93. The defendant knowing where the deed was, and the mode in which he could procure it under the contract, a tender of the deed was unnecessary. (*Gethin v. Walker*, 59 Cal. 502.)

94. The tender by the vendees, at the time of their rescission of the contract of sale, of a deed of conveyance conveying all their right, title, and interest in and to the land sold to them, and in and to all moneys and contracts

of every character arising from sales made by them under the contract, is not objectionable on the ground that it did not include all of the land embraced in the contract of purchase, if the vendor had himself, in pursuance of the terms of the contract, executed deeds by which portions of the land had been conveyed to third parties, and had himself received all of the consideration for which such conveyances had been made. (*Wilcox v. Lattin*, 93 Cal. 588.)

95. A written offer by the purchaser to surrender the title to the land purchased is equivalent to the actual production and tender of a written release or quitclaim. (*Herberger v. Husman*, 90 Cal. 583.)

96. Where vendor agreed to return the money received, if, at the end of a year, the purchaser should be dissatisfied, and where, in addition to written notice of dissatisfaction, demand of return of purchase money, and offer to restore title, a like verbal notice, demand, and offer were made and given at the precise end of the year, and repeatedly thereafter, and on each occasion the vendor promised to return the purchase money, with interest, and only claimed or objected that he did not have the money at the time, and led the purchaser to believe and act upon the belief that he would return the money as soon as he could raise the amount, he is estopped by his conduct from objecting that no complete technical tender of a release of title was made by the purchaser at the end of the year, or that the contract was not then tendered for cancellation. (*Herberger v. Husman*, 90 Cal. 583.)

97. A general allegation of an offer by the purchaser to rescind the entire contract of sale and purchase of the premises, and to restore to plaintiffs all and every part of the premises, is sufficient to support a judgment setting aside the sale, and requiring the purchaser to account for and return all property received under the contract, although the specific allegations as to tender of restitution do not include certain small items of personal property which had been thrown into the trade, and although the value of such items is not alleged. (*Hill v. Wilson*, 88 Cal. 92.)

98. An offer to restore the consideration of a deed which is sought to be set aside, if averred in the language of the statute, is sufficient as against a general demurrer. (*Hick v. Thomas*, 90 Cal. 289.)

99. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value. Plaintiff sold his interest in this claim to defendant for greatly less than its value. Held, that in a suit by plaintiff against defendant, to set aside this sale for fraud and for an account, etc., an averment that defendant is indebted to plaintiff, on the account, in a sum greater than that paid by defendant for the mining claim, is, in effect, an offer to place defendant in statu quo, as per the rule of law. (*Watts v. White*, 13 Cal. 321.)

100. In order to recover possession of premises on the ground of rescission of contract,

the plaintiff must allege a repayment or tender of the amount paid by the defendant at the execution of the contract. (*Bohall v. Diller*, 41 Cal. 532.)

Cited 64 Cal. 18-20.

101. Where P. contracts with B. to sell him his hotel, and, to effect the sale, executes to C. a conveyance thereof, upon C. advancing to P. part of the purchase money, and C. gives B. a contract for a deed when the money he is advanced is repaid, and B. gives P. security for the balance, as between the parties, the sale and conveyance will be deemed, in equity, a mortgage to secure the payment by B. to C. of the sum advanced; and in such case a complaint to set aside the contract for fraudulent representations of B. must aver an offer to refund C. his money. (*Purdy v. Bullard*, 41 Cal. 444.)

Cited 98 Cal. 257.

102. Where there is no averment or proof of a rescission of the contract, or of any attempt to rescind before suit and no averment or proof of any tender or offer before suit, to return to the vendee any thing of value received from said vendee, such defect is fatal to an action to rescind a conveyance. An offer before suit to return the purchase money is a condition precedent to the maintenance of the action, and it is not sufficient to aver a willingness and ability to return to the defendant all the moneys paid on the purchase of the property, and lawfully and legitimately paid out or expended on account of the purchase, and to offer to do so in the complaint. (*Hammond v. Wallace*, 85 Cal. 522.)

103. A complaint by a banking corporation which seeks to recover of a defendant a sum of money paid by it as a purchase price of certain shares of stock, on the ground of fraud in the sale, does not state a cause of action, or show any right to relief, where it does not state a rescission of the contract of sale or aver any offer to return the stock purchased, within a reasonable time. (*Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655.)

104. Conceding that a complaint shows such an "unsound mind," though "not entirely without understanding," as would justify a rescission of the deed of trust, under section 39 of the Civil Code and the chapter on rescission therein referred to, yet if it does not state any offer to restore the money paid under the contract, or that plaintiff is ready or willing to restore any thing of value received from defendant under the contract, it states no cause of action for rescission. (*More v. Calkins*, 85 Cal. 177.)

105. A complaint alleging the sale by plaintiff to defendant of an interest in a business, and of certain notes, in consideration of two thousand five hundred dollars cash, and of the transfer by defendant to plaintiff of ten shares of mining stock at fourteen hundred dollars a share, which were falsely represented by defendant to be of the value of fifteen hundred dollars per share, when they were in fact valueless; that plaintiff had offered, and still offers, a return of the stock; and which prays judgment for fourteen thousand dollars, does not state a cause of action for a rescission of the contract, because not showing an offer to

return the cash payment, nor any demand for a retransfer of the business and notes; nor a cause of action to recover damages for deceit, because it does not allege any damage, nor state any facts as to the value of the business and notes from which damage to plaintiff could be inferred. In the absence of an averment of their value, it cannot be presumed that they were of any value whatever, and the plaintiff must be presumed to have been benefited by the cash payment. (*Wainwright v. Weske*, 82 Cal. 193.)
Cited 98 Cal. 256, 257.

3. Diligence.

106. To enable a party to maintain an action to rescind or reform a contract, reasonable diligence must be used in pursuing the remedy. (*Barfield v. Price*, 40 Cal. 535.)
Cited 70 Cal. 254; 78 Cal. 396; 85 Cal. 31.

107. He who would rescind a sale for fraud must act diligently upon discovering the fraud, and must show himself not only willing but able to return the property received by him. (*Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490.)

108. The first requisite of rescission is prompt action, and a party cannot wait until time shall determine whether the contract sought to be rescinded turned out good or bad; and this is particularly true in a new country, where values change rapidly. (*Hammond v. Wallace*, 85 Cal. 522.)

109. In order that the vendee may avoid a contract for the purchase of real property on the ground of fraud in the vendor in making the contract, he must repudiate the contract and demand its rescission immediately upon discovering the fraud. The vendee cannot, after discovery of the fraud, remain quietly in possession of the property for a long period of time, and afterwards avoid the contract. (*Blen v. Bear River etc. Min. Co.*, 20 Cal. 602.)
Cited 81 Cal. 8.

110. Where the consideration of a note is shares of stock in a corporation, which the maker of the note alleges that he was induced to purchase by fraudulent representations of the payee, and it appears that the shares of stock had a market and supposed real value at the time of the sale, the maker of the note could only rescind his contract by doing so promptly upon discovering the facts entitling him to rescind, and by restoring, or offering to restore, to the payee of the note every thing of value received under the contract. (*Gamble v. Tripp*, 99 Cal. 223.)

111. To suit on note and mortgage, the consideration of which was a deed of land with warranty of title from plaintiff to defendants, defendants set up fraud in this: that plaintiff represented that the title was confirmed by the United States, which representation defendants aver was false. Defendants, at the time of deed, were in possession of a portion of the land, afterwards went into possession of the balance, and have been in possession ever since. They made no offer to rescind the contract until suit and filing answer; and it neither appears, nor is it averred, that defendants had no notice of this fraud until an-

swer. But there was some proof that defendants employed counsel to contest plaintiff's title after the date of the deed. Held, that a party entering on land by virtue of a contract, and holding possession under and enjoying the fruits of the contract, must, if he desires to rescind it for fraud, act promptly and give notice of his intention to rescind, or he will be deemed to have waived the fraud. (*Fratt v. Fisk*, 17 Cal. 380.)
Cited 78 Cal. 396; 85 Cal. 31.

112. An offer to rescind a sale of land on account of material misrepresentations as to the supply of water for irrigation is made within a reasonable time if made within two months after the discovery of the falsity of the representations. (*Hill v. Wilson*, 88 Cal. 92.)

113. Subdivision 1 of section 1699 of the Civil Code, providing that the party rescinding a contract must do so "promptly upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind," is mandatory as to the promptitude required, except as to the cases therein enumerated, and others where a sufficient showing is made in excuse of the delay; and, where there is no excuse therefor, a delay of three months in an offer to rescind a purchase of stock, after discovery of the facts constituting fraud in the purchase, is sufficient to prevent a rescission. (*Marten v. Burns Wine Co.*, 99 Cal. 355.)

114. Where suit upon an adverse claim to an undivided half of the land agreed to be conveyed was commenced against the vendor and his vendees for the purpose of establishing the claim, upon the institution of which the vendor assured the vendees that there was nothing in the claim, and requested temporary postponement of further sales by the vendee, and, after judgment had been rendered in favor of the adverse claimants, made the same representations, and promised them he would appeal therefrom, and upon such appeal establish his title, the fact that the vendees waited until three months after the judgment before giving notice of their rescission of the contract does not amount to a waiver of their right to rescind, but, under such circumstances, reasonable diligence appears in the exercise of their right of rescission. (*Wilcox v. Lattin*, 93 Cal. 588.)

115. A party who seeks to avoid a contract for fraud must rescind the same promptly after the fraud is discovered, or he will be deemed to have waived it. A delay of four months after the discovery of fraud in a partnership contract, during which business is carried on as usual under the contract, is fatal to a claim of right to rescind the contract for the fraud. (*Bailey v. Fox*, 78 Cal. 389.)
Cited 85 Cal. 531; 96 Cal. 282; 98 Cal. 257.

116. Where, in an action on the note, rescission of the contract was sought by the defendant in his answer, and the court found that no offer of rescission was made until after the commencement of the action, and it appears that more than four and a half months elapsed between the time of the defendant's alleged discovery of fraud and his offer to rescind, he

is barred of rescission by the delay, in the absence of an excuse shown therefor. (*Gamble v. Tripp*, 99 Cal. 223.)

117. It is the duty of a party desiring to rescind a contract for fraud to do so promptly, upon a discovery of the facts entitling him to rescind; but held, in this case, that a delay of a little less than six months was not such laches as to deprive him of the right. (*Martson v. Simpeon*, 54 Cal. 189.)
Cited 72 Cal. 286; 85 Cal. 31; 96 Cal. 282.

118. The action was brought to obtain the rescission of a contract whereby the plaintiff purchased from one of the defendants a lot of furniture, and a lease for five years of a boarding-house, on the ground that he had been induced to make the purchase through the false and fraudulent representations of his vendor. Six months after the purchase, the plaintiff, having discovered the falsity of the representations, verbally offered to rescind the contract, and placed the vendor in possession of the furniture and boarding-house. Held, that the offer to rescind was made within a reasonable time, and was sufficient without the tender of a written release of the rights acquired by the plaintiff under the lease. (*Hart v. Kimball*, 72 Cal. 283.)
Cited 85 Cal. 32.

119. One whose consent to the execution of a contract has been obtained through fraud or undue influence may rescind the contract, but he must do so promptly on discovering the facts which entitle him to rescind. Under the circumstances of the present case, an unexplained delay of fifteen months in commencing the action after knowledge of the facts, held, unreasonable and fatal. Held further, that no fraud or undue influence was shown by the complaint. (*Burkle v. Levy*, 70 Cal. 250.)
Cited 85 Cal. 80, 531.

120. The rescission by the purchaser of an executed contract for the sale of land and water certificates, on the ground that the water certificates are void, and that the consideration has failed, must be made with reasonable promptness; and a delay of seventeen months after the purchase, and until two months after the commencement of a suit to foreclose a mortgage given for the purchase money, before offering to rescind, is unreasonable. (*Williams v. Mitchell*, 87 Cal. 532.)

121. It appearing that the purchasers paid no part of the purchase money, and that the improvements made, if the contract had been fully performed, would have belonged to the purchasers, and were provided for in the contract to insure performance by the purchasers and to improve the security of the vendor for payment of purchase money, and that they consisted of trees and vines, for the irrigation of which water was furnished by the vendor, though not in pipes as provided in the contract, but which was accepted and used by the purchasers, who insisted that the supply was insufficient, but remained in possession for two years and until after default in payment of three installments of purchase money, the purchasers could not, under such circumstances, rescind the contract, and re-

cover the moneys laid out and expended by them under their contract, but would be remitted to the remedy for damages for breach of the contract. (*Fountain v. Semi-Tropic Land etc. Co.*, 99 Cal. 677.)

122. Plaintiff who has slept upon his rights so long that notes which were surrendered to him upon settlement and discharge of an express trust have become barred by the statute of limitations, and who intimated no dissatisfaction with the settlement for nearly eight years, and took no steps for rescission of it during that period, has no equity, but his claim is stale, and the court will not enforce it. (*Chapman v. Bank of California*, 97 Cal. 155.)

123. The defendant purchased of the plaintiff certain stock for the sum of — dollars, and pledged the stock to the plaintiff to secure promissory notes given for the purchase money. The contract was procured by fraudulent representations made by the plaintiff to the defendant with reference to the value of the stock, the falsity of which was discovered by the defendant about the 1st of January, 1873, after paying six hundred dollars of the purchase money. November 13, 1874, the stock was sold by the plaintiff for nineteen dollars and sixty cents, and the proceeds applied upon the notes. An action to recover on one of the notes was commenced January 4, 1876, and the answer filed May 22, 1876. Held, that the defendant had not sought to rescind within a reasonable time. (*Collins v. Townsend*, 58 Cal. 608.)
Cited 85 Cal. 531.

Delay in returning article, what waives. See *Sales*, 158.

Rescission of compromise, effect of delay. See *Compromise*, 7.

VI. Complaint in Suit for.

124. In action to rescind sale of real estate, on the ground of fraudulent representations, security, averred in the complaint to have been given for the purchase money, will be presumed to be adequate, unless the contrary is expressly averred. (*Purdy v. Bullard*, 41 Cal. 444.)
Cited 78 Cal. 213; 98 Cal. 257.

125. In an action by a vendor of land to set aside a contract for its sale, an objection to the complaint that the precise time is not alleged at which the plaintiff offered to return the portion of the purchase price paid, if valid at all, must be taken by special demurrer. (*Newman v. Smith*, 77 Cal. 22.)

126. A complaint for a rescission of an unauthorized contract, in writing, for the sale of land, is not bound to anticipate a possible defense that an oral contract was partly performed by taking possession, in connection with payments on purchase money, and need not negative the fact of such possession. (*Salfield v. Sutter County Land etc. Co.*, 94 Cal. 546.)

127. Where a complaint by purchasers of land under a contract of sale, which provided for certain improvements to be made upon the land by the purchaser, is framed so as to obtain a decree declaring the contract re-

rescinded for nonperformance by the vendor, and to obtain compensation for moneys expended under the contract, in an attempt to execute it, but does not show that any purchase money was paid under the contract, and contains no count for moneys laid out and expended, nor for labor performed, nor for materials furnished, nor any statements which would be the equivalent of such counts, nor allege the reasonable value of the improvements made in pursuance of the contract, but merely alleges the cost of such improvements, the complaint is insufficient to support a judgment for the plaintiffs for the cost of the improvements, which could not be recovered as such in any event, but only their reasonable value. (*Fountain v. Semi-Tropic Land etc. Co.*, 99 Cal. 677.)

Pleading restoration of consideration. See ante, V, 2, b.

Complaint in action for rescission for undue influence. See ante, 38.

Averment of rescission. See *Mines and Mining*, 443.

Parties in action to set aside contract. See *Fraud*, 124.

VII. Jurisdiction Over Suit; Conflict of Laws as to.

128. Where it appears that a contract was made in this state for the purchase of mining property in Mexico, for which a deed was given and possession delivered, but the purchase money for which was paid and has been invested in this state, it appearing that the larger part of the consideration consists of notes of a citizen of this state payable therein to a resident thereof, the courts of this state have jurisdiction of an action to rescind such contract and to cancel such notes and mortgage, on the ground of fraud in the sale of the property. (*Loaiza v. Superior Court*, 85 Cal. 11.)

129. Such notes and mortgage are executory contracts, which, if rescinded at all, may be rescinded according to the laws of the state where they were made and where they were to be executed. (*Loaiza v. Superior Court*, 85 Cal. 11.)

130. The real object of such action being to rescind the executory contracts made in this state, and to have the court use its compulsory process only to affect property within its jurisdiction, it is no objection to the granting of the relief sought that property in Mexico is to be restored and redeeded to the defendants in accordance with the laws of Mexico, as a condition of the equitable relief granted. (*Loaiza v. Superior Court*, 85 Cal. 11.)

131. The nonresidence of the plaintiffs in such action, and the fact that they are foreign corporations, is no objection to the granting of the equitable relief sought, as by becoming suitors here the plaintiffs have voluntarily submitted themselves to the jurisdiction of the courts of this state, and must comply with all conditions which may be attached to the relief awarded. (*Loaiza v. Superior Court*, 85 Cal. 11.)

Right to sue absent defendant for rescission. See *Vendor and Vendee*, III.

VIII. Completion of; Effect and Enforcement of Rescission; Right of Action After.

132. An offer by a purchaser, whose purchase was induced by fraud of the vendor, to restore every thing of value received under the contract of purchase, whether such offer is accepted or not, accompanied by a prompt and proper notice of the rescission, makes the rescission complete. (*Loaiza v. Superior Court*, 85 Cal. 11.)

133. On a former appeal in this case, reported in 42 Cal. 591, it was held that upon the execution of the deed from Montenegro to Forbes, August 7, 1848, all the title that M. then held to the premises described in it passed to and vested absolutely in F. Held, conceding that under the Mexican law the sale might have been rescinded after the execution of said deed, the finding of the court below that it was not rescinded is sustained by the evidence. (*Morenhaut v. Bell*, 62 Cal. 336.)

134. Where a vendor, under a contract for the sale of land, elects to rescind the contract, upon a breach thereof by the purchaser, by claiming a forfeiture of all his rights under the contract, pursuant to its terms, which provide for such forfeiture, the contract ceases to be a subsisting or enforceable obligation against the purchaser; and his liability upon the agreement to pay the purchase price ceases with the vendor's rescission of the right to receive the land upon such payment, and the vendor has no right of action whatever on the contract, but simply a right of action for damages for the breach thereof, which necessarily implies that the contract has been terminated. (*Glassell v. Coleman*, 94 Cal. 260.)

135. It is immaterial to the effect of a rescission in extinguishing the agreement of the purchaser to pay the purchase price whether his obligation for the purchase money is expressed in the contract of sale or in a promissory note executed contemporaneously therewith, where each instrument was executed as a part of the same transaction; and the note is, by its terms, only an additional evidence of an obligation to pay certain installments of the purchase money, and given as additional security therefor. A forfeiture of the right to the land works an entire failure of the consideration for the promise to pay for the land, irrespective of the instrument in which the promise is contained. (*Glassell v. Coleman*, 94 Cal. 260.)

136. The superior court, having general jurisdiction to enforce a rescission, has jurisdiction to appoint a receiver of the moneys and securities in this state which the purchaser claims should be restored. Such appointment does not affect the title to the property involved, but simply preserves it, and keeps it within the jurisdiction of the court, until the rights of the parties can be determined. (*Loaiza v. Superior Court*, 85 Cal. 11.)

137. The service of a notice of rescission by the purchasers, when they are not entitled to rescind the contract of sale, will not preclude

a suit for damages to recover their loss proximately caused by the breach. (*Fountain v. Semi-Tropic Land etc. Co.*, 99 Cal. 677.)

138. When A has made a payment in advance on a contract to purchase stock of B, which B refuses or fails to deliver, and A thereupon notifies B that he claims the right to rescind the contract, and claims repayment of the money paid, the notice does not affect or impair the right of A to maintain an action for damages on the contract. (*Jones v. Post*, 6 Cal. 102.)

139. When a contract of sale and purchase of land is abandoned or rescinded by the parties, the purchaser, though in default, may recover back installments paid of the purchase money, less the actual damage to the vendor occasioned by his breach of contract. (*Easton v. Cressey*, 100 Cal. 75.)

140. When a contract of sale and purchase of land is abandoned or rescinded by the parties, the purchaser, though in default, may recover back installments paid upon the purchase money, less the actual damage to the vendor occasioned by his breach of contract, notwithstanding a forfeiture clause in the contract rescinded. (*Shively v. Semi-Tropic Land etc. Co.*, 99 Cal. 259.)

141. An action by the assignee of the rights of a purchaser of land to recover back from the vendor, upon an alleged rescission of the contract of purchase, the installments paid on the purchase price of the land, is an action for money had and received, and not an action arising under the contract; and the assignment by the vendee of the cause of action is no violation of the provisions of the contract prohibiting its assignment. (*Shively v. Semi-Tropic Land etc. Co.*, 99 Cal. 259.)

142. The tender of a deed by the vendor to the vendees, subsequent to the commencement of an action by the vendees to enforce a rescission of the contract made before suit, even if the deed were sufficient to transfer the title to the land, does not revive the contract, which had been extinguished by the rescission; and a judgment in the action that the vendees were entitled to exercise their right of rescission confirms the extinguishment of the contract as of the date when the rescission was made. (*Wilcox v. Lattin*, 93 Cal. 568.)

143. After the vendees have rescinded the contract for the default of the vendor, and tendered restitution, and demanded a repayment of the installments of purchase money paid, no subsequent offer of performance on the part of the vendor will relieve him from the effect of his default; and the vendees are not bound to accept an offer of performance made by the vendor after suit brought for the recovery of the purchase money, and before service of the summons therein. (*Woodruff v. Semi-Tropic Land etc. Co.*, 87 Cal. 275.)

Action for money paid on cancellation. See ante, II.

Renewal of rescinded contract, what does not amount to. See Witnesses, V, 8, c, L.

Rescission of contract to qualify one as witness, effect of. See Witnesses, V, 8, c, L.

RESERVATIONS.

See Military Reservations.

Deeds, reservations in. See Deeds, VIII, 6. Homestead, reservation of. See Assignments for the Benefit of Creditors, VI, 2.

Lease, reservations in. See Landlord and Tenant, 47.

Right of repurchase, reservation of, validity of. See Vendor and Vendee, 29.

Conveyance of water right, reservations in. See Watercourses, XIV, 2, s.

Islands, when included in. See Watercourses, VII.

Patent for mining claim, reservations in. See Mines and Mining, 178.

Patents, reservations in. See Public Lands, XX, 10.

RESERVOIRS.

See Eminent Domain, IV, 3, b; Watercourses, XI.

RES GESTÆ.

Declarations as part of. See Evidence, VI, 1, a.

RESIDENCE.

See cross-references under Domicil; Homesteads, VI.

Firm, residence of, nonresidence of partner. See Partnership, 279.

Presenting inventory to judge at residence. See Executors and Administrators, 12.

Necessity of to actual possession. See Possession, III.

Juror, necessity of residence. See Jury and Jurors, V, 3.

Statement of, sufficiency of. See Mortgages, 943.

Statement of in certificate of corporation. See Corporations, 27, 28.

Statement of in homestead declaration. See Homesteads, IV, 3.

Allegations as to. See Ejectment, V, 3, e.

RESIGNATION.

Office, resignation from. See Offices and Officers, XV.

Executors, resignation of. See Executors and Administrators, V, 1.

Director, resignation of. See Corporations, X, 8.

Assignee, relinquishment of trust by. See Assignments for the Benefit of Creditors, VI, 4.

RESISTING OFFICERS.

See Criminal Law, XXI, 43.

RES JUDICATA.

Judgment as. See Judgments, X, 9.

RESOLUTIONS.

See Corporations, X, 6; Ordinances.

Resolution of intention to change grade of street. See Streets, XI, 3, d.

Intention to improve street, resolution of. See Streets, XII, 4.

Variance in street contract. See Streets, XIV, 8.

RESPONDEAT SUPERIOR.

See Agency; Master and Servant.

RESTITUTION.

See Assistance; Forcible Entry and Unlawful Detainer, VI, 16; Writs of Possession.

Mandamus to compel restitution of property. See Mandamus, II, 11, k.

Restraining writ of restitution. See Injunctions, II, 2, f.

Writs of. See Ejectment, XXI.

RESTORATION TO CAPACITY.

See Insanity, VII.

RESTRAINT ON ALIENATION.

See Charitable Uses, 3.

Condition in restraint of. See Deeds, VIII, 7, b.

Power to remove. See Mexican Lands, 15.

RESTRAINT OF TRADE.

1. Doctrine seems to be in contracts in restraint of trade that there must not only be a consideration for the contract, but there must be some good reason for entering into it; and it must impose no restraint upon one party which is not beneficial to the other. (*California Steam Nav. Co. v. Wright*, 6 Cal. 258.)

2. A covenant not to run or employ, or suffer to be run or employed, a steamboat upon any of the routes of travel on the rivers, bays, or waters of the state of California for the period of ten years, applies not only to existing routes of travel, but to all new routes opened during the ten years. (*Wright v. Ryder*, 36 Cal. 342.)

3. Contract in restraint of trade, otherwise than as expressly excepted in sections 1674 and 1675 of the Civil Code, is against public policy, and void by the terms of section 1673 of the same code. (*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.)

4. Agreement in partial restraint of trade, restricting it within certain reasonable limits, or confining it to particular persons, is, if founded upon a good consideration, valid. (*Wright v. Ryder*, 36 Cal. 342.)

Cited 40 Cal. 254; 45 Cal. 153; 96 Cal. 513; 1 Wash. Ter. N. S. 286.

5. Contract in restraint of trade, and which is not by its terms limited as to territory embraced in its operation, will not be supported. (*Callahan v. Donnolly*, 45 Cal. 152.)

6. Contract in restraint of trade to be upheld must be restricted as to territory, and it must appear to the court, in considering the nature of the business in connection with the territorial limits assigned that the limits designated are not unreasonable in extent. (*Callahan v. Donnolly*, 45 Cal. 152.)

7. Contract, if it include entire area of state, is unreasonable and void, as against public policy. (*Wright v. Ryder*, 36 Cal. 342.)

8. If the purchaser of a steamboat, at the time of the purchase, covenants with the seller that he will not run or employ, or suffer to run or be employed, the said boat for ten years upon any of the routes of travel of the waters

of a state, the covenant, being in restraint of trade and commerce, is void, as against public policy. (*Wright v. Ryder*, 36 Cal. 342.)

9. A contract by which one of the parties binds himself not to engage in a particular business or occupation "in the city and county of San Francisco, or state of California," is in restraint of trade, and therefore void, as against public policy. (*More v. Bonnet*, 40 Cal. 251.)

Cited 45 Cal. 153.

10. Such a contract is an entire contract, and cannot be severed so as to enforce that portion relating to the city and county of San Francisco, and reject that relating to the state of California. (*More v. Bonnet*, 40 Cal. 251.)

Cited 40 Cal. 348; 76 Cal. 393.

11. Contract not to run boats on certain line of travel is not void, as being against public policy and in restraint of trade, where a consideration is paid therefor. (*California Steam Nav. Co. v. Wright*, 6 Cal. 258.)

12. Contract not to run boats on a certain line of travel gives no monopoly, giving an exclusive enjoyment of the business only as against a single individual, while all the world besides is left at full liberty to enter upon the same enterprise. (*California Steam Nav. Co. v. Wright*, 6 Cal. 258.)

13. Contract which provides that party shall not engage in "any branch of yeast powder business" is in restraint of trade, and therefore void. (*Callahan v. Donnolly*, 45 Cal. 152.)

Cited 7 Mont. 98.

14. Contract by which one party binds himself to buy meat at a fixed price and for a time certain of another party, in consideration of the other party refraining from selling meat during that time at the place of business, is valid. (*Lightner v. Menzel*, 35 Cal. 452.)

15. A contract, by the terms of which the defendant agreed to give to the plaintiff the exclusive sale of grainbags or burlaps, up to a specified quantity, to be under the defendant's control for a specified period, and agreed to accept for them the average price received by the plaintiff for all grainbags or burlaps sold by him, and the plaintiff agreed to sell them for a specified commission, and to be bound to sell a specified quantity of them, is not upon its face void as being in restraint of trade, or against public policy; but if it be shown that such contract formed part of a scheme of the plaintiff to establish a monopoly in grainbags or burlaps, to the prejudice of the people of the state, the contract is void, as opposed to public policy. (*Pacific Factor Co. v. Adler*, 90 Cal. 110.)

16. A contract by which one party, at his own limekiln, agrees to manufacture for another party a certain number of barrels of lime within a given time, for which he is to receive a given sum per barrel, and which provides also that during the continuance of the agreement the party manufacturing the lime shall not sell to any person any lime, is not illegal, as being in restraint of trade. (*Schwalm v. Holmes*, 49 Cal. 665.)

17. The plaintiff and the defendants, who were each manufacturers of lumber, entered

into a contract, by the terms of which the defendants agreed to make and deliver to the plaintiff during the year 1881 two million feet of lumber at eleven dollars per thousand feet, and further agreed not to manufacture any lumber during such period for sale within a specified territory, except under the contract, and to pay the plaintiff twenty dollars per thousand feet for any lumber manufactured and sold to parties other than the plaintiff. Similar contracts were made by the plaintiff with other lumber dealers, and its sole object and consideration in entering into such contracts was to form a combination for the purpose of increasing the price of lumber, limiting the supply, and giving it the control of the lumber market within the territory specified. Held, that the contract was in restraint of trade, and, being indivisible, was invalid in its entirety. (*Santa Clara Valley Mill etc. Co. v. Hayes*, 76 Cal. 387.)
Cited 90 Cal. 119.

18. A contract for a term of three years between several powder companies, providing that neither of the parties thereto shall make any shipment of dynamite powder to any part of the United States east of certain boundaries, and regulating the manufacture and sale of it by the parties in the territory west of those boundaries, under certain specified restrictions, and giving power to a standing committee to fix prices, regulate the manufacturing cost, and impose fines for violations of the contract, and providing for a termination of the contract if any other party or parties shall begin to manufacture and sell dynamite in competition with the parties to the contract, is in restraint of trade, and void as against public policy. *Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.)

19. A trader may sell a patent right, and protect his assignee by an agreement to refrain from any acts which would lessen its value, and neither to use the patent nor to interfere in any way with the profit to be derived from it; but several persons or companies cannot legally enter into a business combination to control the manufacture or sale or price of a staple of commerce, merely because some of the contracting parties have letters patent for certain grades of that staple. (*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.)

20. The fact that certain of the parties to a contract providing for the restriction of the sale of dynamite powder were the owners of letters patent for invention of methods or processes for making dynamite does not render the contract valid, where it is not confined to dynamite produced under the processes of the named patents, but refers to dynamite generally, and recognizes the probability of other persons, not having the patents named, entering into the business of making and selling the same commodity. (*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.)

21. No action will lie in favor of one of the parties to such contract to compel the other parties to allow an examination of their books and papers, and for a judgment for such sum as may be found due, under a complaint al-

leging that the defendants have made false reports of the amount of dynamite sold, and have refused an examination of the books, etc., the provisions of the contract sought to be enforced by the action being the very means established by the parties to the contract for the purpose of making sure their illegal agreements. (*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510.)

22. The only penalty which the law attaches to the contracts of natural persons in restraint of trade is to make them non-enforceable. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

23. Where the defendant being the owner, in whole or in part, of certain steamers, in consideration of a sum of money paid to him, covenanted that he would not run, or suffer to be run, or employed, those steamers on certain waters of the state, held, that he was not released from his covenant by a sale of the steamers, or of his interest therein. (*California Steam Nav. Co. v. Wright*, 8 Cal. 585.)

Liquidated damages in contract restraining business. See Damages, 28, 29.

Liquor license, whether is. See Licenses, 64, et seq.

RESULTING TRUST.

See Trusts and Trustees, VI.

RETRAXIT.

See Pleading and Practice, XIII.

Dismissal as. See Dismissal, 63, 65.

RETROACTIVE LAWS.

See Statutes, VIII, 9; Statute of Limitations, II.

Registration statutes. See Registration, I.

RETURN.

See Jury and Jurors, IV, 2.

Statute, time of return of. See Statutes, I, 2.

Inventory, return of. See Executors and Administrators, 115, et seq.

Certiorari, return of. See Certiorari, IV, 7.

Habeas corpus, power of judge on return. See Habeas Corpus, III, 3.

Sheriffs. See Executions, XIII.

Summons, return of. See Summons, V.

Return of property. See Attachments, VIII.

Tax sale, return of. See Taxation, XII, 5, h.

Goods or bill of sale, return of. See Sales, XIV.

RETURNS.

Election returns. See Elections, IX.

Election, conclusiveness. See Elections, XIII, 9.

REVENUE.

See Internal Revenue; Taxation.

Inspectors of Customs. See Inspector of Customs; Collector of the Port.

Internal revenue stamp. See Bills and Notes, II, 1; Contracts, I, 2, a.

REVERSAL.

See Appeals, XII, 7.

REVERSIONS.

1. The right to an estate in reversion becomes absolute on the happening of the event which terminates the intermediate estate. (*Hawes v. Lathrop*, 38 Cal. 493.)

2. In an action by a reversioner for an injury done to the freehold, the duration of the term of the tenant in possession is evidence admissible on behalf of the defendant, as affecting the measure of damages. (*Uttendorfer v. Saegers*, 50 Cal. 496.)

REVIEW.

See *Certiorari*.

On appeal. See *Appeals*, XI.

Ruling on challenge, review of. See *Jury and Jurors*, VII, 5, g.

Order granting nonsuit, review of. See *Nonsuit*, VIII.

REVIVAL.

Barred debt, revival of. See *Statute of Limitations*, XII.

What does not amount to revival of rescinded contract. See *Witnesses*, V, 8, c, L.

Statutes, revival of. See *Statutes*, X.

Judgments, revival of. See *Judgments*, XVII.

Decree made after death without revival. See *Parties*, 106.

Injunction, revival of. See *Injunctions*, IV.

Water right, revival of after abandonment of. See *Watercourses*, XIV, 2, t.

REVOCATION.

Arbitration, revocation of submission to. See *Arbitration and Award*, III, 3.

Assignment, revocation of. See *Assignments for the Benefit of Creditors*, IV.

Grant, revocation of. See *Railroads*, X, 2.

License, revocation of. See *Attorney and Client*, IX, 1.

Legalized obstruction, revocation of. See *Nuisance*, 15.

Dedication, revocation of. See *Dedication*, IX.

Certificate, revocation of. See *Appeals*, VI, 6, e.

Letters, revocation of. See *Executors and Administrators*, V, 2.

Wills, revocation of. See *Wills*, XII.

REWARD.

1. Where a reward is offered in the usual way in the public newspapers, or by handbills, for the arrest and delivery to the proper authorities of persons suspected of crime, and a party accordingly arrests and delivers the persons suspected, who are tried and convicted, held, that the demand for the amount of the reward is neither an "unliquidated demand," nor an "account," within the fourth section of the Practice Act; and, hence, that the assignor of such demand is a competent witness for the assignee in suit against the persons offering the reward. (*Rochester v. See Yup Company*, 18 Cal. 413.)

2. An agreement, by one who has lost property by fire or theft, to pay a certain sum to

any one who will secure the arrest and conviction of the criminal, is not a nude pact; but may be enforced by a person performing the service. (*Ryer v. Stockwell*, 14 Cal. 134.) Cited 77 Cal. 88.

3. In such cases, the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until performance, the offer may be revoked at pleasure. (*Ryer v. Stockwell*, 14 Cal. 134.)

4. Such advertisements, upon acceptance of their terms and performance of the services, become written contracts. (*Ryer v. Stockwell*, 14 Cal. 134.)

5. Where the reward was for such information as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and conviction. The statute of limitations begins to run from that time, and the limitation would be four years, as on a written contract. (*Ryer v. Stockwell*, 14 Cal. 134.)

6. If a reward is offered for the arrest and conviction of a robber, and an arrest is made and conviction had, and the reward paid, and it turns out that the person arrested was not the robber, it is doubtful whether the persons offering the reward are liable for the subsequent arrest and conviction of the real robber. (*Burke v. Wells, Fargo & Co.*, 34 Cal. 60.)

7. Offer, by a party who has been robbed, of a reward for the arrest and conviction of the robbers, is not earned by one who merely communicates to the party robbed his suspicions that a certain person is guilty, with a statement that others were satisfied of his guilt, and that circumstances pointed strongly toward him, and who does not claim the reward until after the arrest and conviction of the robbers. (*Burke v. Wells, Fargo & Co.*, 34 Cal. 60.)

8. A contract arises upon the compliance by one of the public with the conditions of an offer of a reward for the arrest of a criminal. (*McLeod v. Meade*, 77 Cal. 87.)

9. In an action to recover a reward offered by the defendants for the arrest and conviction of any party guilty of a specified crime, the findings of the court were in favor of the plaintiff, with the exception of the finding that none of the acts of the plaintiff were done with a view of obtaining said reward or any part of it. Held, that he was not entitled to recover. (*Hewitt v. Anderson*, 56 Cal. 476.)

10. In an action brought to recover a reward which had been offered by the defendants for the arrest and conviction of the person guilty of a robbery, the record of the conviction of a person for the robbery is admissible in evidence to show a conviction, but not admissible to show that the person convicted was the robber. (*Burke v. Wells, Fargo & Co.*, 34 Cal. 60.)

RIGHT OF ENTRY.

See Easements, VI; Landlord and Tenant, V, 4.

Ejectment against one having. See Ejectment, IV, 2.

RIGHT OF WAY.

See Easements; Railroads, IV.

RIPARIAN RIGHTS.

See Watercourses, XIV.

RISK.

Increase of. See Insurance, II, 5.

RIVERS.

See Watercourses.

Boundaries, rivers as. See Boundaries, II, 6.

ROAD DISTRICTS.

See Highways, VI.

ROADS.

See Highways.

Turnpike companies. See Turnpike Companies.

Road tax. See Taxation, XV.
Streets. See Streets.

ROAD TAX.

See Highways, VI; Taxation, XV.

ROBBERY.

See Criminal Law, XXI, 50.

Assault to rob. See Criminal Law, XXI, 6.

ROMAN CATHOLIC ARCHBISHOP.

Adverse possession by. See Adverse Possession, III, 4, f.

RULES.

Power to make. See Municipal Corporations, IX, 3.

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RULES OF COURT.

Procedure, rules of. See Pleading and Practice, III.

Object and construction of. See Appeals, 1871; Pleading and Practice, 4.

In conflict with statute is void. See Jury and Jurors, 201.

Judicial notice of. See Judicial Notice, 35, et seq.

Parties are bound to know. See Pleading and Practice, 724.

1. Court, equally with suitors, is bound by its rules, and they must be construed as statutes would be construed. (*Hanson v. McCue*, 43 Cal. 178.)
Cited 81 Cal. 483; 5 Utah, 149.

2. Rules adopted by a court are always under its control, and if there is any reason to apprehend that they will work injustice if strictly adhered to, they should be made to yield to the superior calls of justice. (*People v. Williams*, 32 Cal. 280.)
Cited 54 Cal. 148.

3. Rules of court are but a means to accomplish the ends of justice; and it is always in the power of a court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it. (*Pickett v. Wallace*, 54 Cal. 147.)
Cited 73 Cal. 310.

4. The trial judge has power to suspend a rule of court requiring a copy of all ex parte orders to be served on the attorney of the adverse party, or may except a particular case from its operation. (*Sullivan v. Wallace*, 73 Cal. 307.)

5. Rule of court which deprives party of statutory right is void. (*People v. McClellan*, 31 Cal. 101.)
Cited 81 Cal. 483; 5 Utah, 148.

6. Instructions upon a material point in a criminal case should not be refused because not submitted to the opposing counsel before his final argument, in obedience to a rule of court requiring it to be done. (*People v. Williams*, 32 Cal. 280.)

7. A rule of court which requires each counsel to submit such instructions as he intends to ask, to the opposite counsel, before his final argument, under the penalty of having the same refused, may, in many cases, work injustice if strictly adhered to. (*People v. Williams*, 32 Cal. 280.)

8. If a rule of court provides that when a cause has been at issue for two years upon a question of either law or fact, and the plaintiff has not brought it on for a hearing, that the defendant shall be entitled to an order of dismissal without notice, the continuance of the time for the argument of a demurrer by consent takes away for two years thereafter the right of the defendant to move for a dismissal. (*Poole v. Caulfield*, 45 Cal. 107.)

9. Appellate court will not presume what are rules of court below when they are not in the record. (*Warden v. Mendocino County*, 32 Cal. 655.)
Cited 60 Cal. 367.

Jury fees, rule requiring payment of in advance is valid. See Jury and Jurors, 263.

Jury trial not waived by failure to demand as required by rule. See Jury and Jurors, 32.

As to notice of objection. See Depositions, 55, 56.

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Relating to service of transcript. See Appeal, 1055.

Relating to clerk's certificate. See Appeals, VI, 4, d, D.

Relating to certificate of counsel to transcript, effect of. See Appeals, 1057.

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Waiver of objection to service under rules. See Appeals, 627, et seq.

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Error in ruling on demurrer, when immaterial. See Pleading and Practice, X, 12.

Filing of answer as waiver of ruling on demurrer. See Pleading and Practice, X, 16.

Evidence, rulings on. See Evidence, X, 6, e.

SABBATH-BREAKING.

See Criminal Law, XXI, 51.

SACRAMENTO.

1. The land upon which the city of Sacramento is situated is within the exterior limits of the grant to Sutter, of June 18, 1841. (Cornwall v. Culver, 16 Cal. 423.)

2. The deed of October 14, 1848, from John A. Sutter, Sr., to John A. Sutter, Jr., has been directly decided to include the site of Sacramento city, and the question is no longer an open one. (Talbert v. Singleton, 42 Cal. 391.)

Deed from Sutter to Sutter Jr., includes site of. See Deeds, 273, et seq.

3. It was not the intention of the legislature, by the passage of the act of April 24 1850, to repeal certain acts, "and to incorporate the city and county of Sacramento," to repeal the law by which the county of Sacramento was created. (People v. Mullins, 10 Cal. 20.)

4. The territory of the county includes the city, but the city forms but a portion of the county, and their respective limits are kept distinct in the act, the powers of the board of supervisors being different in respect to the two. The county and city constitute a corporation for some purposes, while they are dis-

tingent as to others. (People v. Mullins, 10 Cal. 20.)

5. Under the Consolidation Act of 1853: What becomes of the indebtedness of the county of Sacramento to the city of Sacramento for the services of the recorder in criminal cases under the laws of the state, query? (Curtis v. Sacramento County, 13 Cal. 290.)

6. The act of 1863, which declares that the board of supervisors of Sacramento county shall be a body politic and corporate, does not make that county a municipal corporation within the meaning of that term as used in the nineteenth section of the Political Code. (People ex rel. Moore v. Supervisors of Sacramento County, 45 Cal. 692.)

7. The general election laws of this state, with their successive modifications and changes, apply, so far as practicable, and so far as they are not inconsistent with the act incorporating Sacramento, to the municipal elections in said city. (Kirk v. Rhoads, 46 Cal. 398.)

8. Under the Consolidation Act of 1853, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action, in creating such office and raising such salaries, may be reviewed on certiorari. (Robinson v. Board of Supervisors of Sacramento, 16 Cal. 208.)

9. That act is an enabling statute, creating a board with special powers and jurisdiction, and the board has only the power conferred by the act. (Robinson v. Board of Supervisors of Sacramento, 16 Cal. 208.)

10. If the auditor of the city of Sacramento, in drawing a warrant on the treasurer, incorrectly designates the fund out of which the demand should be paid, it is not the duty of the president of the board of trustees to sign it. (People ex rel. Alexander v. Swift, 28 Cal. 397.)

11. Under the Consolidation Act of 1853 the treasurer of the city and county of Sacramento is entitled to receive for his official services only three thousand dollars per annum. He is not entitled to the percentage allowed by the state to county treasurers for money paid by them into the state treasury. This percentage belongs to the city and county of Sacramento. (City and County of Sacramento v. Bird, 15 Cal. 294.)

12. The president of the board of trustees of the city of Sacramento has no authority to sign a warrant drawn by the auditor on the treasurer, payable out of the "water-works fund," for fitting up the police courtroom, though the room is in the water-works building. (People ex rel. Alexander v. Swift, 28 Cal. 397.)

13. Street assessments in Sacramento are required to be levied and collected as provided in the general revenue laws of the state. (Mayo v. Ah Loy, 32 Cal. 477.)

14. The several acts of the legislature subsequent to the original charter of the city of Sacramento gives authority for the levy and collection of taxes in addition to those specified in such charter, and constitutes an en-

largement of the taxing power conferred by the charter. (*People v. Rigney*, 63 Cal. 296.)

15. Under the act of April 25, 1863, incorporating the city of Sacramento, the revenue act of May 17, 1861, became a part of the city charter so far as concerns the mode of assessing, levying, and collecting the municipal taxes. (*People v. Clunie*, 70 Cal. 504.)

16. The warden of the county jail, appointed by ordinance, in pursuance of the fifty-third section of the Consolidation Act of the city and county of Sacramento (Stats. 1858, p. 284), is not bound to pay into the treasury of said city and county moneys received by him from the authorities of Yolo county for keeping prisoners from that county. Such money is received by the warden in his own right. In taking charge of prisoners from Yolo, he acts as an officer of that county, and he alone is responsible to it. (*Sacramento v. Hardy*, 18 Cal. 412.)

17. The fair and reasonable interpretation to be given to the statute of 1863 in reference to the government of common schools in the city of Sacramento is, that the board of education shall give to the board of trustees a detailed estimate of the amount of money needed in its judgment for certain school purposes, and that the board of trustees, upon consideration thereof, shall use its own discretion and judgment in determining the propriety of the proposed expenditure, and the correctness of the estimate, and in levying such tax within the statutory limit as seems to it proper and just, having regard to the interest of the entire municipality as well as of its several parts. (*Board of Education of Sacramento v. Board of Trustees of Sacramento*, 96 Cal. 42.)

18. The act of March 22, 1864, providing that the holders of all claims against the city of Sacramento which accrued prior to January 1, 1859, might present the same to the board of trustees, and that the said board should cause to be issued bonds payable February 1, 1903, for all such claims as they might consider legal and just, was not intended to extend the time for refunding the indebtedness of the city beyond the time within which an action upon that indebtedness could have been commenced, and a failure of the holder of bonds issued under the acts of April 26, 1853, and April 10, 1854, to present them to the board and demand the issuance of new bonds in their place, until after they had become barred by the statute of limitations, gave the board the right of refusing to issue the new bonds. (*Bates v. Gregory*, 89 Cal. 387.)

State Capitol. See *State Capitol*.

State capitol, Sacramento is. See *State Capitol*, 1.

Is subject to provisions relating to counties. See *Counties*, 3.

Acts authorizing subscription to railroad. See *Constitutional Law*, 327, et seq.

Right to erect bridge without a draw over American river. See *Watercourses*, II, 1.

County court of has jurisdiction to try title to office. See *Offices and Officers*, 65.

Assessor of city and county cannot assess for city. See *Taxation*, 223.

Fines of mayor or recorder of, to whom payable. See *Fines*, 2.

Supervisors, election of in Sacramento. See *Supervisors*, 2.

Recorder, jurisdiction. See *Forcible Entry and Unlawful Detainer*, 150.

Fees of recorder. See *Recorders*, 7, et seq.

Act providing for police of is void. See *Police*, 6.

Police officer, power to remove. See *Police*, 7.

Statute providing for subscription to railroad by city, invalidity of part. See *Constitutional Law*, 215.

License on business, power to impose. See *Licenses*, 39.

Revenue law of, effect of code on. See *Taxation*, 66.

Bonded indebtedness, duty of treasurer. See *Bonds*, 65.

Bonds of, mandamus to compel payment of interest. See *Mandamus*, 140, et seq.

Coupons on bonds of do not bear interest. See *Bonds*, 57.

Duty to levy tax to meet bonded indebtedness. See *Counties*, 67, et seq.

Treasurer of, redemption of bonds for railroad. See *Bonds*, 62, et seq.

Mandamus to compel levy of tax to pay bonds. See *Bonds*, 67.

Compelling treasurer to set apart funds. See *Mandamus*, 142.

Act funding indebtedness of. See *Counties*, 67, et seq.

Statute relating to funding of indebtedness of. See *Constitutional Law*, 318.

Funding act of, constitutionality. See *Constitutional Law*, 354, et seq.

Act funding debt of not repealed by new constitution. See *Constitutional Law*, 91.

Statute suspending right of creditor to sue. See *Constitutional Law*, 354, et seq.

Presentation of claims before suit. See *Municipal Corporations*, 190.

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Statute allowing suits for unpaid taxes. See *Taxation*, 52.

City cemetery is not subject to taxation. See *Taxation*, 173.

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Unfinished delinquent tax suits. See *District Attorney*, 20, et seq.

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SALES.

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Sales on agreement to refund. See Fraudulent Conveyances, II, 7.

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Parol evidence to identify property sold. See Insurance, 156.

Contracts for, necessity of writing. See Statute of Frauds, I, 6.

I. What are Sales; Evidence of; Law Governing.

1. A contract for the sale of goods, and a bond given to secure the performance of the contract, are both deemed to have been made with reference to the law governing sales of goods. (*Crocker v. Field's Biscuit etc. Co.*, 93 Cal. 532.)

2. A contract by the terms of which one party purports to lease to another for a time certain personal property, and deliver him possession thereof, the other party agreeing to pay him stipulated sums as monthly rent for the use of the property, and further providing that if the lessee fails to pay the rent the lessor may take possession of the property and terminate the lease, but that if the lessee pays the rent he shall become the owner of the property, is a contract of sale, with stipulations giving the vendor security for the payment of the purchase money. (*Miller v. Steen*, 30 Cal. 402.) Distinguished 59 Cal. 588.

Sales on installments. See post, VI, 4.

3. In an action upon an account, the question was whether a bill of sale of a quantity of wheat, executed by the defendant to the plaintiffs, was an absolute sale in satisfaction of the debt, or was only by way of security; and the court instructed the jury to the effect that the bill of sale purporting to be an absolute sale, they should find it to be such, unless it appeared from a preponderance of evidence that it was given as security, and that both parties so understood it. Held, that the last clause of the instruction was erroneous. (*Perkins v. Eckert*, 55 Cal. 400.) Cited 67 Cal. 372.

4. Where I., who was conducting a stable business, gave to the assessor for the purpose of assessment for taxes, a list of the personal property used in said business, which was conducted in a building owned by S., as the property of the latter, and thereafter S. appeared before the board of equalization to procure a reduction of said assessment, held, in an action against S. for goods delivered and used in said stable business, and in which action the main issue was whether said goods had been sold to I. or S., that said assessment was competent evidence as tending to prove that said goods were sold to S. (*Arnold v. Skaggs*, 35 Cal. 684.) Cited 67 Cal. 459.

Sales and chattel mortgages, what are. See Mortgages, XXI, 1.

What transaction constitutes. See Shipping, 24.

"Sold," meaning of. See Words and Phrases, 12.

Law governing contracts of. See Conflict of Laws, 6.

Evidence of conversation to identify purchaser. See Evidence, 511.

Validity, by what law governed. See Conflict of Laws, 7.

II. Contract when Binding; Order for Goods and Revocation of.

5. A contract by defendant, "to deliver to plaintiff as many grapes as he should wish, at a given price," is a mere offer, which the plaintiff had the right to accept or reject, and defendant to retract at any time before acceptance; but when the plaintiff named the quantity which he would take, the contract became complete, and both parties were bound by it. (*Keller v. Ybarra*, 3 Cal. 147.)

6. An offer to sell personal property, when no time is given, must be accepted at once, or within a reasonable time, and six months afterward is not a reasonable time, as matter of law, to accept the offer. (*Roberts v. Evans*, 43 Cal. 380.)

7. An order for goods is merely an offer or proposal to buy, which is revocable at any time before acceptance of it, or before any reply or notice of the receipt or acceptance of the order is given or communicated to the person giving the order. (*Harvey v. Duffey*, 99 Cal. 401.)

8. Where an order is given to an agent of an iron company for the purchase of catalogued goods believed to be in stock, without any knowledge that they would have to be manufactured, and the order for the goods is revoked before notice is given by the company or its agent of the acceptance of the order, and without knowledge that the company was manufacturing the goods, no contract either of manufacture or sale is entered into between the parties. (*Harvey v. Duffey*, 99 Cal. 401.)

III. Bills of Sale; What Included in.

9. A bill of sale of "all the goods and merchandise and property we own, have, or have an interest in, in a store in Nevada, county of Nevada, formerly occupied by Bailey Gatzert, and now in the possession of the sheriff of Nevada county, said goods forwarded by us to Bailey Gatzert, Nevada," contains a sufficient description of the goods. (*Ogghill v. Boring*, 15 Cal. 218.)

10. Parol evidence is inadmissible to show that bill of sale included property not described therein. Where a bill of sale is defective in such particular, it can only be altered by a direct proceeding in chancery for the purpose of reforming it. (*Osborn v. Hendrickson*, 8 Cal. 31.)
Cited 14 Cal. 307; 6 Utah, 452.

11. It is not a sufficient objection to the introduction of a bill of sale in evidence that there has been no proof of its delivery. (*McFadden v. Mitchell*, 61 Cal. 148.)

12. Where a vendor sells a quantity of wine at a stipulated price per gallon, and the vendee causes a contract to be written, which is executed in duplicate, the vendor signing both copies upon the assurance of the vendee that the two were exactly alike, but by mistake a less price was inserted in one of the copies, which was taken by the vendee and afterward assigned by him to a third party, the vendee is liable to the vendor for the loss resulting from the mistake, and the fact that the vendor signed both copies of the contract

does not make him responsible therefor. (*Haubert v. Mausshardt*, 89 Cal. 433.)

13. The stallion in question was sold by the plaintiff to one Alexander, who subsequently gave a bill of sale for certain horses to the defendant Bonyman as security for a loan. The evidence tended to show that the stallion was intended to be included in the bill of sale. Thereafter, the plaintiff repurchased the stallion from Alexander, and delivered it into the possession of Bonyman. At some time, it does not appear when, Alexander offered to pay his indebtedness to Bonyman on certain conditions which the latter was not bound to perform, but did not in fact pay it. The action was brought to recover possession of the stallion. Judgment was rendered in favor of the defendants. Held, that it would be presumed in support of the judgment that the stallion was included in the bill of sale. (*Myers v. Moulton*, 71 Cal. 498.)

Recital of consideration in bill of sale contradicting. See Evidence, 400.

IV. Delivery.

1. Necessity of.

14. Upon the execution of a bill of sale, the title to the property sold, as between the parties to the instrument, vests in the purchaser, although the sale was unaccompanied by an actual delivery and continued change of possession; and the purchaser may at any time maintain an action against the seller to recover the possession, irrespective of such delivery. (*Francisco v. Aguirre*, 94 Cal. 180.)

15. In 1881 the plaintiff purchased and paid for certain machinery, and left it on storage in the possession of its vendors. The vendors afterward, and while the machinery was in their possession, sold all their "assets" and "property" to the defendant, who immediately took possession. The schedule of the property sold, which accompanied the bill of sale, did not include the machinery. Held, that the sale of the machinery to the plaintiff was complete, and although not accompanied by a change of possession, was not void as to the defendant, as the latter was not a subsequent purchaser of the machinery. (*Oro Min. etc. Co. v. Starr*, 76 Cal. 166.)

Actual delivery, necessity of. See post, IV, 2.

Change of locality of property or indicia of ownership. See post, IV, 3.

Sale when complete before actual delivery. See post, 101.

Necessity of where vendor is not in possession. See post, IV, 4.

Want of delivery, attaching creditors of vendor, rights of. See Croppers, 13.

2. Actual Delivery, Necessity of and What Amounts to; Change of Possession.

16. Words alone, unaccompanied by acts, cannot make out a delivery. (*Gardet v. Belknap*, 1 Cal. 399.)

17. In order that a verbal contract for the purchase of goods or chattels at a price exceeding two hundred dollars may be saved from the operation of the statute of frauds by a delivery, there must be a transfer of

possession evidenced by acts, and not by words merely. (*Malone v. Plato*, 22 Cal. 103.) Cited 91 Cal. 295.

18. The continued change of possession, required by the statute of frauds, after a sale of goods and chattels, in order to validate the sale, must be "actual," and not constructive. (*Fitzgerald v. Gorham*, 4 Cal. 289.) Cited 8 Cal. 83; 9 Cal. 273.

19. Where delivery of the goods is necessary to make the contract, a symbolical delivery can only be effectual where it can be followed by an actual delivery. (*Stevens v. Stewart*, 3 Cal. 140.)

20. Whether sale of personal property is void as to subsequent purchasers must be determined under the fifteenth section of the statute of frauds. (*Vance v. Boynton*, 8 Cal. 554.)

21. An actual change of the possession of personal property, as distinguished from that which by mere intentment of law follows the transfer of title, is an open visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased. (*Cahoon v. Marshall*, 25 Cal. 187.) Cited 87 Cal. 284; 73 Cal. 402; 84 Cal. 171; 91 Cal. 295.

22. A delivery of goods, in order to take a case out of the statute of frauds, must be of such a nature that the property is placed under the control and power of the vendee; and the acts to change the possession of the property from the vendor to the vendee must be such as to deprive the vendor of his right of lien as security for payment of the purchase money. (*Gardet v. Belknap*, 1 Cal. 399.)

23. An instruction to the jury that "what constitutes a delivery of personal property by the vendor to the vendee depends upon the character of the property sold and the circumstances of such particular case, and for the "purpose of a delivery it is not necessary that the property should pass into the actual possession of the vendee; therefore, when it is so situated that the vendee is entitled to, and can rightfully take, possession thereof at his pleasure, he is considered as having actually received it as the statute requires," is, as to the latter clause thereof, in direct conflict with section 3440 of the Civil Code. (*Pearce v. Boggs*, 99 Cal. 340.)

24. Under section 3440 of the Civil Code, requiring an immediate delivery and actual and continued change of possession of personal property sold, in order to the validity of the sale as against the creditors of the vendor, any delivery that is sufficient to pass the title as between the parties is sufficient if it be immediate. The requirement of an "actual and continued change of possession" was designed to exclude the idea of a mere formal and temporary change of possession, but was not intended to require, upon a penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. (*Porter v. Bucher*, 98 Cal. 454.)

25. In the determination of the question as to the kind of possession necessary to be given in order to make a sale of personal property

valid as against creditors, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties, and the intended use of the property. The law only requires that which could naturally be done in an honest and business-like transaction where there was no thought of fraud or concealment. (*Porter v. Bucher*, 98 Cal. 454.)

26. The change of possession of the property sold must be continued. The statute does not fix any limits when this change may cease; and if courts could put limits to it, they could do away with the clear language of the law. (*Bacon v. Scannell*, 9 Cal. 271.) Overruled 15 Cal. 507; 26 Cal. 323.

27. The sale by which the plaintiff claims title to the property in question, held, to have been accompanied by an immediate delivery, and by an actual and continued change of possession. (*Schumacher v. Connolly*, 75 Cal. 282.)

28. The evidence in this case held to be sufficient to sustain the verdict of the jury upon the question of a sufficient delivery and continued possession of personal property sold to plaintiff, as against an execution creditor of plaintiff's vendor. (*Beatty, J. C.*, dissenting. (*Dale v. Purvis*, 78 Cal. 113.)

29. Case where court below instructed the jury that the facts showed no valid sale of personal property for want of such change of possession as the statute of frauds requires, and this court sustained the instruction. (*Ford v. Chambers*, 19 Cal. 143.)

Actual and immediate delivery. See *Fraudulent Conveyances*, II, 9, b, A.

Delivery of vessels. See *Shipping*, XII.

Delivery, sufficiency of. See *Mortgages*, 977.

Growing crops, delivery and change of possession are not necessary. See *Statute of Frauds*, 77.

Delivery, what amounts to where no place specified. See *Shipping*, 46.

Change of possession. See *Fraudulent Conveyances*, II, 9.

Change of possession, necessity of on judicial sales. See *Executions*, 138.

Change of possession, question whether one of law or fact. See *Fraudulent Conveyances*, II, 9, b, E.

Change of possession on sale of goods in hands of third person or in warehouse. See *post*, IV, 4.

Change of possession on sale between husband and wife. See *post*, IV, 5.

Change of possession on sale of animals. See *post*, IV, 3.

Change of possession on sale of property in bulk. See *post*, IV, 3.

Identification and segregation, necessity of. See *post*, VI, 3.

Change of possession of property not in existence. See *Fraudulent Conveyances*, II, 9, b, B.

Change of possession, instruction not misleading. See *Instructions*, 26.

3. *Change of Locality of Property or Indicia of Ownership; on Sale of Animals Running at Large.*

30. The plaintiffs purchased from B a certain number of cattle, and presented to C, the

agent of B, an order for their delivery. C pointed out the cattle to the plaintiffs, as they were grazing in view, and told him that he delivered him possession, and then accepted an offer of employment from the plaintiffs, and remained in charge of the cattle until they were seized by the defendant. Held, that this was a delivery as immediate and as complete as the nature of the case would admit, and followed by an actual and continued change of possession. (*Montgomery v. Hunt*, 5 Cal. 366.)

Cited 23 Cal. 584; 56 Cal. 334.

31. A sale of hogs on a ranch, in the possession and occupancy of the seller, is not accompanied by an immediate delivery, and actual and continued change of possession, if, after the sale, they are allowed to remain upon the ranch in charge of the same persons who had charge of them before the sale, although such persons were requested after the sale to take charge of them for the buyer, and consented to do so. (*Mosgrove v. Harris*, 94 Cal. 162.)

32. Where the owner of goods made a bona fide sale of them to a purchaser, and delivered possession of them to him, and the purchaser, immediately after, appointed the former owner of them his agent, to take charge of them and sell them, and, for that purpose, redelivered the possession of them to him, held, that the sale was fraudulent and void, as against the creditors of the original owner. (*Fitzgerald v. Gorham*, 4 Cal. 289.)

Cited 8 Cal. 561; disapproved 26 Cal. 323.

33. In an action to recover the possession of cattle taken by the defendant under a writ of attachment against the plaintiff's vendor, where it appeared that the cattle alleged to have been sold consisted largely of milch cows, which were in the actual possession of the vendor, who was milking the cows and peddling the milk as well after the sale as before, and the evidence tended to show that he bought the feed and managed the business as before, it is not error for the court to refuse to charge the jury that "for the purpose of a delivery it is not necessary that the property sold should pass into the actual possession of the buyer," and that "when property is so situated that the buyer is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires." (*Etcheperre v. Aguirre*, 91 Cal. 288.)

34. Plaintiff held a public sale of cattle on his farm, the terms being cash, or notes with approved sureties at sixty days. Defendant bid off two bulls for two hundred and three dollars. The bulls remained on plaintiff's farm at defendant's request, and subject to his control, plaintiff agreeing to keep them until a particular time, when defendant was to send for them, and the persons in charge of them were directed to deliver them to defendant when called for. About two weeks after the expiration of this time, defendant sent for the bulls, but meanwhile they had died. No cash was paid nor any notes given for the bulls. Plaintiff sues for the price bid. Held, that there was such a delivery and ac-

ceptance of the bulls as to complete the sale; that the circumstances were such as to authorize the inference of change of ownership, and that plaintiff in taking charge of the cattle after the sale acted simply as agent of defendant, and is entitled to recover. (*Clark v. Rush*, 19 Cal. 393.)

Cited 22 Cal. 541; 81 Cal. 97.

35. It was not necessary that the cattle should have been actually removed from plaintiff's farm. It was sufficient that there were circumstances authorizing the inference of a change of ownership; and it was for the jury to draw this inference, and it was competent for them to consider any and all acts of the parties tending to prove that the defendant had acquired and assumed control of the cattle as owner. (*Clark v. Rush*, 19 Cal. 393.)

36. Where, after an alleged verbal agreement for the sale of a pair of horses, they remained in the seller's livery-stable, where they had been previously kept, held, that proof of a direction by the purchaser to the seller to keep the horses in the stable for him, or of any other language of that import, was insufficient to show such a delivery as is required by the thirteenth section of the statute of frauds. (*Malone v. Plato*, 22 Cal. 103.)

37. Where H., the owner of barley, which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V.," and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterward sells and delivers the same to B., held, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. (*Vance v. Boynton*, 8 Cal. 554.)

Cited 8 Cal. 517; 9 Cal. 273.

38. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off of the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to be baled by plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred and thirty pounds of hay baled, and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weight. Plaintiff then went to the house of defendant, and told him that the hay was baled and piled up in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked defendant whether he would take the surplus. Defendant said he would be over soon, and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff sues for nine hundred and nineteen dollars, balance due on the hay. The court instructed the jury that if they believed from the evidence that it was the understanding of the parties, upon the payment of the two hundred dollars by defendant, the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess. Held, that the instruction was

right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with other hay belonging to plaintiff made no difference; if defendant agreed to accept it in that condition, and to consider it as delivered, the contract for delivery would be fully executed. (*Smith v. Friend*, 15 Cal. 124.)

39. On the above facts, defendant asked the court to instruct the jury that "if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights, and containing different quantities, and all being in the same pile, there was no delivery without division had." The instruction was refused. Held, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for the defendant. (*Smith v. Friend*, 15 Cal. 124.)

Sale of goods in bulk in warehouse. See post, IV, 4.

40. Where cattle, roaming at large, purchased in good faith, are collected together and marked with the brand of the purchaser, and then allowed to pasture on their accustomed range, these acts constitute a good delivery and continued change of possession. (*Walden v. Murdock*, 23 Cal. 540.)

41. A mere execution of a bill of sale of cattle roaming at large, in which the brand with which they are marked is described, accompanied by a delivery of the branding iron, does not constitute a delivery of possession of the cattle. (*Walden v. Murdock*, 23 Cal. 540.)

42. H., having cattle running at large with those of D., his tenant, sold them to the plaintiff, and the cattle were driven up into a corral, where H. said to the plaintiff, "Here are your cows that you bought"; thereupon the plaintiff requested B. to take care of the cattle and pasture them for her, and B. agreeing to do so, the cattle were turned back into the pasture. Held, that there was an immediate delivery and actual change of possession, and that the sale was not void as to creditors. (*Morgan v. Miller*, 62 Cal. 492.)

43. The defendants agreed verbally to sell the plaintiff one hundred unbroken horses, at a specified price each, out of a band of horses belonging to them, then running at large. The contract provided that the defendants were to gather up a number of the horses of the band from time to time, from which the plaintiff was to select a certain number, and commence breaking them, after which the number so selected and broken were to be turned into the defendants' pasture, and another selection made in like manner, until the whole number agreed to be sold should be gathered up, selected, and broken. Thereupon the horses were to be paid for by the plaintiff, and then taken by him from the premises of the defendants. The defendants gathered up a number of the horses, from which the plaintiff selected twenty-two, which

he broke, and turned into the pasture of the defendants. Thereafter the defendants refused to further perform their part of the contract. Held, that the contract was void under the statute of frauds. (*Terney v. Doten*, 70 Cal. 399.)

Separation of animals running in a larger herd. See post, 108.

Breach of contract of sale of part of herd, remedy of purchaser. See post, 258.

Assumption of ownership. See *Fraudulent Conveyances*, II, 9, b, C.

Changing indicia of ownership. See *Fraudulent Conveyances*, II, 9, b, C.

Vendor remaining in possession. See *Fraudulent Conveyances*, II, 9, b, C.

Employment of seller by purchaser. See *Fraudulent Conveyances*, II, 9, b, D.

4. Where Goods are in Possession of Third Person or in Warehouse.

44. Where vendor of goods is not at time in possession, the transfer is an "assignment" within the meaning of that term in the fifteenth section of the statute of frauds, and an actual and continued change of possession is required equally as in case of a sale by one in possession. (*Weil v. Paul*, 22 Cal. 492.) Cited 11 Mont. 508.

45. If vendor of goods in care and keeping of third person directs him to deliver them to the vendee, and the party holding the goods consents to retain the goods for him, and does so retain them, it is a sufficient delivery and change of possession to satisfy the requirements of section 3440 of the Civil Code. (*Williams v. Lerch*, 56 Cal. 330.) Cited 66 Cal. 122; 91 Cal. 294, 295.

46. Bill of sale of property which recites delivery of property of the vendee, the property then being in the custody of a third person under a contract, transfers the title to the property, as between the vendor and vendee. (*Crill v. Doyle*, 53 Cal. 713.)

47. A delivery of an order for goods is only considered as a delivery of the goods themselves, where they are susceptible of an immediate delivery. (*Stevens v. Stewart*, 3 Cal. 140.)

48. The plaintiff contracted with defendant for certain goods on board a vessel, and delivered to him a bill of sale and an order on the captain of the vessel for the delivery of the goods. When defendant presented the order, he was informed that the goods could not be discharged for some time, to which defendant replied that he would then have nothing to do with them, and nine days elapsed before they were discharged, of which defendant had notice, but refused to take them, and pleaded the statute of frauds. The court below charged the jury that the bill of sale and order took the case out of the statute of frauds. Held, that this was error. (*Stevens v. Stewart*, 3 Cal. 140.)

49. As between the parties to a sale of goods on store in a warehouse, the delivery of an order on the warehouseman for the goods by the seller to the buyer is a delivery, and passes the title to the latter so as to render him liable for the price. (*Ghirardelli v. McDermott*, 22 Cal. 539.)

50. A delivery of a warehouse receipt, stating that the goods named therein are deliverable on return of the receipt, is sufficient prima facie to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. (*Horr v. Barker*, 8 Cal. 609.) Cited 22 Cal. 541; 52 Cal. 615.

51. When the defendants show that the person to whom, in his own name, the receipt was given, and who passed it to plaintiff, was their agent, or broker, acting for them, but permitted to keep it on storage in his own name, they do not rebut the prima facie case made out by the plaintiffs, by the possession of the receipt. (*Horr v. Barker*, 8 Cal. 609.)

52. When a bill of sale was given of a definite number of sacks of wheat, which were to be paid for at so much per cental, and a portion of them were then in a warehouse, for which certificates of weight had been issued to the seller, and which were then transferred to the buyer, and it was agreed that the remainder of the wheat should be delivered at the same warehouse for the buyer, and should be paid for when the buyer was notified of its exact weight, it sufficiently appears that the parties intended a transfer of the whole number of sacks of wheat at the time of the sale, which were then sufficiently identified, and the remainder of the wheat cannot be attached as the property of the seller, after being delivered at the warehouse and weighed, though certificates of weight were issued in the name of the seller, and were not transferred to the buyer until after the attachment. (*Greenbaum v. Martinez*, 36 Cal. 459.)

53. Where the plaintiff bought eight hundred sacks of flour, on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterward attached as the property of the vendor, held, that the delivery was sufficient, and the sale valid. (*Cartwright v. Phoenix*, 7 Cal. 281.) Cited 7 Mont. 129; 17 Nev. 213.

54. When A has six hundred barrels of flour on storage, and he sells to B one hundred, to C two hundred, and to D three hundred, and gives each a delivery order upon his warehouseman, and the purchasers all surrender their several orders to the warehouseman, without making any separation of each lot from the common mass, but voluntarily leave the flour standing on the books of the warehouseman to the credit of each purchaser for his proper number of barrels, it is a complete delivery to each purchaser, and will pass the title to each. (*Horr v. Barker*, 11 Cal. 393.)

55. The separation by the purchasers of their various lots is a mere matter of convenience among themselves, not affecting their rights as to their vendor or a mere trespasser. (*Horr v. Barker*, 11 Cal. 393.)

56. Where A had a large quantity of flour

stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A, held, that the sheriff was not liable to C, in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. (*Adams v. Gorham*, 6 Cal. 68.) Cited 6 Cal. 453; 27 Cal. 463.

57. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor, and crediting the purchasers with their respective lots, held, that there was a sufficient delivery of possession without a separation of the various lots. (*Horr v. Barker*, 8 Cal. 603.) Cited 76 Cal. 217.

58. Where a vendor only sells a part of the goods on storage, if all together and of the same mark, must be separated from the larger mass in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman. (*Horr v. Barker*, 8 Cal. 603.) Cited 27 Cal. 463.

59. The different purchasers have a right to leave the goods so by them purchased in one mass, subject to an apportionment between themselves of any loss. (*Horr v. Barker*, 8 Cal. 603.)

60. Where the plaintiffs bought a certain amount of flour, being part of a large quantity on storage belonging to the vendor, and the plaintiff did not remove the flour purchased, nor separate it from the remainder; but the vendor subsequently sold the remainder and more to other parties, who removed what they purchased, leaving on storage a less amount than had been purchased by plaintiffs, which was afterward attached in a suit against plaintiffs' vendor, held, that the sale and removal of all the flour, except that bought by plaintiff, was a segregation of plaintiffs' flour, vesting in him a clear title at the time of the seizure. (*Horr v. Barker*, 6 Cal. 489.) Cited 27 Cal. 463.

61. Claim of subsequent purchaser of flour from the same vendor, taking an order on the same storekeeper, cannot in such case embarrass the plaintiff's claim, there being no flour in store to meet the order in favor of such subsequent purchaser. (*Horr v. Barker*, 6 Cal. 489.)

62. Where the plaintiff's action in such a case was brought for the value of the flour against another party claiming the flour, who had seized the same, the fact that plaintiff claims a less quantity of flour than he is

really entitled to does not operate otherwise than as a waiver of his claim to such additional quantity. (*Horr v. Barker*, 6 Cal. 489.)

63. The doctrine of segregation is not applicable to a man's property alone in an action against a trespasser, and having claimed damages for a less quantity of flour than was his, it cannot be objected that his action must fail for want of segregation of the flour for which he claims from that which he does not claim, though it is his. (*Horr v. Barker*, 6 Cal. 489.)

Segregation, necessity of to passing title. See post, VI, 3.

Same person remaining in charge when animals in possession of third person sold. See ante, 30, 31.

Goods in warehouse, delivery of. See Mortgages, 1010.

5. On Sale Between Husband and Wife.

64. Where a wife living with her husband upon a farm, which he has claimed as a homestead, is the owner of cattle and horses upon the farm, which are her separate property, and purchased from her husband the crop of hay grown upon the homestead, after it had been stacked in corrals, the gates of which she then closed and fastened, and immediately began to feed the hay to her stock, there being no question as to the bona fides of the sale, and there being evidence of a custom in that vicinity for cattle-owners who bought hay in the stack to take the cattle to the hay and feed them there, without removing the hay, the question whether there was an immediate delivery and actual and continued change of possession of the hay so purchased is one of fact for the jury to determine. (*Porter v. Bucher*, 98 Cal. 454.)

65. In an action for damages for the conversion of the hay which the wife had purchased, brought by the wife against the assignees in insolvency of the husband, who had replevied the hay from the husband, it is error to instruct the jury that the sale to the wife was absolutely void for want of an immediate delivery and continued change of possession of the hay, and that it was the duty of the jury to find for the defendant. (*Porter v. Bucher*, 98 Cal. 454.)

66. The wife was not bound to remove the hay to other land, nor to own the land upon which the stack stood, and her joint tenancy of the homestead with her husband prevented the possession of the hay from being wholly in the husband. (*Porter v. Bucher*, 98 Cal. 454.)

67. The fact that two cows and two horses of the husband were fed from the wife's hay after the purchase, in consideration of his services in assisting to feed the wife's stock, is not necessarily inconsistent with her ownership and possession, though it is competent evidence tending to show the husband's possession and control. (*Porter v. Bucher*, 98 Cal. 454.)

6. Delivery of Part Only; Delivery of Exact Amount.

68. If vendor delivers less quantity of goods than he contracted to deliver, the vendee is

at liberty to refuse to accept, and if he accepts a part, he may return that and refuse to accept less than the whole, but having received and retained a part, he cannot refuse to pay for the part received. (*Polhemus v. Heiman*, 45 Cal. 573; *Willamette Steam Mills etc. Co. v. Union Lumber etc. Co.*, 94 Cal. 156.)

69. Upon part delivery of goods, and an inability on the part of the vendor to deliver the whole quantity sold, he is, nevertheless, entitled to recover the stipulated price of the quantity actually delivered, deducting therefrom the damages sustained by the purchaser on account of the nondelivery of the whole. (*Cole v. Swanston*, 1 Cal. 51.)

70. A contract to deliver about fifty-three thousand pounds of wool does not require the delivery of that exact number of pounds, but the vendor has a reasonable latitude allowed him as to the number of pounds he shall deliver. (*Polhemus v. Heiman*, 45 Cal. 573.)

Delivery varying from contract. See post, VIII.

7. Time and Place of; Delay in; Delivery at Wharf or to Carrier.

71. A bona fide sale of cattle roaming at large over the plains, upon a defined or certain range, is not fraudulent as against the creditors of the vendor, merely because the sale is not followed by an immediate delivery of possession; but the parties are entitled to a reasonable time after the sale to prepare for a rodeo, and give the proper notices thereof, in order that they may separate the cattle purchased from stock owned by others, and to properly mark and brand them; and in the mean time the rights acquired by the purchaser will not be lost. (*Walden v. Murdock*, 23 Cal. 540.)

Immediate delivery, necessity of. See ante, 24.

72. Where no question is raised as to the validity of the contract, or the effect of the statute of frauds, and where the question is as to the kind of delivery which effects a change of property, although the goods cannot be immediately delivered, the delay may be implied as one of the stipulations. (*Stevens v. Stewart*, 3 Cal. 140.)

73. In an action for damages caused by delay in the delivery of a carload of eggs, the cost price of the eggs to the purchaser, under the terms of the contract, is an immaterial element in the case, and it is error to instruct the jury that the measure of damages is the difference between the cost price of the eggs to the plaintiff by the terms of the contract and their value to him at the time and place when they ought to be delivered. (*Ramish v. Kirschbraun*, 98 Cal. 676.)

Cited 98 Cal. 676.

74. The evidence should be confined to the inquiry as to the market value of the eggs between the date that they should have been delivered under the terms of the contract and the date at which they were delivered, and the plaintiff cannot recover any damages if he was benefited by the delay in delivery, but only to the extent to which he is shown

to have been injured thereby. (*Ramish v. Kirschbraun*, 98 Cal. 676.)

75. Personal property is deliverable at the place where it is at the time of sale or agreement to sell, unless the seller has agreed to deliver it elsewhere, or an option as to the place of delivery is provided for. (*Mattingly v. Roach*, 84 Cal. 207.)

76. Plaintiff asked this instruction: "That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them." Held, that this proposition is not strictly correct; that if the trees bargained for were put on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. (*Thompson v. Paige*, 16 Cal. 77.)

77. S. C. & Co., while indebted to D. & G., sold the property in controversy, thirty-three tons of hay, to the respondents, and agreed to deliver it to them at a landing on the Sacramento river. The vendors immediately hauled the hay to the landing, and delivered it on board a schooner chartered by the respondents. While the schooner was in transit to San Francisco, where the respondents were doing business, the appellant, as sheriff, attached the property in an action by D. & G. against the vendors, and sold it, and applied the proceeds to the satisfaction of their claim. Held, in an action against the sheriff to recover the property or its value, that the sale was followed by an immediate and continued change of possession, and not being fraudulent in fact, the seizure was unlawful. (*Schmidt v. Nunan*, 63 Cal. 371.)

78. Under a contract for the sale of fruit, to be shipped to the buyer by a specified carrier at the expense of the buyer, a daily statement of weights of fruit shipped to be forwarded to the buyer, and the fruit to be weighed by the buyer at place of destination, and notice given to the seller of a substantial difference in weights, and thereupon the fruit to be held for twelve hours for adjustment of weights, the shipping weight to be conclusively taken as correct upon failure to give such notice, held, that the fruit was delivered to the buyer immediately upon its delivery to the carrier, and that loss from shrinkage in weight during transit, attributable to natural causes, must be borne by the buyer, notwithstanding the right given by the contract to the buyer to weigh the goods at the place of destination. (*Gates v. Carquinez Packing Co.*, 78 Cal. 439.)

8. Who to Determine.

79. The question of the intention of the parties should not be submitted to the jury. (*Vance v. Boynton*, 8 Cal. 554.)

80. What constitutes an immediate delivery, and an actual and continued change of possession of personal property, within the meaning of section 3440 of the Civil Code, is a fact to be determined upon the evidence in each

particular case. (*Porter v. Bucher*, 98 Cal. 454.)

81. The question as to whether the sale of personal property is accompanied by an immediate delivery thereof, and followed by an actual and continued change of possession, is a question of fact for the jury. (*Meads v. Lasar*, 92 Cal. 221.)

82. The question of delivery and change of possession, under the fifteenth section of the statute of frauds, is a mixed question of law and fact; but as to what shall constitute a delivery is a question of law alone. (*Vance v. Boynton*, 8 Cal. 554.)

83. In an action of claim and delivery, where it appeared that the plaintiff purchased two mares from the owner thereof, but the custodian of the mares refused to give them up on the ground that an employee of the owner, who placed them in his care with the owner's consent, told him not to deliver them to any one except on his order, and subsequently such employee removed them to his own place where he attached them in a suit against their owner, and they were sold to the defendant under execution, an instruction to the jury that if they believe from the evidence that if the plaintiff bought the mares in good faith from their owner, and was prevented from getting possession thereof by the wrongful act of the attaching creditor, they should find for the plaintiff, is erroneous in leaving to the jury the determination of the question of law as to whether any act of the attaching creditor by which the plaintiff had been prevented from getting possession of the mares was "wrongful." (*Pearce v. Boggs*, 99 Cal. 340.)

Immediate change of possession, question of is one for jury. See ante, 64.

9. Evidence as to.

84. Where one purchases land and receives a conveyance therefor, and at the same time buys personal property on the land, the question whether the vendee had actual possession of the land is an important one in determining whether there was an actual delivery of possession of the personal property. (*Cahoon v. Marshall*, 25 Cal. 197.)

85. Where on an issue as to whether a sale had been accompanied with actual and continued change of possession, plaintiff testified that the sheep were driven on land owned by him; to rebut the evidence defendant put in evidence a deed of the land from plaintiff to another, thereupon plaintiff offered to prove by parol that the deed was, in fact, a mortgage; this evidence was ruled out; held, that the ruling was proper, as it was immaterial whether the paper was a deed or mortgage, the material question being who was in the occupancy of the land. (*Chester v. Bower*, 55 Cal. 46.)

86. In connection with acts showing a change of ownership, and in explanation of them, the declarations of the parties showing the nature of their agreement were admissible in evidence. (*Clark v. Rush*, 19 Cal. 393.)

87. The possession and ownership of the vendee after sale may be shown by his acts,

his dealing with the property, but not by his mere admissions. (*Visher v. Webster*, 13 Cal. 58.)

88. Testimony of the vendor, upon cross-examination, as to what he did and said in regard to the cattle, after he had executed the bill of sale of them to the plaintiff, is pertinent to the issue as to whether or not the sale had been accompanied by an immediate delivery and followed by an actual and continued change of possession, and the admission of it by the court is not error. (*Etchepare v. Aguirre*, 91 Cal. 238.)

Books of account, admissibility to prove delivery. See Evidence, 162.

V. Acceptance.

89. Where wood has been sold and delivered upon the premises of the vendee, under an agreement that it shall be optional with him to accept or refuse it, and he afterward uses the wood, he will be deemed to have accepted it, and cannot avoid payment of its value. (*Correio v. Lynch*, 65 Cal. 273.)

90. Acceptance of goods bearing name different from one used in the sale note, by a subvendee, of part of goods sold, does not conclude the vendee as to the whole contract. (*Flint v. Lyon*, 4 Cal. 17.)

Acceptance on delivery of part of goods only. See ante, IV, 6.

Acceptance under executory contract. See post, 99.

Acceptance of goods as waiver of defect. See post, VII, 4, b.

Refusal of purchaser to receive goods. See post, XIII, 1.

Refusal to accept goods, measure of damages. See post, XIII, 1.

Waiver of damages where goods shipped in bad condition by acceptance. See post, IX.

VI. Title of Purchaser.

1. Purchaser has Vendee's Title Only; Priority Where Several Vendees.

See Bona Fide Purchasers.

91. A sale of personal property passes to the purchaser only such title as the vendor had. (*Robinson v. Haas*, 40 Cal. 474.)

92. It is a general rule, applicable alike to conditional and absolute sales, that a second vendee is not entitled to stand in any better situation than his vendor in regard to the title of personal property, other than negotiable instruments, and whatever comes under the general denomination of currency. Whether a further exception to the rule exists in favor of bona fide purchasers from the purchaser at a conditional sale, is not decided. (*Putnam v. Lamphier*, 36 Cal. 151.) Cited 65 Cal. 486.

93. Where purchasers from common vendor are equally innocent, or equally in fault, the first purchaser is entitled to the goods. (*Vance v. Boynton*, 8 Cal. 554.)

Defective title is no defense if vendee retains possession. See post, 239.

2. Where Property Purchased with Borrowed Money.

94. Personal property bought with bor-

rowed money is the property of the borrower, and passes by a deed of all his property, goods, and chattels. (*Pool v. Clifford*, 78 Cal. 371.)

95. If one party negotiates the purchase of personal property, and another furnishes him with the money to pay for it, and for his security takes the bill of sale from the seller in his name, and takes possession, and it is agreed that the property shall belong to the negotiator when he pays the money, the legal title to the property is vested in the person who furnishes the money, and to whom the bill of sale was made. (*Johnson v. White*, 46 Cal. 328.)

96. The same would be the result if the person to whom the bill of sale is given, instead of loaning the money, obtained it by signing with the negotiator a joint note to a bank, or by indorsing a note given by the negotiator to the bank, provided the note is afterward paid by him. (*Johnson v. White*, 46 Cal. 328.)

97. In such case the person to whom the bill of sale is given has a good title to the property as against the attaching creditors of the negotiator. (*Johnson v. White*, 46 Cal. 328.)

3. When Passes, Segregation and Identification.

98. Where it is the duty of the vendor to put the goods into a deliverable condition, and he has not done so, the title does not pass, in the absence of circumstances showing a contrary intention. (*Blackwood v. Outting Packing Co.*, 76 Cal. 212.)

99. When articles sold under executory contract are inspected and accepted by the vendee upon arrival, the title passes to the vendee. (*Habenicht v. Lissak*, 77 Cal. 139.)

100. Where the plaintiff sold a number of bales of drillings to A, for the purpose of making sacks, deliverable to A as fast as he needed them for manufacturing, and A agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments, held, that upon the delivery of the drills to A the title thereto rested in him, and that plaintiff had no lien thereon, or on the sacks, until they were delivered to him. (*Hewlet v. Flint*, 7 Cal. 264.)

101. As to when contract of sale is complete before actual delivery, so as to throw the risk of loss on the vendee, see the opinion of the referee in this case. (*Tyson v. Wells*, 2 Cal. 122.)

102. Whether a contract is an executory contract of sale, in other words, whether the title passes, is a question of intention, to be collected from the whole contract. If from the whole contract it appears that the intention was that the title should pass, and that the vendor should retain a mere lien for the price, any different characterization or naming of the transaction by the parties is not to be regarded. (*Palmer v. Howard*, 72 Cal. 293.) Cited 90 Cal. 168.

103. The defendants sold to the plaintiffs a band of horses, then running at large, for a stipulated price, and guaranteed that, when gathered up, they should amount to a certain

number. Between the date of the sale and the gathering up of the horses two of them died. Held, that the plaintiffs must suffer the loss. (*Girdner v. Beswick*, 69 Cal. 112.)

104. If the goods are not identified, the title does not pass, in the absence of circumstances showing a contrary intention. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.)

105. A sale of a chattel cannot apply to any article until it is clearly designated, and its identity ascertained. (*McLaughlin v. Piatti*, 27 Cal. 451.)

106. A sale of personal property is not completed, so as to pass the title to the property, so long as any thing remains to be done to the thing sold to identify it or discriminate it from other things. (*Caruthers v. McGarvey*, 41 Cal. 15.)

Cited 76 Cal. 217.

107. If goods are sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title remains in the seller until the bargained property is separated and identified. (*McLaughlin v. Piatti*, 27 Cal. 451.)

Cited 76 Cal. 217, 218.

108. A sale of a given number of cattle, then running in a herd of a larger number, is an executory contract, and does not apply to any particular cattle until the number sold have been separated from the herd. (*McLaughlin v. Piatti*, 27 Cal. 451.)

109. As against the controlling features of identification, payment, and delivery, the word "sold" is not conclusive. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.)

Cited 83 Cal. 186.

110. Under section 1140 of the Civil Code, the title to personal property sold or exchanged passes to the buyer whenever the parties agree to a present transfer, and the thing itself is identified, whether it is separated from other things or not. (*Greenbaum v. Martinez*, 86 Cal. 459.)

111. When a specific number of articles of a certain kind are sold, parol evidence is admissible to identify the goods offered for delivery as being the same goods which were sold. (*Habenicht v. Lissak*, 77 Cal. 139.)

Segregation, necessity of where goods are in warehouse. See ante, IV, 4.

Title does not vest under contract, when. See post, 285.

4. *Payment. Necessity of to Passing of Title.*

112. Where terms are cash on delivery, and there has been neither payment nor delivery, the title does not pass, in the absence of circumstances showing a contrary intention. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.)

113. On a sale of chattels, where no time of payment and no time for delivery are agreed upon, delivery and payment are concurrent acts; and neither party can maintain an action for nonperformance without showing a readiness and willingness to perform on his part. (*Cole v. Swanston*, 1 Cal. 51.)

114. A covenant by one party to sell and ship goods in first class cases, and by the other party to pay for the goods on the arri-

val of the bills of lading in due course of mail, are independent covenants, to be performed at different times. (*Wheelock v. Pacific Gas Co.*, 51 Cal. 223.)

115. On a contract for the sale of cattle of a certain brand running with a larger herd, where the number of such cattle is not known, and the time for their identification was not fixed, and nothing was said about the time of delivery or the payment of the balance of the purchase price; the contract is executory, and the law presumes that the parties intended to make the payment of the price, and the delivery of the possession, concurrent conditions. (*Beauchamp v. Archer*, 58 Cal. 431, 434.)

Cited 5 Wash. 728.

116. The action was brought to recover damages for the conversion of certain wood which had been cut from the land of the plaintiff by one Rachael Bashore, under an agreement whereby the latter was to cut the wood, and, when cut, it was to remain the property of the plaintiff until she had paid therefor at the rate of one dollar a cord. This price was never paid. After the wood was cut, it was seized and sold as the property of the husband of Rachael Bashore, under an execution issued against him. Held, that the plaintiff did not have a mere lien on the wood to the extent of one dollar a cord, but had the exclusive property therein, and was entitled to recover its entire value as damages for its conversion. (*Stokes v. Balaam*, 73 Cal. 154.)

117. Where on sale of personal property "the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser." (*Putnam v. Lamphier*, 36 Cal. 151.)

118. Part payment of price does not invest purchaser with title on an executory contract for the sale of cattle, and when he goes to receive the cattle he should go prepared to pay the balance of the purchase money, and upon his failure to do so, the seller may rescind the contract. (*Beauchamp v. Archer*, 58 Cal. 431, 434.)

119. If the owner of a piano deliver the same to another person, under an agreement in writing, stating its value, and that such person agrees to pay a specified sum monthly for the use of it, and that it is to be sold for a price therein mentioned, and that a specified sum is to be paid each month until the agreed price is paid, when a bill of sale will be given, the agreement does not constitute an absolute sale of the piano. (*Kohler v. Hayes*, 41 Cal. 455.)

Cited 68 Cal. 547; 72 Cal. 295; 100 Cal. 412; 8 Or. 22.

120. Under such agreement the title does not pass, and the party receiving the piano cannot sell the same until the purchase price is paid. (*Kohler v. Hayes*, 41 Cal. 455.)

Sale on installments. See ante, 2; post, 225, et seq.

121. When a contract for the sale of chattels, upon the payment of the purchase money by installments, provides that the purchaser shall have the right to the use and possession of the chattels until default be made in the payment of the installments, but that if such default be made the owner may at once resume the possession of the property, if such default be made the right of the owner to resume the possession is not lost or waived by a subsequent receipt of a part of the installment. (*Hegler v. Eddy*, 53 Cal. 597.) Cited 65 Cal. 416; 72 Cal. 295; 100 Cal. 412.

122. Where a party delivers possession of personal property to another under an agreement to sell in consideration of a cash payment and other deferred payments, time being of the essence of the agreement, the contract is executory, and no title passes until the deferred payments are made, and a failure to make them according to the terms of the agreement entitles the vendor to the possession of the property. (*Sere v. McGovern*, 65 Cal. 244.)

123. Provision that in case of nonpayment vendors could retake possession, and if they did, that they should sell "to the best advantage, rendering to the borrower all surplus, if any, after paying the price agreed upon and the expenses of removal and sale." Held, to show, in connection with other features, that the title passed, and that the parties attempted to reserve a mere lien for the price. (*Palmer v. Howard*, 72 Cal. 293.)

Sale when absolute. See post, 295.

5. Where Sale is on Conditions.

124. One who enters into a contract with another whereby it is agreed that he shall own certain personal property on the performance of certain conditions by him, has no complete ownership, either general or special, in the property, by virtue of the contract. (*Cardinell v. Bennett*, 52 Cal. 476.)

125. The action was replevin to recover a horse in the possession of the defendant. The possession was acquired from one Coates, to whom the horse had been delivered by the plaintiff under a contract of sale subject to certain conditions to be performed before the title should pass. The case was tried by the court without a jury, and written findings were filed, on which a judgment was entered in favor of the plaintiff. On a review of the findings, held, that the facts found did not support the judgment. (*Lambert v. McCloud*, 63 Cal. 162.)

Conditional, of horse, deposit with livery-stable keeper, effect of. See *Livery-stable Keepers*, 1.

Bona fide purchaser from conditional vendee, rights of. See ante, 92.

Conditional, felonious conversion of goods, when larceny. See *Criminal Law*, 2308.

VII. Warranties.

1. What Words Constitute a Warranty.

126. To constitute warranty, no precise words are necessary; it will be sufficient if the intention clearly appear. (*Moore v. McKinlay*, 5 Cal. 471.)

127. To create an express warranty on a sale of personal property, the word "warrant" need not be used, nor are any particular words necessary. Any affirmation made at the time of the sale, as to the quality or condition of the thing sold, will be treated as a warranty if it was so intended, and the purchaser bought on the faith of such affirmation, and whether it was so intended, and the purchaser acted upon it, are questions of fact for the jury. (*McLennan v. Ohmen*, 75 Cal. 558.)

128. If one party contracts to deliver to the other wool "in good order," and the latter agrees to accept and pay for it, the clause "in good order" is an express warranty. (*Polhemus v. Heiman*, 50 Cal. 438.)

129. Use in sale note of given name for goods sold is a warranty that they bear that name. (*Flint v. Lyon*, 4 Cal. 17.) Cited 5 Cal. 474; 21 Or. 297.

130. There is no warranty in following words of a sale note: "We have this day sold you two shipments of seeds, for arrival." (*Moore v. McKinlay*, 5 Cal. 471.)

Representations whether constitute warranty. See post, 151.

Words necessary to create warranty of quality. See post, VII, 3, c.

2. Sale Whether Implies; Evidence of; in Executory Contracts.

131. A mere contract of sale or agreement to sell does not imply a warranty. (*Harley v. Golden State etc. Iron Works*, 66 Cal. 238.)

132. Warranty will not be implied, except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use. (*Moore v. McKinlay*, 5 Cal. 471.)

133. Where plaintiff inspects goods before purchasing, the case is taken from the operation of the rule of implied warranty. (*Moore v. McKinlay*, 5 Cal. 471.)

134. There may be an express or implied warranty when the contract for the sale of goods is executory, as well as when it is executed. (*Polhemus v. Heiman*, 45 Cal. 573.)

Title, implied warranty of. See post, VII, 3, a.

135. When there is a written agreement for the sale of personal property containing the terms and conditions of a complete contract, it will be presumed to express all the terms of the agreement between the parties, and parol evidence is inadmissible to show the existence of a warranty not expressed in the contract. (*Johnson v. Powers*, 65 Cal. 179.)

Parol evidence to rebut presumption of warranty. See post, 140.

Warranty on sale of bonds. See *Bonds*, 50. et seq.

3. Particular Warranties.

a. Of Title.

136. When goods are in possession of the vendor, who, dealing with them as owner, sells and delivers them to the purchaser, nothing being said as to the title, the law implies that he warrants the title to the property sold. (*Gross v. Kierski*, 41 Cal. 111.)

137. The vendor of chattels in his possession warrants the title by implication. The warranty is a presumption of law arising from the possession of the vendor and the sale. (*Miller v. Van Tassel*, 24 Cal. 458.) Cited 41 Cal. 113; 65 Cal. 181.

138. This presumption may be rebutted by proof on the part of the defendant that he refused to give a warranty of title, and that the plaintiff agreed to take the property at his own risk. (*Miller v. Van Tassel*, 24 Cal. 458.)

139. Where the vendor of chattels in his possession gives a written bill of sale to the vendee, containing no covenant of warranty, there is an implied warranty, the same as though the sale was by parol. (*Miller v. Van Tassel*, 24 Cal. 458.)

140. Where the vendor of chattels in his possession gives a written bill of sale to the vendee, containing no covenant of warranty, the warranty arising by implication may be rebutted by parol evidence, the same as it could be if the sale was a verbal one. (*Miller v. Van Tassel*, 24 Cal. 458.)

141. The warranty implied in a sale made by general terms, under the system of the civil law, is equivalent to a covenant that the buyer shall quietly possess and enjoy, and nothing more. And to give a buyer a right of action upon this warranty, there must have taken place an actual judicial eviction, by the sentence of a competent tribunal, and this sentence carried into effect. (*Fowler v. Smith*, 2 Cal. 568.) Cited 59 Cal. 528.

142. There is no breach of an express warranty of title to chattels sold until the vendee's possession is disturbed by the true owner. (*Gross v. Kierski*, 41 Cal. 111.)

143. Under the forms of pleading at common law, the vendee of chattels sold with a warranty of title could, on a breach of the warranty, recover damages in assumpsit, or he might sue in an action on the case for deceit, if there had been deceit, as well as warranty of title; but, in the first case, he must aver specially that the defendant warranted his title to the property, and that a breach of the warranty had occurred, and in the latter that the defendant falsely or fraudulently represented himself to be the owner of the property, and that he knew his representations were false. (*Miller v. Van Tassel*, 24 Cal. 458.)

Warranty of title. See Auctions, III.

b. Fitness for Particular Use; on Sale of Manufactured Article.

144. If stallion is sold for breeding purposes, evidence of his unfitness for such purposes is admissible on the question of damages. (*Woody v. Bennett*, 88 Cal. 241.)

145. Evidence of the nature and probable duration of the blemishes has relation to his value, and consequently is admissible on the question of damages. (*Woody v. Bennett*, 88 Cal. 241.)

146. Evidence as to what plaintiff paid for the stallion is admissible on the question of damages. (*Woody v. Bennett*, 88 Cal. 241.)

147. Firewood is not manufactured article,

within the meaning of section 1770 of the Civil Code, and a vendor does not warrant by its sale that it is reasonably fit for the purpose for which ordered or intended to be used. (*Correio v. Lynch*, 65 Cal. 273.)

148. Every person or corporation who manufactures an article under an order for a particular purpose warrants by the sale of it that it is reasonably fit for that purpose. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

149. Under sections 1769 and 1770 of the Civil Code, one who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein; and one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for such purpose. (*Hoult v. Baldwin*, 67 Cal. 610.)

150. In an action for the price of a combined header and separator, which was manufactured by the vendor, when the evidence shows, without substantial conflict, that the machine was not reasonably fit for the purpose for which it was ordered, and broke down by its own weight when moved, and that a prompt offer to return the machine was made after its insufficiency was discovered, a verdict for the plaintiff will be set aside upon appeal, as not supported by the evidence. (*Hoult v. Baldwin*, 78 Cal. 410.)

151. In an action for damages for breach of a contract of sale of harvesting machines manufactured by the defendant, which were warranted to do good work, and concerning the working of which certain representations and guaranties are alleged to have been made, whereby the purchase was induced, it is proper to submit to the jury whether or not the representations testified to were intended as warranties, the averments of the complaint being sufficient to include such warranties. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

152. The machine in question was manufactured and sold by the plaintiffs on the order of an agent of the defendant. At the time of the order, the plaintiffs notified the defendant that they intended to deliver the machine upon the cars, and that their responsibility, so far as the working thereof was concerned, should then cease. The defendant refused to accept it upon these terms, and demanded a guaranty that it would do good work. The plaintiffs thereupon executed and forwarded to him a written guaranty to that effect. Held, that the guaranty was a part of the contract of sale, and supported by a sufficient consideration. (*Hoult v. Baldwin*, 67 Cal. 610.)

153. The evidence of persons not experts, who testify, without knowledge, as to their opinion of the sufficiency of the construction of a manufactured article, with the manufacture of which they had nothing to do, is not admissible, and is entitled to no weight in arriving at a conclusion as to the sufficiency of the evidence to sustain the verdict. (*Hoult v. Baldwin*, 78 Cal. 410.)

154. In an action for the breach of a warranty of a harvesting machine to do certain work, a practical machinist, who is familiar with the requirements of similar machines, and the principles applied in their construction, is competent as an expert to testify as to the general design of the machine in question, and whether it was so made as to successfully do the work for which it was intended. (*Greenleaf v. Stockton Combined Harvester etc. Works*, 78 Cal. 606.)

155. In an action for damages for breach of a contract of sale of harvesting machines, manufactured by the defendant, which were warranted to do good work, evidence for the defendant to the effect that other machines made of the same pattern and of like materials did good work is not admissible. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

156. Upon a breach by the seller of either of implied warranties, or upon a breach by him of an express warranty that the article manufactured and sold would do good work of a particular kind, the buyer has a right to rescind the sale by returning or offering to return the article to the seller. (*Hoult v. Baldwin*, 67 Cal. 610.)

157. The plaintiff agreed for a stipulated price to manufacture a steel rope or cable suitable in all respects for the operation of defendant's street-cars, and to deliver it to defendant for trial. If found suitable, defendant agreed to accept it, but if it proved unfit, it was to be returned to the plaintiff. After testing the rope, defendant refused to accept it, and returned it to the plaintiff, who took it back, and brought this action for goods sold and delivered. The court below found that defendant rejected the rope because of its unfitness for the purpose intended. Held, (1) that the contract was executory, and that such an action would not lie; (2) that the return of the rope to the plaintiff, and his acceptance of it; was a rescission of the contract by mutual consent. (*Hallidie v. Sutter St. R. R. Co.*, 63 Cal. 575.)

158. If the return of a machine, warranted to do good work, and found upon trial to be unfit for use, is delayed at the request of the manufacturer, he thereby waives the right to require prompt delivery by the purchaser on discovery of the fact that it does not do the work guaranteed. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

159. The damage resulting from the breach of a warranty of the fitness of a harvesting machine to do certain work is not impracticable or extremely difficult to fix, and consequently, under section 1670 of the Civil Code, an agreement for liquidated damages in the event of such breach is void. (*Greenleaf v. Stockton Combined Harvester etc. Works*, 78 Cal. 606.)

160. Under sections 3313 and 3314 of the Civil Code, the measure of damages for the breach of a warranty of the fitness of an article for a particular purpose is the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a

fair compensation for the loss incurred by an effort in good faith to use it for such purpose. (*McLennan v. Ohmen*, 75 Cal. 558.)

161. For breach of warranty of a machine sold by the manufacturer, and returned after trial as being unfit for use, the measure of damages is the price paid by the purchaser, with interest, and, in addition thereto, such amount of expense or loss as he has actually sustained in bona fide attempts to make the machine do the work for which it was constructed, including compensation for the loss of time, horse hire, use of animals, and wages and board of hired men. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

162. The plaintiff contracted to manufacture lumber, and the defendant agreed to purchase all that the plaintiff should manufacture at a stipulated price, and to furnish certain machinery for the work. The machinery proved insufficient and not in accordance with the contract, and the plaintiff was thereby prevented from manufacturing as much lumber as he otherwise would have done. Held, that the measure of damages was the contract price of the lumber which he was so prevented from manufacturing, less the expense he would have incurred in manufacturing it, over and above the amount necessarily expended in manufacturing the amount actually furnished by him. (*Winans v. Sierra Lumber Co.*, 66 Cal. 61.) Cited 94 Cal. 15.

Time and place of breach of warranty of guaranteed machine. See post, VII, 4, a.

Warranty of quantity on sale of fruit. See *Growing Crop*, 12.

c. Warranty of Quality or Merchantable Condition.

163. One who agrees to sell crop of fruit of future season gives an implied warranty as to quality. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.) Cited 86 Cal. 575.

164. No particular words are necessary to constitute warranty as to the character, condition, or quality of goods sold, but if the vendor, at the time of sale, affirms a fact as to the essential qualities of his goods, and the purchaser buys on the faith of such affirmation, it is an express warranty. (*Polhemus v. Heiman*, 45 Cal. 573.) Cited 50 Cal. 441; 60 Cal. 287; 75 Cal. 561.

165. Mere praise of personal property, indulged in by the owner when offering it for sale, does not, under the rule of the common law, amount to an express warranty of its quality or marketable condition. (*Byrne v. Jansen*, 60 Cal. 624.)

166. A mere praise of personal property, such as wool, indulged in by the owner when offering it for sale, does not amount to an implied warranty of its quality or condition if the buyer has an opportunity to examine it and fails to do so, and no artifice is used by the seller to prevent him from making an examination. (*Byrne v. Jansen*, 60 Cal. 624.)

167. In an action by a vendor to recover the amount alleged to be due him, under a contract to deliver certain fruit, a finding that at the time the fruit was delivered it was not in

a good and merchantable condition will be held sustained by the evidence when the plaintiff testifies that it was more or less bruised at that time. (*Hicks v. Riverside Fruit Co.*, 72 Cal. 303.)

168. In an action to recover damages for the breach of an express warranty of the merchantable character of one kind of dates sold by the plaintiff to defendants, where the contract specified two kinds of dates, but made no distinction between them as to price or quantity of either kind, evidence as to the difference in market value of the two kinds of dates, for the purpose of showing that one kind furnished which were unmerchantable were worth less than the agreed price, is inadmissible; and the measure of damages is the difference between the contract price and the actual value of the dates as unmerchantable goods. (*Levi v. Dimmick*, 99 Cal. 490.)

169. In an action for breach of warranty of the quality of barley sold by defendant to the plaintiff, the court instructed the jury in effect that the measure of damages was the difference between the market value of the barley actually delivered, and the market value of an equal quantity of barley of the same quality as the sample at the time of delivery. Held, the charge was in accordance with the rule contained in section 3313 of the Civil Code. (*Hughes v. Bray*, 60 Cal. 284.)

Warranty of quality on sales by sample. See post, VIII.

Admissions as to merchantable quality of goods sold. See Evidence, 341.

4. Breach of.

a. Time and Place of.

170. Where a sale of a harvesting-machine which was guaranteed by the defendant corporation to perform good and satisfactory work, and to harvest the plaintiff's grain in the county of his residence at greatly reduced expense, was made at the principal place of business of the corporation, in another county, it will be presumed that the machine was delivered at the latter place if the contrary does not appear, and if the machine was inadequate and unadapted to perform according to the guaranty, the breach of the guaranty was committed at the time and place of sale and delivery, and not upon the failure of the machine to perform the work in the county of the plaintiff's residence. (*Byrum v. Stockton Combined Harvester etc. Works*, 91 Cal. 657.)

b. Remedy for; Waiver of Breach.

171. If a party accepts and pays for part of a quantity of goods delivered under a contract, without reserving the right to object subsequently, and does not offer to return the goods delivered, but retains them, he waives any defect in their quality, and he cannot make such defects a ground of objection to goods which are to be subsequently delivered, and which are in accordance with the contract. (*Guernsey v. West Coast Lumber Co.*, 87 Cal. 249.)

172. If the vendee accepts the goods sold when delivered by the vendor, and renders the vendor an account, it does not prevent the

vendee from recovering damages for a breach of a warranty made by the vendor as to their quality, if the vendee thus accepted and rendered the account in ignorance of the true condition of the goods. (*Polhemus v. Heiman*, 45 Cal. 573.)

Cited 67 Cal. 613; 71 Cal. 149; 1 N. Dak. 328; 2 Wash. 606.

173. The buyer does not lose his rights arising from a breach of warranty by accepting and using a portion of the goods, if it was agreed at the time of such acceptance that the rights of the parties were not to be affected thereby. (*Blackwood v. Cutting Packing Co.*, 76 Cal. 212.)

Accepting goods and suing on warranty. See post, 180.

174. If the vendor warrants the goods sold, and the vendee discovers after they are delivered that there has been a breach of the warranty, he is not compelled to return the goods, although he may do so and rescind the contract, but he is at liberty to retain them and bring an action for the breach of the warranty, or he may plead the breach in reduction of damages in an action brought by the vendor for the purchase money. (*Polhemus v. Heiman*, 45 Cal. 573.)

175. In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment, to mitigate the amount recovered; but it is not available as a complete defense to the action. (*Earl v. Bull*, 15 Cal. 421.)

176. In the case of a sale and delivery of a special cargo with warranty, and a breach of the warranty, the plaintiffs might recover on the contract, and the defendants would be obliged to sue on the warranty, or in the same action to recoup the damages, under proper averments in the pleadings. (*Ruiz v. Norton*, 4 Cal. 355.)

Cited 4 Cal. 20; 28 Cal. 305.

Breach of warranty is defense in action for price. See post, 238.

177. When two machines are purchased on joint account, and paid for out of joint funds of the purchasers, the fact that a separate contract is entered into and signed by each of them separately, in his own name, for one machine each, does not preclude parol proof that the purchase was made by each as agent for both purchasers on their joint account, and such evidence will sustain a joint action for breach of warranty upon sale of the machines. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

178. Where the evidence shows a breach of several warranties made upon the sale of a manufactured article, and the averments of the complaint are sufficient to cover all such warranties, instructions to find for plaintiffs, predicated upon the breach of either of the warranties, are proper. (*Fox v. Stockton Combined Harvester etc. Works*, 83 Cal. 333.)

179. In an action for the price of goods, complaint contained two counts: one upon a special contract for the sale and delivery of the goods;

the other upon a claim for goods sold and delivered. Answer denied the contract and the other allegations of the complaint, but set up a contract between the parties somewhat different, containing a guaranty as to quality, and alleging that the quality of the goods was not in accordance with the contract, and the breach was relied on as a complete defense. Evidence was introduced upon all the issues made by the pleadings. The court instructed the jury that "if the plaintiffs, on the day the contract matured, presented their account, and offered to deliver the goods, they fulfilled the contract on their part; and if the defendants did not, within a reasonable time, and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover." Plaintiffs had verdict and judgment for the price. Held, that in a subsequent action by the defendants against plaintiffs, on the breach of the warranty, for the difference in value between the goods delivered and those contracted for, the former suit is no bar; that the matter in dispute, to wit, this breach of warranty, was not adjudged; that the instruction of the court took that question from the jury, and directed them to decide the rights of the parties upon other considerations. (*Earl v. Bull*, 15 Cal. 421.)

Cited 26 Cal. 305.

Breach of warranty of fitness, on sale of manufactured article, evidence and damages. See ante, VII, 3, b.

Breach of warranty of title. See ante, VII, 3, a.

Damages, measure of, on breach of warranty of quality. See ante, 169.

Damages, measure of, on sale of unmerchantable fruit. See ante, 168.

Remedy for breach of covenant of title. See ante, 143.

Warranty in, usage is not admissible to relieve from liability. See Usages, 3.

VIII. Sales by Sample.

180. Where goods are sold by sample, law implies warranty that the article shall not be inferior in quality to the sample; and if they are, the purchaser may accept them, and bring an action for the breach of warranty. (*Hughes v. Bray*, 60 Cal. 284.)

181. Where a contract for the sale of merchandise is in writing, and nothing in the written contract indicates that a sample was used or referred to, parol evidence is inadmissible to show a sale by sample. (*Harrison v. McCormick*, 89 Cal. 327.)

182. Where there is no allegation in the answer that the defendants were induced to enter into the contract by fraudulent representations, or of a mistake in reducing the contract to writing, parol evidence tending to show that the coal delivered was not of the kind or quality of a sample not referred to in the contract is not admissible as tending to show that the coal delivered was not of the kind or quality described in the contract. (*Harrison v. McCormick*, 89 Cal. 327.)

183. Where the court finds that the coal delivered was of the kind, variety, and class

named in the contract of sale, but fails to find that it was not merchantable, nor equal in quality to that called for in the contract, the admission of parol evidence to show a sale of the coal by sample, and that the coal delivered did not correspond with such sample, is prejudicial error. (*Harrison v. McCormick*, 89 Cal. 327.)

184. The defendant offered to prove the existence of a general custom and usage among the grain dealers in San Francisco that sales of grain by sample are not considered complete until the buyer has actually inspected and accepted the grain sold. Held, the evidence was properly rejected. (*Hughes v. Bray*, 60 Cal. 284.)

185. Where a purchaser has contracted for the sale of two lots of wheat by sample, to be delivered within ten days, he is liable for a larger quantity, a portion of which is delivered at a later period, if the delivery is accepted by his agent for him and pursuant to his orders, but is not liable for the delivery of any excess to the agent, against his consent, and without his authority. (*Bedell v. Kowalsky*, 99 Cal. 236.)

IX. Duty to Ship in Good Condition.

186. In action upon contract to deliver spirits in good packages, where the only issue is whether the packages were good, an instruction to the jury that if the plaintiff had substantially complied with the contract he was entitled to a verdict, but that if the packages containing the spirits were not good, it was not such a substantial compliance with the contract as to entitle the plaintiff to recover, is not erroneous. (*Voorman v. Voight*, 46 Cal. 392.)

Cited 86 Cal. 613.

187. In an action on a contract to deliver spirits in good packages, where the only issue made is whether the packages were good, the plaintiff, being the party to deliver the spirits, may prove that the defendant assigned other reasons than the defect in the packages for not paying for the spirits, and that he did not offer to return the packages. (*Voorman v. Voight*, 46 Cal. 392.)

188. Claim for damages for violation of covenant to ship goods in good cases may be set off by way of counterclaim in an action brought to recover the price of other goods sold to the defendant. (*Wheelock v. Pacific Gas Co.*, 51 Cal. 223.)

189. If the plaintiff contracts to sell and put up gasoline for shipment in first-class cases, and the defendant contracts to pay for it on the arrival of the bills of lading in due course of mail, and several shipments are made in defective cases, for which payment is made before the vessels arrive, and the defendant receives the gasoline when it does arrive, and, with a knowledge that the cases were defective, uses it, he does not thereby waive his claim for damages. (*Wheelock v. Pacific Gas Co.*, 51 Cal. 223.)

190. Letters containing an express waiver of a claim for damages for the violation of a covenant to ship goods in good cases are not binding if written without consideration. (*Wheelock v. Pacific Gas Co.*, 51 Cal. 223.)

Words "in good order" constitute warranty. See ante, VII, 1.

X. Fraud in Sale.

191. Purchaser has right to rely upon representations of seller as to facts not within the purchaser's knowledge, and the seller cannot escape responsibility by showing that the purchaser might have ascertained that such representations were untrue. (*Bank of Woodland v. Hiatt*, 58 Cal. 234.) Cited 70 Cal. 622.

192. In an action by the assignee of a non-negotiable promissory note, given to one S. for the purchase money of mining stock, the court in effect found that the stock was of no value, and that the defendant was induced to purchase partly by misrepresentations made by S., and partly by information obtained from others; but that the defendant by reasonable diligence and inquiry might have known the representations to be untrue, and that S., though he knew them to be untrue, did not intend to defraud the defendant, because he believed the mine to be rich, and the stock to be worth the money. Held, that the facts stated, in connection with an offer to rescind made within a reasonable time, constituted a defense to the action. (*Bank of Woodland v. Hiatt*, 58 Cal. 234.) Cited 85 Cal. 30.

193. It is not essential to the liability of the owner of a horse for damages for false representations as to the soundness of the horse, inducing an exchange therefor, that such owner should be proven to have actually known the horse to be unsound at the time of the trade; but actual fraud is made out if it appears that the horse was unsound in fact, and that the positive assertion as to its soundness was not warranted by the information of the person making it, though he may have believed it to be true. (*Mayer v. Salazar*, 84 Cal. 646.)

194. Where the seller of wool in sacks knew that it had been rained on and was badly damaged, and that for the purpose of concealing its real condition the fleeces had been turned outside in, and so packed; and the purchaser, when making an examination, cut a few inches into several of the sacks without discovering the damage, but remarked the extraordinary weight of the sacks and water stains upon them; and in answer to his inquiries as to these circumstances indicating damage, the seller said that the wool had not been rained on, so far as he knew, and had not got wet; that the weight was occasioned by extra good packing, that the water stains arose from sprinkling the sacks to make them hold more, and that all the wool, so far as he knew, was as good as that examined. Held, that though the rule of *caveat emptor* might apply if the seller had remained silent, yet under the circumstances and on account of the active concealment and artifice of the seller, he was responsible in damages for a fraudulent misrepresentation. (*Roseman v. Canovan*, 43 Cal. 110.)

196. Unless there be warranty or fraud a purchaser of chattels cannot be heard to complain of conditions or defects open to his

observation, or which he might have seen had he thought proper to make an examination for that purpose; in such cases the maxims of "*caveat emptor*" and "*qui vult decipi, decipiat*" apply; but these rules have no application to a case in which the vendor resorts to a trick or artifice for the purpose of diverting the purchaser from the line of inquiry otherwise open to him, and which, but for such diversion, he might have followed. (*Roseman v. Canovan*, 43 Cal. 110.)

196. Though a vendor of chattels may be excused from the obligation of pointing out defects or blemishes in the property he proposes to sell, he is not thereby at liberty to hinder or obstruct the purchaser in his attempts to find them out for himself. (*Roseman v. Canovan*, 43 Cal. 110.)

197. In an action to recover damages for a fraudulent misrepresentation of the quality and condition of certain wool, which the plaintiff had been induced to purchase of the defendant, where there was evidence tending to show that defendant knew that the wool was damaged, and that by his false misrepresentations he induced the plaintiff to omit the examination for himself, which he would otherwise have made, held, that an instruction to the effect that if plaintiff might by examination have ascertained the condition of the wool, defendant would not be responsible for concealing its condition, was practically directing a verdict for defendant, and was error. (*Roseman v. Canovan*, 43 Cal. 110.)

198. A party cannot resist the payment of a promissory note, given in payment for property, on the ground of fraudulent representations, unless within a reasonable time after the discovery of the fraud he offers to return the property and rescind the contract, provided the property sold is of any value to either party. (*Gifford v. Carvill*, 29 Cal. 589.) Cited 54 Cal. 164; 58 Cal. 614; 78 Cal. 554; 82 Cal. 196; 85 Cal. 532; 11 Mont. 146; distinguished 58 Cal. 610.

199. The declarations and acts of a vendor before sale are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud. (*Visher v. Webster*, 8 Cal. 109.)

200. In an action for damages for fraudulent representations by a vendor in the sale of the business, stock, and appurtenances of a newspaper, evidence of the value of the property sold, at a time not remote from the time of sale, is competent and relevant as tending to throw light upon the value at the time of sale; and the fact that the property was pointed out to the witness, by one who knew it to be the property sold, is a sufficient identification of the property, the value of which is testified to. (*Hanscom v. Drullard*, 79 Cal. 234.)

201. In action for false representations in the sale of a newspaper, where evidence was allowed that when the newspaper sold by the defendant to the plaintiff was formerly sold to the defendant by a third party the number of subscribers was larger than the number shown by the books of the defendant at the time of the sale to plaintiff, such evidence could not have harmed the defendant, conceding with-

out deciding that it was immaterial. (*Hanscom v. Drullard*, 79 Cal. 234.)

Fraud is defense in action for price. See post, 238.

202. The fraud in the buyer practiced upon the seller, which will avoid the sale, must be acted, not thought; and it must result in the seller being misled and deceived as to the ability of the buyer to pay, and thereby induced to part with his goods when otherwise he would not; it must act upon the seller, and not exist merely in the mind of the purchaser. If the vendor is allowed to act upon his own judgment, uninfluenced by representations of any kind, no fraud that should avoid a sale is committed. The rule that the bare intent of the buyer, at the time of the purchase, not to pay for the goods, will render the sale void, doubted. (*Bell v. Ellis*, 33 Cal. 620.)

203. Fraudulent intent to procure goods without payment is consummated when the possession of the goods is obtained without payment on delivery, or on call, according to the terms of sale. The debt, under such circumstances, is fraudulently contracted. (*Stewart v. Levy*, 36 Cal. 159.)

204. Where person, clearly insolvent, purchases goods from another on credit, and conceals the fact of his insolvency from the vendor, he is guilty of such fraud as vitiates the sale. (*Seligman v. Kalkman*, 8 Cal. 207.) Overruled 33 Cal. 626; disapproved 4 Nev. 300.

205. A sale of goods on credit is void for fraud, if induced by any false representations on the part of the buyer as to his pecuniary circumstances or ability to pay; but the buyer is not bound to disclose his pecuniary circumstances unless asked to do so; and if he does not, and is not asked to do so, the mere fact that he is insolvent will not render the sale void, even though he knew himself to be insolvent at the time. (*Bell v. Ellis*, 33 Cal. 620.)

206. In a suit to recover goods on the ground of fraud in the vendee, the admission of evidence that he was insolvent two months after the purchase is not sufficient to reverse the judgment, unless it is clearly shown that the evidence was irrelevant, and injurious to the party objecting. (*Coghill v. Boring*, 15 Cal. 213.) Cited 81 Cal. 406.

207. The ownership of goods is not changed when the claim to such ownership is based on a fraudulent contract. (*Butler v. Collins*, 12 Cal. 457.) Cited 18 Cal. 35; 66 Cal. 428, 429; 70 Cal. 443; 88 Cal. 397.

208. Where a sale of personal property is procured by fraud, the ownership of the property is not changed, unless the seller in some way afterward ratifies the sale; and, in the absence of a ratification, the seller may maintain an action to recover possession of the property or damages for its conversion. (*Amer v. Hightower*, 70 Cal. 440.)

209. Where the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods under the representation that it was

only to serve as a temporary security for the compliance by the plaintiff to furnish certain securities on previous indebtedness, and at this time intended to refuse to receive such security, or give plaintiff the advantage of such new contract, the possession of such goods thus obtained was fraudulent, and the bill of sale is void. (*Butler v. Collins*, 12 Cal. 457.)

210. It is as much a trespass to take possession of goods under such circumstances, as it is to take possession of goods without color of contract. It is the using the form of a contract as a covering for the wrongful taking of another's property, and it divests such possession of every attribute of a sale. (*Butler v. Collins*, 12 Cal. 457.)

211. A party wishing to avoid a purchase by an insolvent on credit, on the ground of fraud, has no right to sue upon the contract at the same time. The latter suit may be pleaded in bar to the former. (*Seligman v. Kalkman*, 8 Cal. 207.)

212. In an action to recover goods, sold by the plaintiffs to E., and by his directions delivered to defendant, the plaintiffs claiming that the sale had been procured by fraud, and that it had been on that account rescinded by them, held, that evidence of transactions by which defendants and E. had obtained goods from other persons by means similar to those used in the case in question, was admissible for the plaintiffs. (*Bancroft v. Heringhi*, 54 Cal. 120.)

213. Where the vendor of personal property acquired his title to the property in fraud of the creditor of his vendor, his vendee, for a valuable consideration and without notice of the original fraud, is not affected by the taint of his title. The title, although originally fraudulent, is cured by the subsequent conveyance to an innocent party. (*Paige v. O'Neal*, 12 Cal. 483.) Cited 19 Cal. 576, 622.

Demand is not necessary where purchase fraudulent. See post, XII, 3.

Fraud in, arrest for. See Arrest, II.

False representations as to solvency. See Criminal Law, 1576.

Fraudulent purchase by insolvent, attachment before maturity of debt. See Attachments, 35, 36.

Misrepresentations as to value of business. See Fraud, 43.

Purchaser not guilty of false pretenses, when. See Criminal Law, 1569.

XI. Stoppage in Transitu.

214. The right of a vendor of goods to a stoppage in transitu exists until they arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitu. (*Markwald v. His Creditors*, 7 Cal. 213.) Cited 23 Cal. 510; 37 Cal. 632.

215. The vendor of goods upon credit may retake them, upon the discovery of the insolvency of the vendee, at any time before they have been delivered to the vendee, or

before any third party has acquired bona fide rights in the goods. (*Jones v. Earl*, 37 Cal. 630.)

216. The vendor of goods who has sold them on credit to one who is insolvent has a right to stop the goods and take them into his possession at any time before they arrive at their place of destination, and go into the possession of the purchaser. (*Blackman v. Pierce*, 23 Cal. 508.)

Cited 37 Cal. 632; 20 Nev. 316.

217. Right of stoppage in transitu is paramount to any lien on the goods claimed by third persons through the purchaser, and may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee. (*Blackman v. Pierce*, 23 Cal. 508.)

218. Upon demand by the vendor of goods upon credit, when the right of stoppage in transitu exists, and while it continues, the carrier becomes liable for conversion if he declines to deliver the goods to the vendor, or delivers them to the vendee. (*Jones v. Earl*, 37 Cal. 630.)

219. An express demand for the goods is not required in order to charge the carrier. If he is clearly informed that it is the desire of the vendor to retake the goods, the notice is sufficient. (*Jones v. Earl*, 37 Cal. 630.)

220. Notice to an agent of the carrier, who is in the possession of the goods in the regular course of his agency, is notice to the carrier. (*Jones v. Earl*, 37 Cal. 630.)

221. A letter by the vendor, delivered to the agent of the carrier in possession of the goods, to the effect that the vendee had been attached, and that he desired to save the goods, giving a bill of particulars, and directing him to deliver the goods to no one but his agent, is a sufficient demand for the return of the goods to charge the carrier for a conversion. (*Jones v. Earl*, 37 Cal. 630.)

Right to stoppage in transitu. See ante, 76.

XII. Price.

1. Lien for.

222. A lien of one selling personalty, to be valid as against third persons, must conform to the requirements of the law as to mortgages of personal property. (*Palmer v. Howard*, 72 Cal. 293.)

2. Time of Payment; Default in; Retaking Property.

223. The defendant agreed to take and pay for all the fruit raised by the plaintiff at a uniform rate per pound for all fruit raised and delivered at the works of the defendant. As the fruit ripened the plaintiff delivered and the defendant received it under the contract; but the latter refused to pay for the fruit until all was delivered, and thereupon the plaintiff declined to deliver any more, and sued for the value of that delivered. Held, that according to the true construction of the contract, as each lot was delivered and accepted by the defendant, there became due and payable from it to the plaintiff the value thereof at the rate per pound fixed in the contract. (*Veerkamp v. Hulburd Canning etc. Co.*, 58 Cal. 229.)

224. Contract provided for immediate delivery, for the payment of one-half down and the balance in four monthly installments, with a provision that the vendor might retake possession in case of a default. In accordance with the contract, the property was delivered, but the vendees made default in the payment of the second and third installments, whereupon the vendor immediately retook possession. At the time the last installment fell due, the vendees tendered to the vendor the full amount remaining due on said contract, and demanded the return of said property, which was refused, whereupon the vendees demanded the repayment of the money paid, which was likewise refused. Thereafter, the vendees sued to recover the amount of their payments, with interest. Held, (1) that the vendor alone had the right to rescind said contract, and that he did not rescind it; (2) that upon no hypothesis, other than that the contract had been rescinded, could the plaintiffs recover back the said purchase money sued for; (3) that the available remedy of plaintiffs was to recover the value of the property, less the amount of said purchase money unpaid, and the necessary expenses incurred by defendants. (*Miller v. Steen*, 34 Cal. 138.)

225. Where one leases property to another with the agreement that if the payments are regularly made the lessee shall become the owner, time is not of the essence of the contract, and if default is made in one or more of the payments, the vendor is not entitled to have the property and the money already paid by the vendee. (*Miller v. Steen*, 30 Cal. 402.)

Cited 40 Cal. 11.

Sales on installments. See ante, 119, et seq.

226. In such case, if the vendor, upon default, is entitled at his option either to rescind the contract or retake the property and hold it as security, and he does retake the property without rescinding, he may have it sold in a proper proceeding to pay the balance of the purchase money due. (*Miller v. Steen*, 30 Cal. 402.)

Cited 71 Cal. 229.

227. If the vendor retakes the property after default, without rescinding, the vendee, before a sale to pay the balance of purchase money, may pay or tender the full amount due, and thereby become entitled to the property. (*Miller v. Steen*, 30 Cal. 402.)

228. The action was brought to recover damages for the alleged conversion of certain personal property which had been sold by the plaintiff on credit, and the possession of which had been immediately delivered to the vendee. By an agreement supplemental to the sale, the parties thereto agreed that the property should remain in the possession of vendee until the maturity of the purchase price, and that upon default in the payment thereof the vendor should be entitled to retake the possession, and that in the mean time the property should be considered as pledged to secure the payment of the price. At the time of maturity, the vendee made default in the payment of the price, and refused to surrender the possession. Subsequently, and while the property was still in

the possession of the vendee, the defendant, one of his creditors, having notice of the supplemental agreement, attached and sold it under execution as the property of the vendee. Held, that the transfer provided for by the supplemental agreement was void as against the defendant, because not accompanied by an actual and continued change of possession. (*McClain v. Buck*, 73 Cal. 320.)

Provisions for retaking possession on non-payment. See ante, 123.

229. Default in payment of price entitles the purchaser to rescind, and a tender subsequent to default does not defeat the right of rescission. (*Beauchamp v. Archer*, 58 Cal. 431, 435.)

Tender does not invest title to property. See *Tender*, 10.

Fraud, effect of on tender. See *Tender*, 10.

Lease payable in installments. See ante, I.

Passing of title, whether dependent upon payment of price. See ante, VI, 4.

3. Actions for.

230. A demand for the price of goods sold is not necessary to maintain an action against a debtor for fraudulently purchasing the same. Payment, though it would satisfy the debt, would not remove the taint of the fraud, which is the gravamen of the action. (*Stewart v. Levy*, 36 Cal. 159.)

231. In an action in a justice's court, the complaint alleged that at the time specified the defendant Anna M. purchased of the plaintiff's assignors merchandise of the value and for which she agreed to pay the sum of two hundred and forty-two dollars and twenty-nine cents, on delivery; that the goods were delivered; and that afterward, Anna M. intermarried with her codefendant, and prayed for judgment against the two defendants for the sum mentioned, which was entered accordingly. Held, that the complaint contained a sufficient statement of facts to constitute a cause of action in a justice's court; that the want of an averment that the goods were sold and delivered at the request of the defendants, or that they were indebted to the plaintiff for them, was a fault in pleading which might have been reached by demurrer, but did not affect the jurisdiction of the court, or the validity of the judgment as against collateral attack. (*Aucker v. McCoy*, 56 Cal. 524.)

232. It is not necessary to state, in a complaint in an action for goods sold and delivered, where the goods were sold; and a demurrer for uncertainty will not lie for want of such averment. (*Behlow v. Shorb*, 91 Cal. 141.)

233. A complaint for goods sold, which avers that the defendant is indebted to the plaintiff in a certain sum for goods sold and delivered to him at his request, and that defendant has not paid for the same, states a cause of action. (*Abadie v. Carillo*, 32 Cal. 172.)

Cited 48 Cal. 365; 49 Cal. 145; 55 Cal. 23; 63 Cal. 395.

234. A declaration is insufficient, which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery

of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued, whether on account of the defendant, or that of another. (*Mershon v. Randall*, 4 Cal. 324.)

235. A complaint, on a contract in which the defendant agrees to purchase a given quantity of hay, then in a stack, from the plaintiff, and pay a fixed sum therefor at a fixed time, and the hay to be weighed at the stack, should aver, if the hay has not all been delivered, a readiness or offer on the part of the plaintiff to deliver it. (*Barron v. Frink*, 30 Cal. 486.)

236. If the complaint avers the sale and delivery to defendant of goods and the value of the same, an answer which denies the indebtedness but does not deny the facts, the sale and delivery, and amount of goods, does not raise an issue, as it only denies the legal conclusion resulting from the facts. (*Lightner v. Menzel*, 35 Cal. 452.)

Cited 69 Cal. 87; 77 Cal. 425; 11 Col. 542.

237. Where vendors cannot recover on their written contract, and there has been a partial delivery of the goods sold under it, they may recover the value of the goods so delivered on a quantum valebant. (*Ruiz v. Norton*, 4 Cal. 355.)

238. A vendee may avail himself of fraud, breach of warranty, or failure of consideration, by way of defense, in an action upon a contract. (*Flint v. Lyon*, 4 Cal. 17.)

239. A purchaser, while he retains possession, cannot resist the payment of the purchase money, however defective his title, and has no right to a rescission of his contract. (*Fowler v. Smith*, 2 Cal. 568.)

Breach of warranty as defense in action for price. See ante, VII, 4, b.

240. The action was brought to recover an installment alleged to be due the plaintiffs under a contract for the manufacture of lumber from trees cut on the land of the plaintiffs. The defendants pleaded payment on account of the lumber so cut, and gave evidence in support of the plea. The plaintiffs thereupon offered in evidence the pleadings in a prior action between the parties to recover another installment due under the same contract, in which the same payment had been pleaded by the defendants, and evidence thereof had been given. At the time of the trial, the prior action had not been finally determined. Held, that the defendants were not estopped from claiming the benefit of their plea of payment. (*Waterman v. Morrill*, 72 Cal. 48.)

241. In an action on a written contract to deliver a certain quantity of "sound" rice, the plaintiffs are bound to show that the rice was "sound," and failing to do so, they ought not to be allowed to recover on the contract. (*Ruiz v. Norton*, 4 Cal. 355.)

Cited 5 Cal. 474.

242. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, the defendant may show any thing disproving the contract as averred; as, that another party, who in fact sold the cattle, sold them as his own and not as the agent of plaintiff; or, that defendant was not to pay until the cattle were

fattened and slaughtered. Such proof is not new matter. (*Hawkins v. Borland*, 14 Cal. 413.)

Cited 69 Cal. 86; 7 Nev. 590.

243. Such proof is not new matter. (*Hawkins v. Borland*, 14 Cal. 413.)

244. The action was brought to recover for goods sold and delivered. The complaint alleged a promise to pay for the goods on demand. The answer merely denied the allegations of the complaint. On the trial, the court excluded evidence offered by the defendant showing that the goods were sold on a credit of sixty days, which period had not expired when the action was commenced. Held, that the evidence was not new matter, and was admissible in defense of the action without being specially pleaded. (*Landis v. Morrissey*, 60 Cal. 83.)

245. The complaint contained two counts, the first alleging the sale of a horse to the defendants for the sum of fifteen hundred dollars; the second, that the defendants were indebted to the plaintiff in that sum on account of a horse delivered to them by the plaintiff at their request, which (it was alleged) was reasonably worth fifteen hundred dollars. The proof was that the defendants agreed to give the plaintiff for the horse seven hundred and fifty dollars in money and seven hundred and fifty in horses, and that the plaintiff sold and delivered the horse to the defendant on those terms. Held, the plaintiff ought to have counted on the agreement to deliver the horses as well as the agreement to pay the money; but as no objection was made to the proof as to the contract, on the ground of variance or otherwise, the error was waived. (*Cummings v. Dudley*, 60 Cal. 383.)

246. In an action for goods sold and delivered, held, that the evidence tended to show the price agreed to be paid for, and the receipt and acceptance of, the goods. (*Llewellyn Steam etc. Co. v. Malter*, 76 Cal. 242.)

247. In an action to recover for goods sold and delivered under a contract, whereby the purchasers were entitled to a certain percentage of the purchase price as a commission, an instruction that the plaintiffs were entitled to recover the entire purchase price, ignoring all reference to the deduction of the commission, is erroneous. (*Llewellyn Steam etc. Co. v. Malter*, 76 Cal. 242.)

Mistake in price in bill of sale. See ante, III.

Assumpsit for goods sold. See Assumpsit, II, 3.

Action for price, performance of conditions precedent. See Shipping, 38.

Assumpsit for goods sold, refusal of amendment, when proper. See Pleading and Practice, 656.

Summons, statements in, in action for goods sold. See Summons, 20.

Parties in action. See Contracts, V, 4.

Action for balance of account, reference of. See Reference, 17, 18.

Interest on open account for goods sold and delivered. See Interest, 46.

Interest on value of goods sold. See Interest, 21.

XIII. Breach of Contract of Sale.

1. By Purchaser.

248. In an action of assumpsit for goods sold and money paid out and advanced for defendant, where the defendant pleads a special contract to deliver a quantity of wood to plaintiffs, which plaintiffs refused to receive, and the proof shows that the refusal only applied to wood for which an order was given upon a third party, an unsigned letter forbidding plaintiffs to take that wood, which there was evidence tending to show had been sent to plaintiffs by the attorney of such third person, is admissible for plaintiffs as tending to show that they were not at fault for not taking such wood as part of defendant's delivery. (*Goldman v. Bashore*, 80 Cal. 146.)

249. Contract to purchase a newspaper and stationery stand being but an agreement to sell, section 1749 of the Civil Code, and other sections relating to the enforcement of a lien of the seller, do not apply, as the title to the property remained in the seller, and he could not enforce a lien against his own property, or sell it as the property of the buyer; and an action for damages for the breach of such executory contract will lie without the enforcement of any lien, or a rescission of the sale, as provided in section 1749 of the Civil Code. (*Gibbs v. Ranard*, 86 Cal. 531.)

250. The contract sued on required that the lumber should be delivered, from time to time, at such wharf or place as the defendants should designate. The defendants refused not only to designate the place of delivery, but to accept the lumber. Held, that the plaintiffs were entitled to sue for a breach of the contract, although at the time of the refusal of the defendants the plaintiffs may not have been the owners of the lumber to be delivered. (*Warner v. Wilson*, 4 Cal. 310.)

251. In an action to recover damages for the failure of the buyer to comply with a contract for the purchase of a newspaper and stationery stand, which, by its terms, was to be void unless such arrangements could be made with certain newspapers as would be satisfactory to him, evidence that the buyer made arrangements with the newspapers upon the same terms that they had given to the seller, and that such terms were stated to the buyer at the time of the negotiation, and were then agreed to be satisfactory to him, sufficiently shows a compliance with the condition upon which the contract was to become operative. (*Gibbs v. Ranard*, 86 Cal. 531.)

252. In such action parol evidence as to the conversation between the buyer and the seller, with reference to the arrangements with the newspapers, whether had before or after the written contract was executed, is admissible to show that the buyer knew what the arrangements of the seller with the newspapers were at the time of the agreement, and that he would be satisfied with a renewal of the same arrangements, and to show that his repudiation of the agreement was not in good faith. (*Gibbs v. Ranard*, 86 Cal. 531.)

253. In an action for damages for the breach of an agreement to buy, where the value of

the property is fixed as between the parties by the contract, it is not necessary for the seller to prove the value of the property. (*Gibbs v. Ranard*, 86 Cal. 531.)

254. Evidence that the seller notified the buyer, upon his refusal to consummate the agreement of purchase, that he would sell the property to some one else for what he could get for it, and hold him responsible for the difference, and that he advertised it, and sold it for a certain price, which was the highest price he could get, is competent, as tending to show the amount of damages actually resulting from the breach of the contract. (*Gibbs v. Ranard*, 86 Cal. 531.)

255. The rule of damages against a purchaser for not receiving goods according to contract is the difference between the contract price and the market value at the time of the breach of the contract. (*Haskell v. McHenry*, 4 Cal. 411.)

256. The measure of damages for a partial breach of a buyer's contract to purchase personal property is recompense to the seller at the contract price for the part performance, and indemnity for his loss in respect to the part unexecuted. Accordingly, where a buyer contracted to purchase a certain quantity of ironwork, and, after accepting a portion thereof, declined to receive the balance, held, in an action by the seller for the breach, that the plaintiff was entitled to recover for the ironwork furnished such a proportion of the whole contract price as the quantity which he furnished bears to the whole quantity contracted for; and, in addition, the profit he would have made if he had been allowed to complete his contract, together with the damages he incurred in providing means for furnishing the residue of the ironwork called for by the contract. (*Upstone v. Weir*, 54 Cal. 124.) Cited 68 Cal. 67; 93 Cal. 535.)

257. Where a buyer contracted to purchase a certain quantity of ironwork, and, after accepting a portion, declined to receive the balance, the plaintiff is entitled to interest on the amount found due from the time of his demand. (*Upstone v. Weir*, 54 Cal. 124.)

Breach of contract, what amounts to. See Contracts, 268.

Agreement to manufacture, remedy on prevention. See Contracts, 252.

2. By Seller.

258. A bill of sale of a given number of cattle, part of a herd running on the seller's ranch, giving the purchaser the right to select the number sold and take the same immediately, gives to the purchaser the right, after demand and refusal, to recover possession of the entire herd in an action at law, and then select the number purchased, and return the residue to the seller. (*McLaughlin v. Piatti*, 27 Cal. 451.)

259. Where a party contracts for a quantity of wheat, to be delivered on demand, and paid for on delivery, in an action for non-delivery it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit. (*Crosby v. Watkins*, 12 Cal. 85.) Cited 23 Cal. 369.

260. A complaint alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and, after the sale, executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. (*Dabovich v. Emeric*, 7 Cal. 209.) Cited 12 Cal. 178.

261. The true point is whether the defendant undertook to deliver. From the nature of the sale it operated as a delivery. There was no necessity of a demand on defendant, unless for the purpose of enabling him to comply with his guaranty. (*Dabovich v. Emeric*, 7 Cal. 209.)

262. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as the agents of defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. (*Cochran v. Goodman*, 3 Cal. 244.)

263. Where the complaint, in *hæc verba*, set forth the bill of sale, it was held to remedy a defect in the description of the quantity of the goods sold: a party must be presumed to know what was intended by his own account. (*Cochran v. Goodman*, 3 Cal. 244.)

264. It is no answer to the action for non-delivery of the lumber that the plaintiff resold it soon after the purchase, it appearing that the purchaser from the plaintiff had a claim against him for nondelivery. (*Gunter v. Sanchez*, 1 Cal. 45.)

265. In an action for a breach of contract in not delivering goods sold at the time agreed upon, evidence of the buyer as to the price agreed upon between himself and third persons, to whom he had contracted to resell the goods, is incompetent to establish their market value. (*Ramish v. Kirschbraun*, 90 Cal. 581.) Cited 98 Cal. 676.

266. Evidence in such action tending to show a depreciation in the market value of the goods sold subsequent to the date of the delivery is inadmissible. (*Ramish v. Kirschbraun*, 90 Cal. 581.)

267. It appearing that the goods could have been sold to a third person at the price agreed on, the plaintiff was not required to prove a valid agreement with him under the statute of frauds. (*McKay v. Riley*, 65 Cal. 623.)

268. In an action for failure to deliver goods according to contract, the contract was for the cargo, or all the goods of a given description in a given vessel, and there were no other like goods in the market. Held, that the admission of evidence to show what they were worth in broken parcels was error. (*Tobin v. Post*, 3 Cal. 373.)

269. The measure of damages in an action by the buyer against the seller to recover for the breach of a contract for the sale and delivery of personal property is prescribed by sections 3308 and 3354 of the Civil Code. (*Bullard v. Stone*, 67 Cal. 477.)

270. In a suit for damages, for the failure of the defendant to deliver goods according to contract, the true rule of damages is the difference between the price agreed between the parties and the market value of the goods at the time of the breach of the contract. (Tobin v. Post, 3 Cal. 373.)

271. Where a party contracts for a quantity of wheat, to be delivered on demand and paid for on delivery, in an action for non-delivery, the measure of damages is the difference between the contract price and the value of the article sold. (Orosby v. Watkins, 12 Cal. 85.)

272. The difference between the value of the cargo and the contract price is the true measure of damages in an action for failure to deliver goods according to contract, where the contract was for the cargo or all the goods of a given description in a given vessel, and there were no other like goods in the market. (Tobin v. Post, 3 Cal. 373.)

273. Plaintiff sues on a contract of sale of cattle to be delivered within "three weeks at the furthest," the consideration money being paid, adding also the common counts. Complaint avers the breach of the agreement by failure to deliver the cattle. Held, that it was not error in the court below, instructing the jury that if defendants did not have the cattle ready for delivery at the time mentioned in the contract, they should find for plaintiff, and in assessing damages they might find the purchase money, with ten per cent interest, or the highest market price of the cattle to the time of trial. (Maher v. Riley, 17 Cal. 415.)

274. The admission of testimony to prove the speculative profits of the plaintiff in an action for failure to deliver goods according to contract is error. (Tobin v. Post, 3 Cal. 373.)

275. In an action for a failure to deliver goods under a contract of sale, where the goods have no market value, the plaintiff may recover as damages the difference between the price to be paid by him, and an advanced price for which he had agreed to sell the goods to a third person on the faith of the contract. (McKay v. Riley, 65 Cal. 623.)

276. A loss resulting to the vendee in a contract of sale from a failure to realize upon a contract with a third person, which was known to the vendor at the time of the sale, held, too remote to be recovered as damages from the vendor for a delay in delivering the goods, although the delay was the cause of the vendee's failure to realize upon his contract. (Friend & Terry Lumber Co. v. Miller, 67 Cal. 464.)
Cited 71 Cal. 200.

277. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. (Dabovich v. Emeric, 12 Cal. 171.)
Cited 17 Cal. 416; 5 Mont. 11.

278. Where part only of the lumber contracted for is delivered, on an allowance to the purchaser for the lumber not delivered, the price paid for the purchase of materials to supply the lacking lumber is not the crite-

rium of their value, unless it be shown that the amount of the cost was necessary or reasonable. (Willamette Steam Mills Lumbering etc. Co. v. Union Lumber etc. Co., 94 Cal. 158.)

279. In an action by a buyer for a breach of a contract of sale, money paid by the plaintiff to a third person, in pursuance of the contract, may be recovered from the defendant. (Bullard v. Stone, 67 Cal. 477.)

280. The action was brought to recover damages for the breach of a contract for the sale and delivery of certain hops at a stipulated price per pound. On a review of the evidence, held, that the damages awarded by the lower court were excessive, and should be reduced as indicated in the opinion. (Cochran v. Jewell, 71 Cal. 509.)

281. If buyer should waive his contract, and sue in general assumpsit on breach of a contract of sale, the measure of damages would be the value of the property delivered. (Upstone v. Weir, 54 Cal. 124.)

Breach of warranty. See ante, VII, 4, b.

Damages on breach of contracts to manufacture lumber. See Damages, 4.

Contract of sale not usually enforced. See Specific Performance, 77.

XIV. Return of Goods or Bill of Sale.

282. Where goods ordered were sent to the purchaser with the privilege of returning any thing not suitable to the purchaser's market within ten days, and several months thereafter, without previous complaint, the purchaser requested permission to return part of the goods, which request was declined by the seller, with an offer to receive them to be handled by the seller for the purchaser at the best price attainable, and they were returned to the seller pursuant to such offer, the offer and acceptance thereof constituted a new contract, which precluded the purchaser from thereafter recouping damages for the goods returned, on the ground that they were not the kind of goods ordered, and he is liable in an action by the seller for the difference between the original price of the goods and a less price at which they were sold for his benefit under the new contract. (King v. Sheward, 97 Cal. 235.)

283. Where M. made a bill of sale to G. of forty-two barrels of vinegar, then in possession of G., as keeper for the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt or change of the possession of the property, and the property was afterward sold by the defendant as sheriff, M. bringing an action of trover against the defendant to recover the same, held, that M. had no title to the property upon which he could recover in such an action, as the mere handing back the bill of sale to M. did not revest the title in him. (Middlesworth v. Sedgwick, 10 Cal. 392.)
Cited 7 Mont. 195.

XV. Particular Contracts of Sale, Construction of and Rights Arising Out of.

284. Where W. agreed to sell a team and wagon to T., he to have the use thereof to

draw wood to be delivered to W., and by him to be credited at the market price on the price of the team and wagon—the property to belong to W. until so paid for—and the performance of the contract was entered upon by T., held, that the contract is valid; that until a neglect or refusal by T. to complete the performance, W. could not have reclaimed the property, nor could the sheriff, under an execution against him, until then seize it. (*Bickerstaff v. Doub*, 19 Cal. 109.)

285. If there is a provision in a contract between the purchaser and seller of personal property, that the seller shall pay the purchase price at the end of two years, or reconvey the property, and that, if the purchase price is not paid, the conveyance shall become null and void, but that the purchaser may sell within two years, a sale within the two years prevents the property from vesting in the seller on a failure to pay the money. (*Rewrick v. Goldstone*, 48 Cal. 554.)

286. A sale of nine slaves for a gross sum is an entire contract. There being no means afforded for determining the price of each one, the agreement is implied that the whole are to be taken, or none. (*Norris v. Harris*, 15 Cal. 226.)

287. Where the defendants stipulated to sell to the plaintiff certain merchandise "shipped" from Batavia, in the island of Java, for the port of San Francisco, and the parties agreed that the contract should be considered as binding until the arrival of the ship, held, that the fulfillment of it on either side depended on the contingency of the ship's arrival, and that an action could not be maintained by the vendee of the goods, it appearing that the ship had never arrived at her port of destination. (*Middleton v. Ballingall*, 1 Cal. 446.)

288. The fair construction of a contract to sell plaintiff certain merchandise "shipped" from Batavia to San Francisco, the contract to be binding until the arrival of the ship, is that, on the arrival of the ship containing the goods, the defendants should deliver them, and the plaintiffs should pay the contract price; and the arrival of the goods in such case is a condition precedent, which must be shown to have taken place before either party can bring suit. (*Middleton v. Ballingall*, 1 Cal. 446.)

289. Where, in a bill of sale of all the cattle of a certain estate, estimated at seven thousand head, a total price being fixed, it was stipulated that the vendee, on arriving in Texas where the cattle were, might choose to take all the cattle of the estate without counting them, in which event he was to notify the agents of the vendors of his choice, and pay an additional four thousand dollars; but if a count was had, and the cattle exceeded or fell short of the estimated number, the excess or deficiency should be paid for at the rate of eight dollars per head; and no count was ever made, and no notification ever given by the vendee, that he took the cattle without a count; held, that the vendor, on the facts, cannot recover the four thousand dollars; that the only obligation of the vendee, in the first instance, was

to receive the cattle and pay for any excess over the estimated number if counted; that his liability for the four thousand dollars depended entirely on his choice to take the cattle without a count, and that this choice was a mere privilege, to be exercised or not, at his option. (*Norris v. Harris*, 15 Cal. 226.)

290. The vendor, after waiting a reasonable time for the vendee to make his choice, he neglecting or refusing to make it, could fix his liability by making the count himself. (*Norris v. Harris*, 15 Cal. 226.)

291. The doctrine of election has no application here. That doctrine applies only to cases where the party, upon whom rests the performance, stands in the same position to both alternatives presented, and is bound to indicate his choice between them. Here, the vendee was bound to choose only in the event he desired to take the cattle without a count. If he did not so desire, he was not required to give notice to that effect. His obligation to pay for any excess was absolute, without any expression of choice; but his obligation to pay the four thousand dollars was conditional, dependent solely upon the indication of his desire to dispense with the count. (*Norris v. Harris*, 15 Cal. 226.)

292. Plaintiff contracted with a mill on Puget Sound for the purchase and delivery to him of certain lumber, to be paid for in goods on the arrival of a ship on the sound, at any time after six weeks from the date of the contract, upon giving three days' notice, and assigned the contract to defendants, who, after the expiration of that time, went to the sound, gave three days' verbal notice under the contract, and demanded the lumber, but failed to receive it, because it had not been paid for by the plaintiff. In a suit by the plaintiff against the defendants to recover the consideration of the assignment, the defendants set up in defense a failure of consideration. Held, that it was not necessary for defendants to notify plaintiff of the time when they would make the demand, nor to give a written notice to the mill, no such stipulation being required in the contract; that the plaintiff was bound to be ready to pay for the lumber whenever the ship should be at the mill to receive it, and the mill ready to deliver it; that the delivery was not a condition precedent, as the conditions were concurrent; that the defendants were not bound to prove that the plaintiff was not ready to pay, etc., and that the fact that he did not pay, and that delivery was refused in consequence thereof, was sufficient to sustain the defense. (*Fruit v. Phelps*, 4 Cal. 282.)

293. The contract on which the action was brought, after providing for the manufacture by the defendants of certain timber into lumber, gave the plaintiffs a right to buy, at a stipulated price, any part or the whole of the refuse lumber that might accumulate during the process of manufacturing. Held, that the plaintiffs were authorized to take any part or the whole of the refuse, but could not cull and pick it over for the best pieces. (*Waterman v. Morrell*, 68 Cal. 217.)

294. The action was brought to recover the

price of certain wool sold and delivered by the plaintiffs to the defendants, subject to graders' rejection. By the term "graders' rejection" was meant that the defendants upon receipt of the wool should cause it to be examined, fleeces by fleece, by wool-graders, for the purpose of ascertaining what portion, if any, was taggy or scabby, and that for such portion, the plaintiffs, after being notified thereof by the defendants, should allow them a proportionate deduction from the purchase price. The defendants retained possession of all the wool, but refused to pay for a portion, on the ground that it had been rejected by the graders, and so notified the plaintiffs. The latter refused to abide by the rejection, for the reason that the graders had not examined the wool fleeces by fleece. The defendants thereupon offered to have the rejected portion so examined, but the plaintiffs refused. Held, that it was the duty of the defendants to have had the grading conducted fleece by fleece, and that having failed to do so, and retained possession of the wool, they were liable for the entire amount delivered, at the agreed price. (*Merehin v. Ball*, 68 Cal. 205.)

295. Fuller purchased some yokes of oxen of Helm, the appellant, for one thousand dollars, paid two hundred dollars down, and gave his note, with C. as surety, for the balance. C. signed the note on the express condition that title to the oxen was to remain in Helm till they were fully paid for. Fuller was to have the absolute use of them. The oxen were placed in the hands of a brother of Helm, who was in the employ of Fuller, as a driver, with the intention of securing the title in Helm. The defendant, a constable, levied upon and sold the oxen, thus situated, as the property of Fuller. Held, that the sale by Helm to Fuller was absolute, and that Fuller had such a right of property in them as was subject to execution; that Helm retained no effective lien upon the property; there was no agreement in writing to that effect, nor did Helm, as mortgagee, retain possession; but it was under the control and direction of Fuller; the legal consequences of this condition of things cannot be evaded by showing that the property was in the possession of Fuller's hired servant as agent or trustee. (*Helm v. Dumars*, 3 Cal. 454.)

296. A agreed to convey to B a certain vessel, and B gave his promissory note for the consideration money, payable at a future day. Held, that A being still the holder of the note, could not bring an action thereon, without showing that he had conveyed the vessel to B, or had tendered a conveyance. And held further, that the tender of a bill of sale executed by A, as attorney for C, the real owner, was neither performance nor an offer to perform. (*Osborne v. Elliott*, 1 Cal. 337.)

297. If a draft is given for part purchase price of goods, under a contract that the vendor shall keep the goods ninety days and then deliver them upon the payment of the entire price, less the draft, and before the time expires the purchaser notifies the vendor that he cannot comply with the contract, but will pay the draft, the vendor is excused from keeping the goods. (*Plate v. Vega*, 31 Cal. 383.)

298. Plaintiff and one Davis entered into a contract by which the latter was to deliver to the former a certain quantity of lumber, at a certain price, within a certain time. Davis was also to purchase of plaintiff a mule team and harness for one thousand dollars, to have the use of the team, though the possession was to remain in plaintiff until the team was paid for. Davis delivered some lumber, but not within the time nor in the quantity agreed; he also delivered other lumber on general account, and plaintiff advanced money from time to time. Davis then called on plaintiff for a settlement of their accounts, stating that he wished to know whether the team was paid for, so that he could sell it. No settlement was made; but, in speaking of selling the mules to defendant, plaintiff said to Davis, "Let Urton have them." Davis subsequently sold the mules to Urton, and plaintiff now sues for them. Held, that this remark, taken in connection with the accompanying circumstances, was an assent and authorization of a sale to Urton by Davis of the property as that of Davis, and upon such terms as they might agree on. (*Gluckauf v. Urton*, 19 Cal. 61.)

Contract for sale of fruit, time of payment. See ante, 223.

Construction of particular contracts. See ante, VI, 5.

Agreement to purchase logs, construction of and rights arising out of. See Contracts, II, 7.

Construction of contract to manufacture lumber. See Contracts, 132.

Contract for manufacture of lumber, when performed. See Contracts, 203.

Sale of water, construction of contract for. See Contracts, 125, et seq.

Construction of contract to buy grapes. See Contracts, 147.

SALT MARSH LANDS.

See Swamp and Overflowed Lands, II.

SAMPLE.

Sales by. See Sales, VIII.

SAN BERNARDINO COUNTY.

Boundaries of. See Counties, 33.

Fence law not repealed. See Animals, 10.

License imposed in, effect of county government bill. See Licenses, 20.

SAN DIEGO.

1. The peninsula of San Diego is within the limits of the city of San Diego, and land situated on said peninsula is subject to assessment and taxation for city purposes, though not included within the limits of lands patented to the city of San Diego. (*City of San Diego v. Grannis*, 77 Cal. 511.) Cited 86 Cal. 158.

2. The act of March 19, 1889, providing for changing the boundaries of cities and the exclusion of territory therefrom, applies to the city of San Diego, and empowered it to change its boundaries and exclude therefrom the territory known as "Coronado Beach." (*People ex rel. Connolly v. City of Coronado*, 100 Cal. 571.)

3. The act of March 16, 1889, amending an act to reincorporate the city of San Diego, and containing a description of the territory that should thereafter constitute the said city, is unconstitutional and void so far as it undertakes to exclude or take away any part of the territory under the municipal jurisdiction of San Diego. (*People ex rel. Miller v. Common Council of the City of San Diego*, 85 Cal. 369.) Cited 86 Cal. 159.

4. The territory known as Coronado Beach is within the limits of the municipal jurisdiction of the city of San Diego; and the act of March 16, 1889, is unconstitutional and void, so far as it undertakes to exclude or take away any part of the territory under the municipal jurisdiction of that city. (*Fisher v. Police Court of the City of San Diego*, 86 Cal. 158.)

Boundaries of. See Counties, 33.

5. The "Interest Tax Fund" mentioned in the act of March 18, 1868, "to provide for the government of the county of San Diego," was intended to take the place of the "interest tax," required to be levied by the act of May 4, 1855, "to fund the debt of said county and provide for the payment of the same," and was also intended to pay the interest on the old bonds of the county in case the holders should not choose to accept the terms of payment offered by the said act of 1868. (*People v. Morse*, 43 Cal. 534.)

6. An action commenced before a justice of the city of San Diego, under section 12 of the act reincorporating such city, to recover a fine for a violation of a city ordinance, may be transferred for trial to a justice having his office outside the city. (*Palmer v. Snyder*, 67 Cal. 105.)

7. The city of San Diego as a municipal corporation has no interest in moneys paid into the county treasury to the credit of the school district of the city of San Diego, which is a distinct corporation, whose rights and obligations are governed by the Political Code, and not by the city charter; and the city is not entitled to an injunction to prevent the county treasurer from paying a warrant drawn upon him in payment of the salary of the superintendent of schools of the city of San Diego. (*City of San Diego v. Dauer*, 97 Cal. 442.)

8. The city of San Diego is a corporation distinct from the corporation known as the school district of the city of San Diego, and the rights and obligations of the school district corporation are to be determined by the provisions of the Political Code, and not by those of the charter of the city of San Diego; and a provision of its charter that all moneys belonging to the school fund of the city shall be deposited with the city treasurer does not supersede the requirements of the Political Code that all moneys pertaining to the public school fund shall be paid into the county treasury. (*Kennedy v. Miller*, 97 Cal. 429.)

Power of common council over salaries. See Offices and Officers, 157, et seq; School, 39.

SAN FRANCISCO.

Includes the doctrines relating to the city and county of San Francisco particularly. For

doctrines applicable to San Francisco in common with other municipal corporations, see Municipal Corporations.

I. San Francisco as a Pueblo.

II. Consolidation of City and County, and Effect of; Effect of New Constitution on Consolidation Act.

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1. *Supervisors; Recorders; Miscellaneous Officers.*

2. *Vacancies in Office, Filling of.*

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1. *Title of City to; Control Over; Extent of; Confirmation of and Survey.*

2. *Mexican Grant in.*

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4. *Outside Lands; Rights of Claimants; Grant by Congress in Trust for.*

5. *Origin of Title in; Sale of Land; Rights on Confirmation to City.*

6. *Funded Debt Commissioners, Rights of, and Conveyances by.*

7. *Rights Arising Under Van Ness Ordinance.*

a. *Object of Van Ness Ordinance.*

b. *Act Ratifying Ordinance; Grant by Congress; Repeal of Ordinance.*

c. *Construction of Ordinance; Who may Claim Benefit of.*

d. *Possession, Sufficiency of and Evidence of; Ouster from Possession.*

e. *Amount of Land Which may be Claimed Under.*

f. *Estoppel of One Claiming Under.*

g. *Time of Commencing Action Under.*

h. *Title Under.*

i. *Rights of Heirs.*

8. *Lease of Lands.*

9. *Whether Subject to Execution.*

10. *Beach and Water Lots.*

a. *Water Front of San Francisco, Line of, and What Included in.*

* School property in. See post, X.V.

- b. Grant of to San Francisco; Nature of Interest in.
 - c. Rights of Owners Below Low-water Mark; Accretion.
 - d. Title of Commissioners of Funded Debt to; Mission Bay.
 - e. Conveyances of.
 - f. Sale of on Execution; Liability to Assessment.
11. *Government Reserve and Point San Jose Military Reservation; Rights of Lessees or Occupants.*

XV. Schools in, and School Lands.

- Police court of. See Jurisdiction, 159, et seq.
- Police judges of. See Judges, 76, et seq.
- Police courts of, acts establishing. See Courts, 13, et seq.
- Superior court of, act creating is valid. See Courts, 22.
- Superior court of, jurisdiction of. See Jurisdiction, XI, 2.
- Jurisdiction of district court in. See Jurisdiction, XI, 1, a.
- City recorder of, jurisdiction of over assault. See Criminal Law, 1211.
- Municipal criminal court of. See Courts, 32, et seq.
- Judgments of alcaldes of, effect of. See Judgments, 239.
- Bond on attachment in suit by. See Attachments, 61, 62.
- Time for defendant to appear in. See Pleading and Practice, 229.
- Judicial notice as to. See Judicial Notice, 46, et seq.
- Percentage as costs in. See Costs, I, 7.
- Power to make sanitary regulations. See Constitutional Law, 437.
- Validity of ordinance relating to storage of gunpowder. See Explosives, 11.
- Ordinances in, question relating to. See Ordinances.
- Subscription to stock of railroad. See Municipal Corporations, 147.
- Contracts for lighting streets. See Supervisors, 67.
- Water rates in, fixing. See Water Companies, III.
- Spring Valley Water Works, questions relating to. See Water Companies.
- Alms-house, appropriation by state for support of. See Poor Laws, 2.
- Home for the Inebriates. See Home for the Inebriates.
- House of Correction in. See Criminal Law, 1078, et seq.
- Wharves in San Francisco. See Wharves, VIII.
- Enjoining erection of wharf in. See Injunctions, 184.
- Harbor dues, liability of vessels for harbor dues in. See Shipping, VI.
- Ferriage in. See Harbor Commissioners.
- Police life and health insurance fund. See Police, 8.

I. San Francisco as a Pueblo.

1. San Francisco was, at date of conquest and cession of California, and long prior to that time, a pueblo, entitled to and possess-

ing all the rights which the law conferred upon such municipal organizations. (*Hart v. Burnett*, 15 Cal. 530.)

Cited 16 Cal. 226, 228, 240, 241, 457, 461; 20 Cal. 480; 21 Cal. 42; 25 Cal. 615, 616; 35 Cal. 432, 433; 42 Cal. 556, 559; 69 Cal. 167, 328; 92 Cal. 217; distinguished 15 Cal. 635.

2. Place called Punta Yerba Buena, on which the city of San Francisco now stands, seems never to have been a pueblo separately from the presidio, which was founded in 1776. (*Welch v. Sullivan*, 8 Cal. 165.)

San Francisco was a pueblo before military occupation. See post, 95, 149.

II. Consolidation of City and County, and Effect of; Effect of New Constitution on Consolidation Act.

3. City and county of San Francisco is continuation of the municipal corporation known as the city of San Francisco. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.) Cited 69 Cal. 100.

4. Corporation, city of San Francisco, was not destroyed by the Consolidation Act, but continued. Its name only was changed, and the change in this respect did not require any alteration in the pleadings or any suggestion of record in an action pending against the city at the time the act was passed. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

5. The provision of the fourth section of the Consolidation Act, respecting the pre-existing indebtedness of the city of San Francisco, was not a mere legislative declaration of good faith towards the public creditors, but a requirement imposing upon the board of supervisors the duty of providing for the payment of that indebtedness. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

6. Section 95 of the Consolidation Act, with reference to auditing claims, does not apply to judgments recovered upon the pre-existing indebtedness of the city. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

7. The restrictive clauses of that section and of other sections of the act must be read in connection with the fourth section and receive such a construction that the provisions of all may stand. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

8. Where an action was commenced against the city of San Francisco previous to the passage of the Consolidation Act, but judgment was not recovered until after the passage of the said act, held, that the judgment was binding against the existing corporation, the city and county of San Francisco. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

9. An account audited against the city of San Francisco, but not paid at the time the Consolidation Act went into effect, need not again be audited to entitle it to payment. (*Knox v. Woods*, 8 Cal. 545.) Cited 60 Cal. 347.

10. The provisions of section 7 of article XI that "in consolidated city and county governments of more than one hundred thousand inhabitants there shall be two boards of supervisors, or houses of legislation," has ref-

erence to general laws or charters for the government of such corporations passed subsequently to the adoption of the constitution; and, therefore, the act of incorporation of the city and county of San Francisco, known as the Consolidation Act, is not in conflict with the provisions of the constitution, and remains in force by virtue of the first clause of section 1 of the schedule to the constitution. (*Desmond v. Dunn*, 55 Cal. 242.)

Cited 55 Cal. 495, 500.

Consolidation Act is constitutional. See Constitutional Law, 305, 306.

Consolidation Act, construction of, relating to bonds. See Bonds, 77, 93.

Consolidation Act, provision as to debts, constitutionality. See Constitutional Law, 348.

Charter of may be affected by general law. See Municipal Corporations, 29.

Charter, constitutional provisions as to is self executing. See Municipal Corporations, 57.

Act called McClure Charter does not apply to. See Municipal Corporations, 72.

III. Boundaries of; Conclusiveness of Survey and Patent.

11. Center of old presidio square is initial point for a survey of the four square leagues to which the pueblo is entitled, and the survey is to be made according to the *ordinanzas de Tierras y Aguas*, in all directions, i. e., north, south, east, and west, so as to include in all the four square leagues—making up for deficiencies in one direction (where these exist by reason of water being reached, etc.) by including the quantity thus deficient in another line or lines. (*Payne v. Treadwell*, 16 Cal. 220.)

12. According to these rules of measurement, the fundo legal of the pueblo of San Francisco is bounded upon three sides by water; and hence the fourth line must be drawn for quantity east and west, straight across the peninsula, from the ocean to the bay. The four square leagues—exclusive of the military reserve, church buildings, etc.—constitute the municipal lands of the pueblo of San Francisco. (*Payne v. Treadwell*, 16 Cal. 220.)

13. The pueblo grant of San Francisco was of a fixed and definite quantity, with boundaries established on three sides by the terms of the grant, and required a survey merely for the purpose of fixing the fourth or southern line so as to secure the given quantity, exclusive of lands held by title paramount within the exterior boundaries; but such quantity, though required, could not control the natural boundaries described, and could only be ascertained by going south for quantity. (*United Land Assn. v. Knight*, 85 Cal. 448.)

14. The survey of such grant belonged to the political department of the government, and not to the courts, and the survey and patent are conclusive upon the courts in actions of ejectment, when not in conflict with the prior rights of third persons; but, when such prior rights are involved, the inconclu-

siveness of the survey and patent may be asserted to the extent essential for the protection of such prior rights. (*United Land Assn. v. Knight*, 85 Cal. 448.)

15. The decree of confirmation of the pueblo lands of San Francisco, having described one of the definitive boundaries of such lands as being the "extreme upper portion of the peninsula above ordinary high-water mark," etc., such boundary must control the survey and patent, though the survey made under the decree fixed the boundary below the ordinary high-water mark, and the patent recited the decree confirming the grant, and in its granting clause described the boundaries of the land as fixed in the survey. *McFarland, J., Beatty, O. J., and Worka, J., dissenting.* (*United Land Assn. v. Knight*, 85 Cal. 448.)

16. Evidence is admissible in an action of ejectment to challenge the validity of patent issued on confirmation of the pueblo lands of San Francisco as a conveyance of a particular tract for the recovery of which the action is brought, on the ground that the tract is below ordinary high-water mark in a navigable arm of the bay of San Francisco, and was not embraced within the lands covered by the grant which the patent was intended to evidence, and was not on land which the government or its officers had the power to convey, but consisted of land belonging to the state of California at the time of the patent. (*United Land Assn. v. Knight*, 85 Cal. 448.)

IV. County Government Act does not Apply to.

17. The provisions of the County Government Act do not apply to the passage and publication of ordinances of the city and county of San Francisco. (*Ex parte Christensen*, 85 Cal. 208.)

V. Officers in.

1. Supervisors; Recorders; Miscellaneous Officers.

18. The first chapter of title 2, part 4, of the Political Code, which treats of "the board of supervisors," does not apply to the city and county of San Francisco. (*Tillson v. Ford*, 53 Cal. 701.)

Supervisors of first board. See Supervisors, 8.

Records of supervisors of, evidence to contradict. See Evidence, 383.

Control of over treasurer. See post, 90.

Power to compromise claims of Central Pacific against city. See post, 71.

Allowance of claims against. See post, 70.

Power to accept training-ship. See post, VII.

Power to dispose of public squares. See post, IX.

Judgment against supervisors as claim against city. See post, 73.

19. Whether there was any officer in San Francisco authorized to record mortgages previous to the passage of the act of the legislature establishing recorders' offices, passed April 4, 1850, with the effect of making them constructive notice to subsequent purchasers or mortgagees, query? (*Woodworth v. Gusman*, 1 Cal. 203.)

Gauger of the port. See Gauger of the Port.

Harbor commissioners. See Harbor Commissioners.

Pilots in. See Pilots and Pilotage.

Boards of precinct registration in. See Elections, 63.

Clerks of registrar in. See Elections, 64, 65.

Registrar, compensation of deputy, how payable. See Elections, 65.

Board of election commissioners. See Elections, VII.

Election commissioners may fix number of assistants. See Elections, 62.

City and county attorney. See City and County Attorney.

Assistant district attorney of, duties of. See District Attorneys, 7.

Police commission. See Police.

Police officer, liability for acts of. See Municipal Corporations, 170.

Public administrator, liability of. See Executors and Administrators, 547.

Gas inspector, salary, when payable. See Gas Inspectors, 1.

Salary of coroner of. See Coroners, 2.

Treasurer, duty of to pay fees of reporters. See Shorthand Reporters.

Salary of sheriff, statute relating to is continued in force. See Sheriffs, 186.

Act fixing fees of officers is continued in force. See Offices and Officers, 161.

Salary of officer, presentation of. See Municipal Corporations, 177.

2. Vacancies in Office, Filling of.

20. Object of ninth section of the Consolidation Act of 1856 was not to repeal the general law of 1855, relative to filling vacancies, but to provide for cases not embraced by the general law—that is, for certain local offices, made elective by the people, peculiar to San Francisco, and for which no provision has been made. (People ex rel. Attorney General v. Brown, 16 Cal. 441.)

21. The act of April 2, 1866 (Acts of 1865-66, p. 719), relative to elections and officers in San Francisco, applies only to officials holding office at the time of its passage, and was not intended to supply the rule applicable to the filling of vacancies, should any occur, after the expiration of the terms of such incumbents. (Tillson v. Ford, 53 Cal. 701.)

Appointment to fill vacancy of school director, term of. See post, 84.

Appointee to fill vacancy, term of office. See Offices and Officers, 175.

3. Elections in and Terms of Officers.

22. Best rule of interpretation of city charter of 1851 is to follow the established policy of the government from its origin, which is, to make elective all officers of the state, counties, and cities, at the shortest period which the convenience of the public will permit. (People ex rel. Harris v. Brenham, 3 Cal. 477.)

23. Municipal elections and terms of municipal officers in San Francisco are provided for in the Consolidation Act. (Tillson v. Ford, 53 Cal. 701.)

24. The act to reincorporate the city of San

Francisco, passed the 15th of April, 1851, provides that the first election for city officers should be held on the fourth Monday of April, 1851, and thereafter annually at the general election for state officers. The general election was appointed by law to be held on the first Monday in September of each year. At the first election for city officers, held on the fourth Monday of April, as above directed, the respondent was elected mayor of the city, was qualified, and was in the exercise of the functions of his office. At the general election held on the first Monday of September following, the relator received eleven hundred and one votes for mayor (the whole number given), was qualified, and claimed the office of the respondent on the 24th of the same month. No notice of the latter election was given, or other measure pursued, by the city council under the fourth section of the second article of the charter. The respondent refused to surrender the office, and the relator filed this bill asserting his right to it, etc. Held, that the election of the relator was valid, and that the means of bringing about the election and the irregularities therein should be disregarded. (People ex rel. Harris v. Brenham, 3 Cal. 477.) Cited 5 Cal. 344; distinguished 3 Cal. 126; 6 Cal. 28; 11 Cal. 63, 64.

25. It is not important to interpret the literal meaning of the word "annually" or the word "or," as used in the city charter of 1851 respecting the election of municipal officers; the actual and substantial intention of the legislature is to be sought after. (People ex rel. Harris v. Brenham, 3 Cal. 477.) Cited 5 Utah, 450.

26. The constitution did not change the time for electing city and county officers in San Francisco; but such elections are still governed by the act of April 2, 1866 (as amended by the act of March 30, 1872), and take place in the odd numbered years. (Barton v. Kallach, 56 Cal. 95.) Cited 58 Cal. 328, 561, 570; 61 Cal. 323.

27. By the act of March 7, 1881, amending section 4109 of the Political Code (commonly known as the "Hartson act"), an election of the elective officers of the city and county of San Francisco is required to be held at the general election to occur in November of the present year. (Staude v. Board of Election Commrs., 61 Cal. 313.)

28. The Hartson act was not intended to amend or repeal the provisions of the act of incorporation of the city and county of San Francisco, which fixed the times of holding elections of officers of said city and county, and if so construed would be unconstitutional. When the constitution declares that cities organized before its adoption shall be subject to and controlled by the general laws it means as to matters not specially provided in charters which existed at the date of the adoption of the constitution. Sharpstein and McKinstry, JJ., dissenting. (Staude v. Board of Election Commrs., 61 Cal. 313.) Cited 89 Cal. 143.

29. The act of April 2, 1866, as amended March 7, 1872, fixing the time for holding municipal elections in San Francisco, is not

repealed by the amendment of March 7, 1881, to the Political Code. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.)
Cited 66 Cal. 5.

30. Constitution of 1879 does not repeal the said special acts fixing the time for municipal elections in San Francisco. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.)
Cited 58 Cal. 338.

31. With the exception of police judge, chief of police, and assessor, all of the elective officers of San Francisco must be elected at the time fixed by the acts of April 2, 1866, and March 30, 1872. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.)
Cited 61 Cal. 323, 324; 62 Cal. 566.

32. The act of May 7, 1881, cannot operate to postpone the elections provided for in the acts of April 2, 1866, and March 30, 1872, because such operation would extend the terms of municipal officers, and therein violate section 9, article XI, of the constitution; but the act of May 7, 1881, applies to the city and county of San Francisco, and that its operation in providing for a municipal election in 1882 is constitutional and valid. *Ross, J.*, concurring. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.)
Cited 62 Cal. 573.

33. No election could be held in San Francisco until the first Tuesday after the first Monday in November, 1882. *Myrick, J.*, and *McKee, J.*, dissenting. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.)

34. In an action to determine the right of the defendant to the office of school director, to which he had been appointed on the tenth day of May, 1880 (under section 13, supplement XIII, of the Consolidation Act of San Francisco), by the superintendent, by and with the consent of a majority of the school directors, to fill a vacancy—his term of office under the law being until the municipal election next ensuing, and the election and qualification of his successor; the relator claimed to have been elected to fill the vacancy at a municipal election held on the second day of November, 1880, and a judgment in the lower court was given in his favor. Held, that the alleged election was illegal and void, and that therefore the term of the defendant had not expired. (*People ex rel. Danielwitz v. Harvey*, 58 Cal. 337.)
Cited 85 Cal. 55.

35. Whatever powers were vested in the board of supervisors of San Francisco by the Consolidation Act or the Political Code were, under sections 1, 33, and 34 of the act of April 18, 1878, transferred to the board of election commissioners in express terms; and the authority to cause a board of freeholders to be elected to frame a charter (under the provisions of section 8, article XI, of the constitution) is therefore not vested in the former body. (*People v. Hoge*, 55 Cal. 612.)
Cited 60 Cal. 347.

36. The only conditions imposed by the constitution to make the election provided for in section 8, article XI, of the constitution valid is, that the freeholders must be chosen at a general or special election, and, where there has been such an election, the voice of

the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. (*People v. Hoge*, 55 Cal. 612.)

37. The power of fixing the day for holding an election, under the provisions of section 8, article XI, of the constitution, was not vested in the board of election commissioners, or in the people acting en masse; and such power, being legislative in its nature, was vested in some authority competent, under the constitution, to legislate on the subject; and the election of the freeholders involved in this cause was held without authority, and was void. *Thornton, J.*, dissenting. (*People v. Hoge*, 55 Cal. 612.)

Election to fill vacancy, validity. See ante, V, 2.

Election of members of fire department and contest of. See post, VI.

Elections are to be held on even numbered years. See Elections, 34.

County clerk of, election of. See County Clerk, 4, 5.

Acts relating to election of and vacancy in office of district attorney apply to. See District Attorneys, 4.

Term of county clerk of. See County Clerk, 3.

VI. Fire Department; Liability for Negligence of Members.

38. Fire department is not mere voluntary association, but is a branch of the municipal government of that city. (*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479.)

39. The form and manner of proceeding, before the board of delegates, in deciding upon a contested election, is for the board to determine. And the courts will not undertake to say what is, or is not, sufficient for the board to proceed upon in the first instance. It is requisite simply that at some point of the proceedings it appear that the case is within the terms of the law. (*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479.)

40. Where the contest before the board of delegates was on the sole ground of illegal votes the board had no power to declare the election void. It should have decided for one or the other of the contestants, and issued a certificate accordingly. (*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479.)

41. The decision of the board of delegates, in the case of contested election for chief engineer, is a judicial decision and subject to review by the courts on certiorari. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction. (*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479.)

Cited 24 Cal. 452; 32 Cal. 53; 34 Cal. 640; 46 Cal. 670; 52 Cal. 137; 5 Nev. 318, 319.

42. Where the board, instead of so deciding, declared the election void, and ordered a new one, the contestant not objecting, the matter of the contested election must be considered finally dismissed. And the board ought to declare the result of the first election, according to the returns then made, and issue a certificate of office. (*People ex rel. Whitney v. Board of Delegates*, 14 Cal. 479.)

43. In an action of ejectment by the city and county of San Francisco to recover the possession of a lot claimed by the city to have been reserved as a fire-engine lot under the Van Ness ordinance, where the plaintiff offered in evidence the several ordinances of the common council, and the map prepared in pursuance thereof, known as the "Van Ness map," which were confirmed and made the subject of judicial notice by the act of 1858, and also the report of the commissioners who prepared the map, that they had selected twenty-five lots in the city for fire purposes, and designated their size, it further appearing that upon the map were twenty-five spaces, within parallel lines, similar to the one in question; that upon some of those spaces were figures indicating the size of the lots, to correspond with the report of the commissioners; that from other portions of the map such figures were intended to represent feet and inches; that the map was originally white, and that the spaces within the parallel lines were originally colored, it is sufficiently shown that the twenty-five spaces, of which the lot in question was one, were reserved, under the provisions of the ordinance, for public use for engine lots. (*City and County of San Francisco v. Bradbury*, 92 Cal. 414.)

44. The provisions of the statute under which the fire department of San Francisco is organized do not create a liability on the part of the city for acts of negligence committed by the members of its fire department while engaged in duties pertaining to the department. (*Howard v. San Francisco*, 51 Cal. 52.)

Fire department, questions relating to. See Fire Department.

Liability for destruction of property to prevent conflagration. See Municipal Corporations, XIII, 4.

Ordinance regulating fire department is void. See Ordinances, 107.

VII. Training-Ship in.

45. The board of supervisors of the city and county of San Francisco has no authority, under the act of March 16, 1874, to accept from the government of the United States a vessel for a training-ship for boys, if the act of Congress granting the vessel contains provisions inconsistent with said act of March 16th. (*Glass v. Ashbury*, 49 Cal. 571.)

VIII. Taxation.

46. The general revenue system provided in the Political Code, which went into effect in 1872, applies to the city and county of San Francisco. (*Savings and Loan Society v. Austin*, 46 Cal. 415, cited 76 Cal. 276; *People ex rel. Attorney General v. Reis*, 76 Cal. 269.)

47. Section 9 of the act of March 18, 1874, authorizing an assessment for taxes in the city and county of San Francisco, after the time within which the board of supervisors can meet for the purpose of equalization, violates both the state constitution and the fourteenth amendment to the constitution of the United States, and its validity may be attacked even by one who has failed to fur-

nish the statement required by section 3629 of the Political Code. (*People v. Pittsburg R. R. Co.*, 67 Cal. 625.)

Taxation under funding acts. See post, 92.
Levy of tax in, when invalid. See Taxation, 463.

Assessment, time of, statute relating to is void, when. See Taxation, 216.

Statute legalizing assessments in. See Taxation, 497.

Enjoining sale for taxes. See Injunctions, 229.

Tax collector, compensation of. See Taxation, 886.

Statutes relating to licenses in. See Licenses, 18.

Intelligence offices in, licensing. See Licenses, 68.

License taxes, payment into general fund. See Licenses, 83.

License on peddlers, validity of. See Licenses, 70.

IX. Public Squares.

48. The city of San Francisco holds its public squares in trust for the public, and the municipal authorities have no authority to dispose of them by way of compromise or otherwise. (*City and County of San Francisco v. Itsell*, 80 Cal. 57.)

Right of claimant of outside land to compensation where land taken for park. See post, 140.

La Fayette park, judgment concerning. See Judgments, 326, 348.

Parks in. See Public Parks.

Dedication of squares in. See Dedication, 80.

X. New City Hall.

49. The act of March 24, 1876, providing for the completion of the building known as the New City Hall in the city and county of San Francisco, is constitutional. The act is not an attempt by special legislation to deprive the supervisors of their discretion with respect to a local improvement. The New City Hall Commission continues in existence until the amounts raised by taxation for the New City Hall funds have been expended under the contract made by the commissioners. (*People v. Bartlett*, 67 Cal. 156.)
Cited 72 Cal. 412.

50. Appeal from a judgment denying a writ of mandamus to the city auditor to audit a claim of the plaintiffs allowed by the board of city hall commissioners, July 21, 1880, for professional services as attorney. Held, the board of city hall commissioners had no authority to employ or pay counsel; such payment is prohibited by section 12 of the act of March 24th, which was in force when the employment of the plaintiffs took place. (*Great-house v. Dunn*, 60 Cal. 311.)

51. Action to enjoin the payment of money to defendant Carter upon a "lathing and furring contract" with the city hall commissioners. Defendants, "commissioners of the New City Hall," published an invitation for proposals for furnishing materials and doing certain work. The notice declared that the work was to be performed and the materials

supplied in accordance with contract and specifications mentioned. Among the specifications was one as to the quality and manufacture of the lathing. Held, (1) the act under which the commissioners were acting contemplated the preparation of specifications before the publication of notice for bids; (2) if the commissioners had power to adopt the specification there is no question but the notice for bids was in proper form and published as required; (3) if the court could substitute its judgment for that of the commissioner in determining the kind of lathing and where it should be manufactured, there is no evidence in the record to show that the commissioners were mistaken, and the court cannot take judicial notice that the facts are not as found by the commissioners; (4) the contract made by the commissioners with the defendant Carter is not void. (*Mulrein v. Kalloch*, 61 Cal. 522.)

52. Under the provisions of the act of March 24, 1876 (Stats. 1875-76, p. 461), to provide for the completion of the New City Hall in San Francisco, all contracts to perform labor upon, or to furnish materials for the construction of, the building must be awarded to the lowest bidder, after proposals or bids shall be called for in the manner provided in the act. (*Carter v. Kalloch*, 56 Cal. 335.)

53. Under the supplementary act of April 3, 1876, relating to the construction of the New City Hall in San Francisco, and directing the payment of certain outstanding warrants out of a fund arising from the sale of bonds referred to in the act, it was the duty of the treasurer to pay the interest as well as the principal of said warrants, so long as there was any money in the fund. (*Jordan v. Hubert*, 54 Cal. 260.)

Indictment against commissioners for misconduct in office. See Appeals, 63; Criminal Law, 2496.

Commissioners, indictment, appeal from. See Appeals, 63.

XI. Streets and Sewers; Extending into Tide Water; Injuries in; East, Channel, and Bay Streets.

54. The general street law of March 18, 1885, as amended in 1889, requiring the resolution of intention to do street work to be published and posted for two days only, superseded the Consolidation Act, and became the governing law of the city and county of San Francisco as to all matters provided for; and a resolution of intention to construct a sewer within the city limits, published and posted as required by the act of 1885 as amended, is not insufficient because not published and posted for five days, as required by the Consolidation Act. (*Anderson v. De Urioste*, 96 Cal. 404.)

55. Under section 3 of the act of April 1, 1872 (Stats. 1871-72, p. 804), the board of supervisors of San Francisco had the power to order the construction of a sewer, or other street improvement, extending through two or more streets. (*Mahoney v. Braverman*, 54 Cal. 565.)

56. Under the statutes of 1871-72, providing

for street work in the city and county of San Francisco, an assessment for the construction of a sewer for one block, exclusive of crossings, on Montgomery avenue, a street dedicated to public use and laid down on the city map, and which was an open public street, with width and grade established, is valid, if made against all the lots fronting on said block and the proposed work. The limitation of the right to assess for improvements at street crossings to such streets as are named and particularly described in said act does not apply to an assessment upon lots fronting upon any recognized and open public street for the construction of a sewer in front of such lot. (*Boyle v. Tibbey*, 82 Cal. 11.) Cited 93 Cal. 165.

Liability for damages from sewers. See Municipal Corporations, XVI.

57. In the plan of the city of San Francisco, the survey into blocks, lots, and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water, on the land line, for the convenience of shipping. (*Eldridge v. Cowell*, 4 Cal. 80.)

58. In the plan of San Francisco and the survey of blocks and streets into the tide waters in front of the city it was necessarily anticipated that the water lots would be filled up to a level suitable for building or land carriage. (*Eldridge v. Cowell*, 4 Cal. 80.)

59. East street, San Francisco, extends from Folsom to Market street, the latter and not Jackson street being its northern terminus. (*People ex rel. Burr v. Dana*, 22 Cal. 11.)

60. The object of the act of 1851, commonly called the "Water Lot Act," was to provide for the disposition of the water lot property, and not to interfere with the location of streets; and the designation therein of one of the boundaries of that property as the "eastern line of East street to its point of intersection with the northern line of Jackson street," was not intended nor did it operate to extend East street northward to Jackson. (*People ex rel. Burr v. Dana*, 22 Cal. 11.)

61. The design and only effect of the twenty-fourth section of the Consolidation Act is to exempt the city and county from the liability for injuries which would otherwise attach to it, by reason of the exclusive control of the streets and public highways, conferred upon it by other sections of the statute, and to transfer such responsibility to individual officers, agents, and employees of the corporation. (*Eustace v. Jahns*, 38 Cal. 3.)

Consolidation Act exempts from liability. See Streets, 28.

Street law of, effect on of new constitution. See Streets, 262.

Dedication of streets in, acceptance not necessary. See Dedication, 24.

Acceptance of street in, effect of. See Streets, 46.

Order relating to acceptance of streets. See Streets, 43.

Power to open streets in. See Streets, 67.

Improvement of streets in. See Streets, 187, et seq.

Consolidation act as to street improvements, construction of. See Streets, 681.

Macadamizing, planking, and paving. See Streets, XII, 2.

Grades of streets in. See Streets, XI, 1.

Change of grades in. See Streets, XI, 2.

Grading streets in. See Streets, XI, 3, a.

Width of streets in. See Streets, 107.

Dupont street, widening. See Streets, X.

Consolidation Act imposing personal liability for street assessment is void. See Streets, 680.

City is not liable on street assessment. See Streets, 540.

Limiting hours of work on street contracts in. See Public Works.

Duty of repairing streets in. See Streets, 24, et seq.

Liability of for repair of sidewalks. See Streets, 41.

Railroads in, duty to keep streets in repair. See Railroads, 270.

Streets on city front of. See Streets, 8, et seq.

Front street, driving piles in. See Streets, 22.

Mariposa street, discontinuance of. See Streets, 54.

Commissioners' report on Second street cut. See Streets, 87.

Superintendent of streets, nature of office and duties. See Streets, 57.

Suit to quiet title lies against street commissioner. See Quieting Title, 92.

62. The grant by the state of its beach and water lot property in the bay of San Francisco to the city of San Francisco, by the act of March 26, 1851, did not surrender the control of the state over the navigable waters of the bay of which Channel street is a part. (Payne v. English, 79 Cal. 540.)

63. The several acts of the legislature in relation to water property in San Francisco, and the establishment of Channel street as a public highway, cited and discussed by the court, and held not to be a surrender of such right of control on the part of the state to the city and county of San Francisco as to a portion of Channel street covered by the navigable waters of the bay. (People v. Williams, 64 Cal. 498.)

Cited 79 Cal. 548.

Channel street, dedication of. See Dedication, 110.

Sale of Channel street. See post, 156, 157.

Wharf in Channel street, control of state harbor commissioners. See Wharves, 47.

Map delineating streets, ratification of. See post, 195.

64. An action to enforce the liability of the city and county for grading done on Bay street in San Francisco in front of the United States reservation, under a contract providing for such work, is based either on a contract founded on an instrument in writing, or on an obligation or liability arising out of an assessment made in writing, both executed in this state, and consequently could not be barred by the provisions of subdivision 1 of section 379 of the Code of Civil Procedure, which relates to a contract, obligation, or liability not founded upon an instrument in writing, or upon an instrument in writing executed out of the state. A plea of such

section, therefore, raises no issue. (Onderdonk v. San Francisco, 75 Cal. 534.)

East street in, line of. See Streets, 9, et seq.

East street in is a public street. See Streets, 1.

Dedication of East street. See Dedication, 109.

Bay street, liability of San Francisco for grading of. See Streets, 179.

XII. Swinging of Lots in.

65. What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of the grantee therein. The taking of a part of a lot from an individual for the purpose of a public street, though it may, perhaps, give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. (Reynolds v. West, 1 Cal. 322.)

XIII. Indebtedness of and Claims Against; Funding Indebtedness.

66. The act of April 15, 1851, reincorporating the city of San Francisco by its provisions, continued the body politic as a corporation, and did not extinguish the debts of the city incurred under the former charter, nor did its property escheat to the state. An act passed with such intention would be unconstitutional and void. (Smith v. Morse, 2 Cal. 524.)

Consolidation of city and county, effect of on pre-existing debt. See ante, II.

Limitation in charter of power to create debts, construction and effect of. See Municipal Corporations, IX, 5.

One-twelfth Act, effect of on compensation of deputies. See Offices and Officers, 146, 147.

67. The prohibition against contracting debts over a certain amount, contained in the charter of San Francisco, applies to contracts and appropriations, but does not affect liabilities which the law may cast upon the city. (Holland v. San Francisco, 7 Cal. 361.)

68. The thirty-second section of the charter of 1855 of the city of San Francisco was designed as a check upon the city government under that charter, leaving the previous indebtedness to stand as a matter the legislature could not interfere with. (Soule v. McKibben, 6 Cal. 142.)

69. The limitation fixed by the thirty-second section of the charter of 1855 of San Francisco upon the amount of indebtedness that could be lawfully incurred by the city refers only to the indebtedness under the charter, not computing the previous debt funded or unfunded. (Soule v. McKibben, 6 Cal. 142.)

70. The board of supervisors of the city and county of San Francisco may, at one vote, allow several claims against the city and county without the passage of an ordinance, even if the aggregate of the demands exceeds five hundred dollars, provided each demand is for

a less sum than five hundred dollars. (*Sweeny v. Maynard*, 52 Cal. 468.)

Necessity of publication of appropriation over five hundred dollars. See Ordinances, 14, 15.

71. The act of the legislature, passed April 4, 1864, authorizing the board of supervisors of the city and county of San Francisco to compromise and settle all claims upon the part of the Western Pacific Railroad Company and the Central Pacific Railroad Company, for bonds claimed by said companies, of said city and county, under the act of April 22, 1863, fully empowered said board of supervisors to make a settlement with said Central Pacific Railroad Company, by the terms of which the company released its claim for the six hundred thousand dollars of bonds claimed under the act of 1863, and accepted in place thereof bonds of said city and county to the amount of four hundred thousand dollars, and the city and county released its right to stock in the company, and withdrew its subscription to the capital stock of the same. Said act also fully empowered and authorized the said city and county to compromise with the Central Pacific Railroad Company, without compromising with the Western Pacific Railroad Company also. (*People ex rel. Central Pac. R. R. Co. v. Coon*, 25 Cal. 635.) Cited 27 Cal. 678; 42 Cal. 557.

72. City cannot set up right in state to defeat claim against her. If her right, title, and interest in property has been sold by the sheriff, and the state has any right, the latter can assert it when she chooses to have it ascertained. (*Smith v. Morse*, 2 Cal. 524.) Cited 15 Cal. 586, 587, 617, 636.

73. A judgment obtained in April, 1854, against the board of supervisors of San Francisco county, in an ordinary common law action, was not a judgment against the former county of San Francisco. (*Hastings v. San Francisco*, 18 Cal. 49.)

Mandamus to compel auditor to allow demand. See Mandamus, 156, et seq.

Supervisors, duty to pay judgments. See Supervisors, 37, et seq.

Act authorizing and directing payment of claims by. See Constitutional Law, 308.

Mob, claim for injury from need not be presented. See Municipal Corporations, 172.

Claim for injuries through negligent construction of sewer need not be presented. See Municipal Corporations, 193.

Presentation of claim before suit. See Municipal Corporations, 191, et seq.

74. The first charter of the city of San Francisco does not authorize the creation of a sinking fund commission in terms; nor is there any clause under which it can be exercised even by implication. (*Smith v. Morse*, 2 Cal. 524.)

75. The act of April 15, 1850, incorporating the city of San Francisco, did not confer upon the common council of that city the power to create by ordinance a sinking fund to pay the indebtedness of the city, nor did it confer upon said common council the power to convey, by ordinance, the city front or wharves

in the harbor to said board of commissioners of the sinking fund. (*People ex rel. Harbor Commrs. v. Broadway Wharf Co.*, 31 Cal. 33.) Cited 35 Cal. 708.

76. The act of May 1, 1851, funding the debt of the city, is unconstitutional, so far as the rights of the plaintiff are affected thereby; and the levy and sale on a judgment rendered before are regular and valid. (*Smith v. Morse*, 2 Cal. 524, cited 5 Cal. 75; *Wheeler v. Miller*, 16 Cal. 124.)

77. The act of 1858, amendatory of the act of May 1, 1851, authorizing the funding of the floating debt of the city of San Francisco, and to provide for the payment of the same, is constitutional. The amendment, that the commissioners may purchase stock at five per cent above par, does not affect injuriously the creditors under the act of 1851. (*Thornton v. Hooper*, 14 Cal. 9.) Cited 20 Cal. 658.

78. The act of May 1, 1851, authorizing "the funding of the floating debt of the city of San Francisco," is substantially a trust deed, whereby she agrees, on a valuable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations, in the mode and according to the terms of her agreement. (*People ex rel. McLane v. Bond*, 10 Cal. 563.) Cited 19 Cal. 184.

79. The act being of this character, it was not competent for the legislature to substantially change its terms, without the sanction of the creditors. (*People ex rel. McLane v. Bond*, 10 Cal. 563, cited 14 Cal. 12, 19 Cal. 23; *Board of Education v. Fowler*, 19 Cal. 11.)

80. The act of May 1, 1851, providing for the funding of the floating debt of the city of San Francisco, authorizing a contract between the city and her creditors, and the contract having been executed, its obligations cannot be impaired by any subsequent modification or repeal of the act. (*Babcock v. Middleton*, 20 Cal. 643; *People ex rel. Talant v. Wood*, 7 Cal. 579, cited 10 Cal. 570.)

81. The provisions of the act, which are mere legislative modes to give effect to the substantial purposes of the act, may be altered, provided the alteration does not affect the security of the creditors, who have accepted the bonds of the city under the act. (*Babcock v. Middleton*, 20 Cal. 643.)

82. The act of 1851 is a law as well as a contract. And those provisions which are mere modes of giving effect to the substantial purposes of the act may be revised and altered. The constitution forbids impairing the obligation of contracts, but does not inhibit legislation respecting them. (*Thornton v. Hooper*, 14 Cal. 9.)

83. The execution by the city of San Francisco of the bonds authorized by the Funding Act of May 1, 1851, in pursuance of and to give effect to the act amounts to an acceptance by the corporation of the act of the legislature in all its parts; and this would be sufficient to give validity to the entire act, if, by force of the legislative will alone, the act, as a conveyance of the property of the city,

would not be effectual. (*Board of Education v. Fowler*, 19 Cal. 11.)

84. The commissioners of the funded debt of the city of San Francisco are not private agents; they are public officers, clothed with important trusts, for the due administration of which they have executed bonds, with security. (*County of San Francisco v. Fund Commrs.*, 10 Cal. 585.)

85. The commissioners of the funded debt of San Francisco are not officers within the meaning of article XI, section 7, of the constitution, and the term during which the commissioners are authorized to act is not limited to four years. (*People ex rel. Carlton v. Middleton*, 28 Cal. 603.)
Cited 79 Cal. 113; 3 Dak. 417.

86. The act of May 1, 1851, authorizing the funding of the floating debt of San Francisco, confers the power on five commissioners, and though a majority may control, yet it is necessary that all should meet and consult, or have notice of the meeting, that they may attend if they desire. (*Leonard v. Darlington*, 6 Cal. 123.)

87. The Funding Act of 1851 gives considerable discretion to the commissioners in the execution of their trust, and directs that discretion to be exercised for the benefit of the city; and an arbitrary exercise of this authority, by such partial discriminations as would throw the whole burden upon particular portions of this property thus affected, even if legal, is not to be anticipated. Whether, in the exercise of this power, the public interest involved in the freeing of large masses of city property from such burdens, by some equitable apportionment of the common charge, would not be for the public interest, is a matter which addresses itself to the consideration of those interested, and which this court is not called upon to decide. (*Board of Education v. Fowler*, 19 Cal. 11.)

88. Whether the statute of limitations runs against a trust like this of the commissioners of said funded debt, and whether they may not pay claims barred, query? (*People ex rel. Davis v. Middleton*, 14 Cal. 540.)

Commissioners, title of to beach and water lot property. See post, XIV, 10, d.

Commissioners, power of to sell beach and water lots. See post, XIV, 10, e.

Power to convey school lots. See post, XV.

Enjoining sale by public debt commissioners. See Injunctions, II, 11.

89. If, under the act of 1858, amendatory of the act of May 1, 1851, a large surplus accumulates, it may be applied to the purchase of bonds, even if no provision exist in the act for judgment before the bonds are due. (*Thornton v. Hooper*, 14 Cal. 9.)

90. Board of supervisors have no control over treasurer in payment of interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit, of the board, are alike immaterial. (*People ex rel. Tallant v. San Francisco County*, 12 Cal. 300.)

91. The city assessor and the city treasurer, by the act of 1851, are put in direct relations

with the commissioners, and clear and definite duties are assigned to them, respectively, of a simple ministerial character. No one else is authorized to intervene between them, or to disturb their relations. Neither the old city government, nor the present city and county government, neither the mayor and council, nor the board of supervisors, have any authority to prevent the instant payment of this fund by the treasurer, in pursuance of law, to the commissioners. (*People ex rel. McLane v. Bond*, 10 Cal. 563, cited 10 Cal. 584, 12 Cal. 300; *People ex rel. Tallant v. Tillinghast*, 10 Cal. 584, cited 14 Cal. 11, 12, 19 Cal. 194.)

92. There is nothing in the act of 1856,—which simply alters the mode of levying taxes, the result not being changed,—which, in substance, conflicts with the act of 1851 in those provisions which offered a security to the creditors for their debts. It is just as clear that the law does not contemplate the imposition of double taxation in any one year for the purpose of raising the money provided for by the act of 1851; and, therefore, the terms of the act of 1856, in this respect, supersede those provisions in the act of 1851 which declare the duty of the assessor to add to the list the several sums of money which are intended to be raised by the act of 1851. (*People ex rel. McLane v. Bond*, 10 Cal. 563.)

93. In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the fund commissioners created by the act of April 20, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom the bonds are to be issued should be made parties to the action. (*Hutchinson v. Burr*, 12 Cal. 103.)
Cited 12 Cal. 106.

94. The rule which governs and alone entitles the parties to intervene to restrain the proceedings, or control the action of the trustees of the funded debt, is, that the fund is in danger of being wasted or impaired; or that a liability will be incurred, or an injury done by threatened or probable malfeasance, for which the agents' bond or personal responsibility would afford no probable or adequate redress. Until this is shown, no injunction can issue to prevent them as such commissioners from receiving the trust fund. (*County of San Francisco v. Fund Commrs.*, 10 Cal. 585.)

Execution against, sale of beach and water lots on. See post, XIV, 10, f.

Execution against, sale of realty on. See post, XIV, 9.

Lease of wharves by funded debt commissioners. See Wharves, VIII.

Interest of funded debt commissioners in wharves. See Wharves, VIII.

XIV. Lands in.

1. Title of City to; Control Over; Extent of; Confirmation of and Survey.

95. Before the military occupation of California by the army of the United States San Francisco was a Mexican pueblo, or municipal corporation, and was invested with title to the lands within her boundaries. (*Cohas v. Raisin*, 3 Cal. 443.)

Cited 5 Cal. 307, 402; 7 Cal. 348; 8 Cal. 187, 199; 15 Cal. 589, 617.

96. The occupation and subsequent acquisition of California by the United States did not suspend or determine any rights or interest of San Francisco in such lands. And, if any interest passed to the government of the United States by the said acquisition, it has been reconveyed by the act of Congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in California." (*Cohan v. Raisin*, 3 Cal. 443.) Cited 5 Cal. 307; 15 Cal. 589.

97. The title of the city of San Francisco to the pueblo lands, as successor to the pueblo of San Francisco, was not an indefeasible estate, nor strict ownership, but was a restricted and qualified right to alienate portions of the lands to the inhabitants, and to devote the residue to public uses, and was in the nature of a trust for the benefit of the inhabitants; and its right of disposition and use was in all particulars subject to the control of the government. (*Baker v. Brickell*, 87 Cal. 329.)

98. Neither the former pueblo nor the city and county of San Francisco, as its successor, ever held an indefeasible proprietary interest in the pueblo lands. Such lands are held in trust for certain municipal purposes. (*San Francisco v. Canavan*, 42 Cal. 541.) Cited 92 Cal. 17.

99. City of San Francisco succeeded to rights of pueblo of Yerba Buena in the lands of the pueblo, and these lands were held in trust for the public use of the city. (*Hart v. Burnett*, 15 Cal. 530, cited 20 Cal. 450; *Fulton v. Hanlow*, 20 Cal. 450, cited 42 Cal. 556.)

100. Pueblo of San Francisco derived its title to its land from the grant of the government of Mexico, and not from the United States, whose patent is not an original grant, and did not emanate from the source of title, and was not necessary to invest title in the city, but is a mere acknowledgment that the pueblo had title under the Mexican government, which existed at the cession of the territory, and is a release of all claim of the United States to the property found by its tribunals to have been so vested in the pueblo. (*United Land Assn. v. Knight*, 85 Cal. 448.)

101. The municipal lands and the trusts on which they were held were public and municipal in their nature, and were within the control and supervision of the state sovereignty, and the federal government had no such control or supervision. (*Hart v. Burnett*, 15 Cal. 530.) Cited 18 Cal. 573, 614; 42 Cal. 556, 559.

Federal government cannot control. See post, 145.

102. The decree of the circuit court of the United States, confirming to the city of San Francisco four square leagues of pueblo lands, did not confirm to said city land which by executive proceedings had been reserved for public uses by the United States. (*Naglee v. Palmer*, 50 Cal. 641.)

103. The confirmation of the title of the city of San Francisco by the board of United

States land commissioners, and the dismissal of the appeal by the attorney general, have settled that no title to lands within the limits of that city can hereafter be acquired from the United States. (*Norton v. Hyatt*, 8 Cal. 539.)

104. The patent from the United States government to the city and county of San Francisco for pueblo lands confirmed to it under the acts of congress of March 3, 1851, and of July 1, 1864, by the decree of the United States circuit court, which patent conforms in its description of the lands granted to the final survey made, as provided in the latter act, in accordance with the instructions of the commissioner of the general land-office, is conclusive evidence as against the state of California of the right of the city and county of San Francisco to all the lands embraced within the exterior limits of the survey, including tide lands lying below the line of ordinary high tide. (*People v. City and County of San Francisco*, 75 Cal. 588.) Cited 85 Cal. 462, et seq; 91 Cal. 402.

105. The act of Congress of 1851 operates as a grant to the city of San Francisco of all the vacant lands within her limits, and the confirmation of the United States land commission is final as to the boundaries therein laid down, the appeal therefrom having been dismissed. (*Welch v. Sullivan*, 8 Cal. 165.) Cited 15 Cal. 588, 619; 4 N. Mex. 307.

What are municipal lands of San Francisco. See ante, III.

Point San Jose military reservation, grant of to city. See post, XIV, 11.

Congressional grant of lands within Van Ness ordinance. See post, XIV, 7, b.

Legal title to outside lands. See post, XIV, 4.

Grant by congress in trust for claimants of outside land. See post, XIV, 4.

Priority between title by Mexican grant and pueblo. See post, XIV, 2.

Grant of water front and beach and water lots. See post, XIV, 10, b.

Pueblo lands in. See Mexican Lands, II.

Patent to, conclusiveness of. See *Stare Decisis*, 23.

Conveyance of pueblo lands, power of legislature. See Mexican Lands, 421, et seq.

Jurisdiction of supreme court of United States on decision concerning pueblo rights. See Appeals, 3374.

Military reservation in. See Military Reservations, 1.

2. Mexican Grant in.

106. Where a Mexican grant to land situated within the limits of the city and county of San Francisco was confirmed by the board of United States land commissioners, and, together with the survey thereof, was, in 1863, affirmed by the United States district court, and, on appeal, said survey was confirmed by the supreme court of the United States, held, that under the provisions of the act of Congress approved June 14, 1860, as against those claiming under the party who contested said survey in the district court and on said appeal, and who claimed title thereto under the Van Ness ordinance, the successors in interest of the grantee of said land acquired thereby such title thereto, without a patent from the

United States, as to maintain an action of ejectment therefor. (*Bernal v. Lynch*, 38 Cal. 135.)

Cited 44 Cal. 575, 578; 49 Cal. 537; 60 Cal. 524.

107. In such case the decree confirming the survey was an adjudication that said land mentioned in the decree confirming the claim was properly located and correctly surveyed; and the contestant of said survey, having made himself a party to the proceeding for its confirmation, neither he nor those claiming under him can be permitted to collaterally question the decree. (*Bernal v. Lynch*, 38 Cal. 135.)

108. Conceding that said contestant acquired to said land, by virtue of the Van Ness ordinance, all the title which the city of San Francisco held to it as pueblo land, yet, as under said act of Congress of 1860 said decree of confirmation was made the equivalent of a patent issued by the United States, the confirmee thereby acquired the title of the United States, and his title so acquired was unaffected by the act of Congress of 1864, entitled "An act to expedite the settlement of titles to lands in the state of California." The claim of the confirmee was, by the decree of confirmation, established as a bona fide claim, and was therefore within the protection accorded to bona fide claims by the fifth section of said last-named act. (*Bernal v. Lynch*, 38 Cal. 135.)

109. It does not follow, because the inchoate title of the pueblo of which said land was a part was older than the Mexican grant under which said confirmee claimed the same, that the former was the better title. The decree by which the title of the city of San Francisco was confirmed to said pueblo expressly excepted Mexican grants from its operation; moreover, the exercise of the power by the governors of California under the Mexican government to grant lands within pueblos has been so long acquiesced in, and so many titles depend upon a recognition of the power, that it ought not now to be drawn in question, except upon the most cogent considerations. (*Bernal v. Lynch*, 38 Cal. 135.)

Pueblo lands in, and conveyances of. See Mexican Lands, II.

Power of alcaldes to make grant after conquest. See Mexican Lands, II, 4, a.

Pueblo, grant by justice of. See Mexican Lands, 428, 429.

Grant by justice to husband is separate property. See Husband and Wife, 141.

Sale of pueblo lands at auction. See Mexican Lands, 471.

Title passing by pueblo grant. See Mexican Lands, II, 4, h.

Mission, pueblo grant in. See Mexican Lands, 445, 446, 459.

Confirmation of pueblo grants in. See Mexican Lands, II, 5.

Alcalde grant, who may question. See Mexican Lands, 473, 474.

Alcalde grants in, presumption in favor of. See Mexican Lands, II, 4, l.

Book A of original grants as evidence. See Mexican Lands, 494.

Presumption from Blotter B as to alcalde grants. See Mexican Lands, 495.

City is not liable on covenants in alcalde grant. See Mexican Lands, 487, 488.

8. Claims Under Statute of Limitations.

110. The act of March, 1864 (Stats. 1863-64, p. 149), in relation to limitations of actions for the recovery of real estate in the city and county of San Francisco, is not unconstitutional. (*Brooks v. Hyde*, 37 Cal. 386.)

Adverse possession of land reserved for schoolhouses. See post, 324.

111. A claim to land within the boundaries of the former pueblo of San Francisco, taken up under the statutes of this state, is void. (*Judson v. Malloy*, 40 Cal. 299.)

112. The holder of a title derived from such claim, though in possession of a part of the lands, and claiming title to the whole, upon the rule of *Hicks v. Coleman*, 25 Cal. 122, does not come within the proviso to the sixth section of the statute of limitations of 1855, nor the second proviso to the sixth section of the amendatory act of 1863. (*Judson v. Malloy*, 40 Cal. 299.)

113. In an ejectment suit by the state, for land in San Francisco outside of the red line, where a defendant claimed the title under the statute of limitations, and relied upon the adverse possession of his grantors, but it appeared that his deeds either called for land different from that sued for, or were void for uncertainty of description, held, that he did not connect himself, by means of such deeds, with the possession of his grantors. (*People v. Klumpke*, 41 Cal. 263.)

114. The statute of limitations as to the pueblo lands in the city of San Francisco did not commence to run until the passage of the act of Congress of July 1, 1864, granting and relinquishing the title to the city. (*Hoadley v. San Francisco*, 50 Cal. 265.)
Cited 64 Cal. 609; 93 Cal. 245.

115. An action may be brought and maintained to recover possession of land within the pueblo of San Francisco, by one holding title derived from the pueblo, at any time within five years after the issuance of a patent for the pueblo lands by the United States. (*Davis v. Davis*, 26 Cal. 23.)

Cited 33 Cal. 479; 48 Cal. 291, 294; 60 Cal. 521; 63 Cal. 11.

116. The statute of limitations did not commence running against the city of San Francisco, with reference to the pueblo lands confirmed to it by the decree of the circuit court of the United States, May 18, 1865, until after the passage of the act of Congress of March 8, 1866, quieting the title of the city to said lands. (*McManus v. O'Sullivan*, 48 Cal. 7.)

Cited 57 Cal. 67; 64 Cal. 609.

117. Even if the perfect grant had conveyed the pueblo title, which was confirmed to the city by the act of Congress of 1866, and the benefit of that confirmation has inured to the holder of the perfect grant, either as a trust or as a title, his right of action to enforce the trust or to recover the land then accrued, and the statute then began to run against his right of action, either in equity or at law. (*Ohm v. San Francisco*, 92 Cal. 487.)

118. Person in mere naked possession of pueblo land in San Francisco, and whose claim is not connected with the title of the city, and who was ousted in 1861 by a party who thence held adversely to him, cannot insist that such party shall be deprived of the benefit of the statute of limitations, because holding in subordination to the title of the city. (*McManus v. O'Sullivan*, 48 Cal. 7.)

Presumption as to title arising from possession. See *Mexican Lands*, 506, et seq.

Adverse possession of engine lot reserved under Van Ness ordinance. See *Adverse Possession*, 154.

4. Outside Lands in; Rights of Claimants; Grant by Congress in Trust for.

119. Legal title to outside lands in San Francisco passed to the United States from Mexico upon the acquisition of California, and passed to the city by the act of Congress of March 8, 1866, upon the trusts set forth in said act, in favor of persons in bona fide actual possession of the same at the date of its passage, by themselves or by their tenants. (*Baker v. Brickell*, 87 Cal. 329.)

120. The act of Congress of March 8, 1866, granting to the city and county of San Francisco the right of the United States to pueblo lands within its limits, to hold in trust, to dispose of, and convey the same to parties in the bona fide actual possession thereof on the passage of the act, by themselves or tenants, limited the rights of possessors to such quantities and such terms and conditions as the legislature of the state of California might prescribe, and no municipal ordinances not ratified or confirmed by the legislature could confer any rights upon such possessor. (*Newman v. City and County of San Francisco*, 92 Cal. 378.)

121. The words "bona fide actual possession," in the act of Congress, passed March 8, 1866, to quiet the title to certain lands within the corporate limits of the city of San Francisco, mean a possession which is bona fide as against adverse claimants, and not as against the government. (*Iburg v. Suanet*, 47 Cal. 265.)

122. One who claims title to pueblo lands in San Francisco as a beneficiary under the act of Congress of March 8, 1866, and of Order No. 800, must show that his possession on the 8th of March, 1866, was bona fide. (*McCreery v. Sawyer*, 52 Cal. 257.)

123. A person who was in possession of pueblo lands in San Francisco prior to 1861, but who was ousted therefrom, did not become a beneficiary under the act of Congress of March 8, 1866, and ordinance No. 800 of said city, and the act of the legislature confirming it, unless he had recovered possession. (*McManus v. O'Sullivan*, 48 Cal. 7.)
Oited 74 Cal. 344.

124. Where a conveyance was made by the city in pursuance of the act of Congress of 1866, and of order 800 and ordinance 822 of the board of supervisors, and of the acts of the legislature of 1868 and 1870 ratifying said order and ordinance, to a person in actual possession of outside lands, if it does not appear that any suit was pending against such per-

son in regard to the land, it will be presumed that no suit existed, and that the possession was bona fide. (*Baker v. Brickell*, 87 Cal. 329.)

125. The mere possession of outside lands by a husband, who died before the passage of the act of Congress of 1866, when the title was in the United States, conferred no rights upon him or his heirs, nor could he be the recipient of a grant after his death; but the donation given by the act inured directly to the surviving wife, who was then in bona fide possession. (*Baker v. Brickell*, 87 Cal. 329.)

126. The grant of Congress by said act to the city was intended to be made in trust for the head of a family residing on the lands, and inured to the benefit of a surviving wife in bona fide possession, with her children, at the date of its passage by virtue of such possession, and not to the estate of her deceased husband, who held bona fide possession prior thereto, nor would she take title from the city in trust for the estate of her husband, or for their children. (*Baker v. Brickell*, 87 Cal. 329.)

127. The "possession by tenant," spoken of in the act of Congress, signifies possess on by a conventional tenant, and does not apply to the possession of a surviving wife continued after the decease of the husband, which occurred before the passage of the act. (*Baker v. Brickell*, 87 Cal. 329.)

128. A trust arises from the contract or from circumstances which affect the conscience of a party, and charge him with the rights of another, but cannot arise in respect of outside lands in favor of children, as against a surviving wife who acquired title thereto as a bona fide possessor, if she had no contract with her deceased husband, and owed no duty to her children in respect to the lands. (*Baker v. Brickell*, 87 Cal. 329.)

129. Under order 800, providing that outside lands should be delineated, and that a map should be made of them, action was required upon the part of every person having or claiming any interest in any portion of the land; such action was required by the owner or by some one acting on his behalf. (*Howard v. Donahue*, 60 Cal. 264.)

130. Part owner of land is not an agent of his co-owner, where he takes proceedings under order No. 800, in relation to outside land, to have his interest subdivided and delineated on the map, and where such co-owner fails to take any proceedings he cannot sue the other in assumpsit for his proportion of the compensation, where the land is taken for a park. (*Howard v. Donahue*, 60 Cal. 264, 277.)

131. A parcel of the lands granted to San Francisco by act of Congress of March 8, 1866, had been awarded to T., as successor of defendant R. The plaintiff, claiming to be himself the successor of R., sued T., R., and the city, and obtained a decree directing the city to convey to plaintiff instead of R., which was done. R. having ejected plaintiff, this action was brought for possession; and defendant claimed that said deed was void, because neither plaintiff nor his predecessors had complied with certain requirements of said act. Held, that the defense was inadmissible. (*Forbes v. Reilly*, 57 Cal. 302.)

132. Order 733 of the board of supervisors of the city and county of San Francisco, relinquishing and granting the legal title to the lands therein referred to, to the person or persons who were in the bona fide occupancy thereof at the date of the passage of the act of Congress of March 8, 1866, never having been ratified by the legislature of the state of California, was ineffectual to confer any rights, and order 800 of the board of supervisors, imposing other terms and conditions, subsequently ratified by the legislature, became thereby operative, and a party in the possession of such land on March 8, 1866, who did not comply with the terms and conditions prescribed by order 800, can claim no rights under the act of Congress. (*Newman v. City and County of San Francisco*, 92 Cal. 378.)

133. Order number 800 of the board of supervisors of the city and county of San Francisco, prescribing the payment of taxes and assessments as a condition upon which persons in possession of outside lands in said city should be entitled to the benefit of the act of Congress of March 8, 1866, did not contemplate the payment of taxes and assessments twice on the same land. (*Randell v. Austin*, 46 Cal. 54.) Cited 87 Cal. 334.

134. It was the intention of said order that such taxes and assessments should be paid by the person, or his predecessor in interest, who was in possession March 8, 1866, or had been wrongfully deprived of the possession, and was entitled to recover it. The act of March 14, 1870, prescribing the method of proceeding for the possessors to obtain from said city a conveyance of said land entitled to record, which requires contesting claimants each of them to pay to the tax-collector the taxes and assessments on the land, was intended to enforce a mere deposit of the taxes and assessments, and the unsuccessful party to the litigation has a right to withdraw his deposit. (*Randell v. Austin*, 46 Cal. 54.)

135. So long as the tax-collector retains such taxes and assessments it is his duty to pay the same to the unsuccessful litigant, and he will not be allowed to set up as a defense that the city and county of San Francisco is the proper party to be sued. (*Randell v. Austin*, 46 Cal. 54.)

136. Congress relinquished and granted to the city of San Francisco the right of the United States to certain pueblo lands within its limits, to hold in trust, to dispose of, and convey the same to parties in possession thereof, on such conditions as should be prescribed by the legislature. One of the conditions prescribed by the legislature, by which a person in possession, or who had been unlawfully ousted, was to become entitled to the benefit of the act of Congress, was that, prior to a certain time, all taxes which had been assessed during the five years preceding shall have been paid; held, that no title vested in one in possession, or who had been ousted from possession, unless he, or some one acting in his behalf, had paid such taxes; held, also, that the same rule prevailed as to the payment of an assessment imposed on the land as a condition precedent

to vesting title. (*Dupond v. Barstow*, 45 Cal. 446.) Cited 46 Cal. 62; 92 Cal. 381.

137. In an action by one claiming title to a part of the pueblo lands of the city and county of San Francisco under order 733 of the board of supervisors, to enforce a trust against the city and county, and other persons claiming under it, the failure of the plaintiff to allege that he paid or tendered the assessment required by order 800 renders the complaint insufficient and bad, upon a general demurrer, as not showing any legal or equitable title in the plaintiff, and such omission is not cured by a general averment that the "terms and conditions" imposed by order 800, and ratified by the legislature, were oppressive, or that such act of the legislature ratifying that order was unconstitutional. (*Newman v. City and County of San Francisco*, 92 Cal. 378.)

138. The plaintiff in such action, having failed to show that he was entitled to acquire the land in controversy, or that he was prevented by the defendants from complying with the conditions of order 800 as ratified and adopted by the legislature, is in no position to call in question the manner in which the defendants acquired their deeds from the city and county of San Francisco, and averments in the complaint charging them with having done so by fraud and false evidence are immaterial. (*Newman v. City and County of San Francisco*, 92 Cal. 378.)

139. Conveyance made by city to one in possession of outside lands merely has the effect to aid and assure the title already held. (*Swain v. Duane*, 48 Cal. 359.)

140. The C. H. and R. Association made application to the board of supervisors of San Francisco for a parcel of the outside lands, under the ordinances of the city and county and statutes of the state applicable to the disposition of such lands, caused its claim to be delineated on the "Outside Land Map," paid the assessments and taxes thereon, and proved its right and possession to the satisfaction of the board. A portion of the land claimed was taken for a park, under the ordinances and statutes aforesaid. The plaintiffs had themselves previously conveyed to the association. Held, that plaintiffs, who now claim an interest in the land awarded to the C. H. and R. A., but who made no application to the supervisors, nor notified the board of their claim, who did not have their claim delineated on the map, nor pay any assessments or taxes, cannot maintain an action against the city and county of San Francisco for a part of the assessed value of the land so taken for the park. (*Clark v. San Francisco*, 53 Cal. 306.)

141. Ejectment for land forming part of the "outside lands" of San Francisco. (Complaint filed September 16, 1873.) The plaintiff deraigned title under deed from the city and county of San Francisco, dated April 5, 1870, issued in pursuance of proceedings taken under order No. 866, prior to the passage of the act of April 14, 1870, "to expedite the settlement of land titles in the city and county of San Francisco." (Stats. 1869-70, p. 353.) Held, in effect, order 806 was ratified and re-enacted

by the act referred to. The deeds under which the plaintiff claims were therefore valid. (*Rousset v. Reay*, 60 Cal. 328.)

Action to recover money paid under order 800. See Statute of Limitations, 189.

5. Origin of Title in; Sale of Land; Rights on Confirmation to City.

See ante, 100.

142. It follows, from the confirmation of the title of the city of San Francisco, by the board of United States land commissioners, that any title to lands within the city of San Francisco accruing to individuals since July 7, 1846, must have been derived from the local authorities of the city. (*Norton v. Hyatt*, 8 Cal. 539.)

143. The pueblo retained, during the war, all its rights to municipal lands which had been conferred upon it previous to the war. The right to alienate is incident to that of ownership. The fact that this right was exercised by the municipality from 1835 to 1850 without question or restriction would prove the usage and custom in the absence of law. (*Cohas v. Raisin*, 3 Cal. 443.)

144. The pueblo had the same right to dispose of its property during the war as a natural person. (*Cohas v. Raisin*, 3 Cal. 443.)

145. The right or interest which the city of San Francisco had in its pueblo lands it held subject to the control of the legislature of the state, and Congress could not control the city in any manner whatever in respect to the disposition of such pueblo lands. (*Pickett v. Hastings*, 47 Cal. 269.)

146. The charter of the city of San Francisco gives her the power to convey her property by law; and, if an ordinance for this purpose is a law, it must be governed by the same rules of construction as other laws. (*Holland v. San Francisco*, 7 Cal. 361.)

147. Pueblo of San Francisco had a certain right or title to the lands within its general limits; and the portions of such lands which had not been set apart, or dedicated to common use or to special purposes, could be granted in lots by its municipal officers to private persons in full ownership. (*Hart v. Burnett*, 15 Cal. 530.) Cited 2 Wash. 276.

148. The lands lying within the corporate limits of San Francisco, which had not been granted by the Mexican government, or its officers, previous to the conquest of the country by the American forces, constitute a part of the public domain of the United States, and cannot be transferred, except under the authority of Congress. (*Woodworth v. Fulton*, 1 Cal. 295.)

149. *Hart v. Burnett*, 15 Cal. 530, holding (1) that San Francisco was, at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations; (2) that such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart or dedicated to common use, or to special purposes, could be

granted in lots, by its municipal officers, to private persons in full ownership; (3) that the authority to grant such lands was vested in the ayuntamiento, and in the alcaldes, or other officers who, at the time, represented it, or who had succeeded to its "powers and obligations"; (4) that the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority, affirmed. (*Payne v. Treadwell*, 16 Cal. 220.)

Oited 17 Cal. 462; 42 Cal. 556; 92 Cal. 217.

Beach and water lots, sales of. See post, XIV, 10, e.

Right and power of disposition. See ante, 97.

Reservation of school lots. See post, XV.

150. One who was not a beneficiary under the act of Congress of July 1, 1870, and relinquishing the interest of the United States in certain land to the city, cannot question the right of the city to convey land, under the provisions of the act, to another. (*Naglee v. Palmer*, 50 Cal. 641.)

Cited 72 Cal. 186; 10 Col. 69.

151. The only authority the common council of San Francisco possessed to sell city property was derived from the thirteenth section of article 3 of the charter, and this section provides for the sale of property in one way only, to wit: By the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. This mode of selling the property, having been pointed out by the charter, was restrictive—no other mode could be followed. (*McOracken v. City of San Francisco*, 16 Cal. 591.)

152. The only way in which the common council could give validity to a sale was by passing a law directing it. Ordinance No. 493 does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance No. 481. The common council could pass a law or ordinance only in one way, and that was by voting for it. (*McOracken v. City of San Francisco*, 16 Cal. 591.)

Oited 23 Cal. 318; distinguished 31 Cal. 590.

153. As to the pueblo lands of San Francisco, the agents of that municipal corporation can sell or dispose of them only in the way, and according to the order of the legislature; and, therefore, the legislature may by law, by operating immediately upon the subject, dispose of this property, or give effect to any previous disposition, or attempted disposition, of it. The property itself is a trust, and the legislature is the prime and original controlling power, managing and directing the use, disposition, and direction of it. (*Payne v. Treadwell*, 16 Cal. 220.)

154. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property has no application to the question involved in the case at bar. Its

powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalities of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire department, and matters connected with the general welfare of the city. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

155. The tenure by which the pueblo lands are held by San Francisco is of a fiduciary nature, and cannot be alienated except in accordance with the trust. (*San Francisco v. Canavan*, 42 Cal. 541.)

156. The act of March 27, 1874 (Stats. 1873-74, p. 711), authorizing and requiring the board of supervisors of the plaintiff to sell at public auction all of Ohannel street and Mission creek, except so much thereof as might be required for a street and sewer, and providing that the deed of the mayor to the purchaser of any lot should vest the title in such purchaser, did not operate as a grant to the plaintiff. (*San Francisco v. Ellis*, 54 Cal. 72.)

157. In an action by the plaintiff to quiet title to a portion of the said land, against one claiming under a deed, subsequent to the act, from the board of tide land commissioners, the complaint alleging that the plaintiff was seised of the land, held, that the action could not be maintained, for want of title in the plaintiff, and that it was, therefore, unnecessary to examine the title of defendant. (*San Francisco v. Ellis*, 54 Cal. 72. Cited 5 Mont. 91.)

158. The regulation forbidding grants to be made within two hundred varas of the waterline of the bay had reference only to a portion of the present city front. (*Norton v. Hyatt*, 8 Cal. 539.)

159. Assuming that the title to the lot in San Francisco on which the United States Marine Hospital stands was in said city at the time of the passage of the Van Ness ordinance, then a deed in 1852 by the mayor of said city, in pursuance of an order of the common council thereof, conveying said lot to the United States, was effectual as a license from the city to the United States to enter upon and hold the lot, even if the deed was not operative to pass the title. (*Hubbard v. Sullivan*, 18 Cal. 508.)

160. Assuming that this deed did not pass the title to the United States, then, by and upon the passage of the Van Ness ordinance of 1855 and the act of 1858 confirming it, the United States, holding the lot under the city through this deed as a license, and having actual possession, may be considered as in possession for the city, and entitled to protection against the antecedent possession of the plaintiff or his predecessor. (*Hubbard v. Sullivan*, 18 Cal. 508.)

161. Whether the United States got any title by the deed from the city—that is, whether the city could convey her real estate by way of gift, or whether the Van Ness ordinance operated in this case in favor of the

United States, not decided. (*Hubbard v. Sullivan*, 18 Cal. 508.)

United States Marine Hospital, title to. See post, 245.

162. Where the land granted by an alcalde is shown to be within the limits of the four square leagues thus measured, the presumption attaches that it was pueblo land, grantable as such, and that the alcalde grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the alcalde, or by proof that this was land reserved as a fort site, etc., or proof of anterior or better title to the land by grant from some officer or body authorized to make it. (*Payne v. Treadwell*, 16 Cal. 220.)

163. A plaintiff suing for a lot in San Francisco may rest his case prima facie upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square in the manner directed by the ordinances. (*Payne v. Treadwell*, 16 Cal. 220.)

164. Persons who now contest a grant by competent authority within the city limits must rely on a sufficient title, issued by competent authority prior to July 7, 1846. (*Welch v. Sullivan*, 8 Cal. 165.)

165. A municipal body, under restrictions such as are contained in the charter of 1851 of the city of San Francisco, can give their assent to a sale of the city property only in one way, to wit: by an ordinance authorizing a sale at public auction, after due advertisement of the time, place, and terms. (*Grogan v. San Francisco*, 18 Cal. 590.) Cited 21 Cal. 363; 3 Utah, 207.

166. Inasmuch as by article 6, section 6, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Alcalde grants were validated by act ratifying Van Ness ordinance. See post, 198.

Rights of grantees of city where title confirmed or relinquished to city. See ante, XIV, 1.

167. The city of San Francisco is not estopped from denying the sale made under ordinance No. 481, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance No. 493, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance 493, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or in-

tention to deceive on the part of the common council. They acted, in passing ordinance No. 493, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Cited 18 Cal. 608; 21 Cal. 362.

168. The doctrine of estoppel, as laid down in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 280, controls the question here. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

169. Even if the city would be estopped from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrongdoer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrongdoer who is estopped, upon the principle that he shall not take advantage of his own wrong. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Cited 33 Cal. 140, 141; 38 Cal. 315.

170. The sale of the city's property in this case, being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money. *Field, O. J.* (*McCracken v. City of San Francisco*, 16 Cal. 591.)

171. The title of the city was unaffected by the sale, and the deeds made in pursuance thereof. The parties claiming possession from the plaintiff are simply trespassers, who can at any time be ejected from the premises by action on behalf of the city. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

172. The sale of December 26, 1853, under ordinance No. 481, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Cited 42 Cal. 557.

173. The deed to plaintiff of the land bought being signed by the mayor of the city and sealed with the corporate seal—the mayor being the legal custodian of the seal, and it being affixed by his authority—is sufficient to entitle the deed to be read in evidence, and a party relying upon it need not go behind the seal for the purpose of showing authority for its execution. The seal is prima facie evidence that it was affixed by proper authority, and the deed is prima facie sufficient to pass the title. *Cope, J.* (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Cited 84 Cal. 566; 93 Cal. 117.

174. The deed, in this case, is not a mere nullity. So far as passing the title to the land or creating any right or interest against the city is concerned the deed is inoperative and void and may be attacked collaterally. But the objections to it do not appear on its face, and its invalidity must be shown by the party impeaching it, by evidence aliunde. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

175. Prima facie, it is a valid and sufficient conveyance, and a party holding under it must be deemed to hold adversely, and not in subordination to the real title. Possession under it may ripen into a perfect title, and it cannot fail to prejudice the interests, if not the rights, of the lawful owner. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Cited 23 Cal. 437.

176. Such being the effect of the deed in this case, plaintiff cannot recover the purchase money without procuring a reconveyance of the property and a surrender of the possession, so as to place the parties in statu quo. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

Outside lands, conveyance of to one in possession, effect of. See ante, XIV, 4.

177. The act of Congress of July 1, 1870, relinquishing the interest of the United States in certain lands to the city and county of San Francisco, did not impart validity to alcaldes' grants. The only persons who were beneficiaries under said act were those who were in possession of land at the date of the passage of the act, or had been deprived of the possession thereof by the military authorities of the United States. (*Naglee v. Palmer*, 50 Cal. 641.)

178. Title acquired by San Francisco by virtue of act of Congress of March 3, 1851, to the pueblo lands, must inure to the benefit of bona fide holders under her grants. (*Cohas v. Raisin*, 3 Cal. 443.)

6. Funded Debt Commissioners; Rights of and Conveyances by.

179. The act of the city of San Francisco creating the board of sinking fund commissioners, and the deed executed to them of all the property of the city, is void for want of power in the city, and because said deed is within the statute of frauds. (*Smith v. Morse*, 2 Cal. 524.)

Cited 4 Cal. 148; 15 Cal. 514; 19 Cal. 21; 31 Cal. 39; 32 Cal. 49.

180. If the intention of the legislature by the act of May, 1851, to confirm the void acts of the common council, and the deed to the commissioners of the sinking fund, can be fairly inferred from the language of the act, query? (*Smith v. Morse*, 2 Cal. 524.)

181. Deed to commissioners of funded debt, under act of 1851, for the payment of the city debts, is a conveyance in trust for the purpose for which it was executed, leaving the residuary interest, after satisfying or discharging the trust, in the city, and, subject to this right of the commissioners, supposing it to exist, the city could still, without objection from third persons, control the subject of the

trust, *semble*. (Hubbard v. Sullivan, 18 Cal. 508.)

182. Deed of commissioners of sinking fund to commissioners of funded debt, executed in pursuance of the act of May 1, 1851, did not pass all the real estate of the city, but only such property as was embraced in the deed by the city to the commissioners of the sinking fund. (Board of Education v. Fowler, 19 Cal. 11.)
Cited 54 Cal. 458, 460, 461.

183. Act authorizing commissioners to compromise and settle certain claims made to real estate held by them, and to convey such real estate, is not unconstitutional. Its only object is to provide a new mode for the disposition of those portions of the property which cannot be advantageously disposed of at public sale, in consequence of existing doubts as to the title of the commissioners. (Babcock v. Middleton, 20 Cal. 643.)

184. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. (Heydenfeldt v. Hitchcock, 15 Cal. 514.)
Cited 19 Cal. 21; 31 Cal. 39; 32 Cal. 449.

185. The commissioners of the funded debt of the city of San Francisco are the exclusive judges of the necessity for the sale or lease of the property of the city held by them in trust, until the trust is finally closed, and their action cannot be interfered with nor their discretion be controlled by the city, or its assignee, except on the ground of fraud, or a gross abuse of discretion by the trustees. (Ellis v. Commissioners, 38 Cal. 629.)

Power to convey city front or wharves to board of commissioners of the sinking fund. See ante, 75.

Conveyance of beach and water lots by commissioners. See post, XIV, 10, e.

Conveyance of school lots. See post, XV.

186. The object of the provision of the act of May 1, 1851, providing for the funding of the floating debt, requiring a public sale of the property conveyed to the commissioners of the funded debt, when a sale is made, is to secure a fair price from the purchasers. If this object can be accomplished by a sale in any other mode the obligation of the contract is not impaired by legislation authorizing such other mode. (Babcock v. Middleton, 20 Cal. 643.)

187. A sale of land of the city of San Francisco by a portion of the board of commissioners of the funded debt does not pass a legal title upon which ejectment can be maintained. (Leonard v. Darlington, 6 Cal. 123.)
Cited 8 Cal. 201.

188. By the act of April 2, 1866, the commissioners of the funded debt were authorized, in certain cases—with the consent of the board of supervisors—to make conveyances of the trust lands; and they executed a deed to the plaintiffs, but whether with the consent

of the supervisors, the record did not show. Held, (1) that even if the deed was unauthorized by the trusts as originally defined in the act of May 1, 1851, or as modified by that of April 2, 1866, it operated to transfer to the grantees the legal estate, and the defendants, being mere intruders, could not assert the breach of trust as a defense to an action at law to recover the land; and (2) that the consent of the city was unnecessary, as the plaintiff had, under the sheriff's deed, succeeded to all the right to consent to the conveyance. (Le Roy v. Dunkerly, 54 Cal. 452.)

189. The commissioners of the funded debt of the city of San Francisco have power, under the twelfth section of the act of May 1, 1851, authorizing them to sell the realty conveyed to them by the commissioners of the sinking fund, created by ordinance of said city, to receive the "three per cent scrip" of the city instead of cash on the sale, it being conceded that the assets of the city were sufficient to pay all debts. (People ex rel. Davis v. Middleton, 14 Cal. 540.)

190. A general resolution passed by the whole board of commissioners of the funded debt, a year before the sale in question, that they would sell all the city property to pay her debts, will not give validity to the particular sale made in pursuance of a resolution to sell the particular lot, adopted by only three of the board shortly before the sale. (Leonard v. Darlington, 6 Cal. 123.)

191. The sales of land made by the commissioners of the sinking fund of San Francisco on the twenty-fifth day of January, 1851, were void for want of power in the commissioners. (Ellis v. Eastman, 32 Cal. 447.)

192. If it appear from the entire instrument that the grantors in the deed intended to execute the same in their official capacity as "commissioners of the sinking fund of the city of San Francisco," though attaching thereto their private seals and signatures only, it comes within the purview of the statute of March 25, 1858 (Stats. 1858, p. 84), which was intended to validate such sales and conveyances of the commissioners. (Ellis v. Eastman, 38 Cal. 195.)

1. Rights Arising Under Van Ness Ordinance.

a. Object of Van Ness Ordinance.

193. The object of the Van Ness ordinance was to protect actual possessors—parties seeking, by settlement, to build up homes within the city limits. (Wolf v. Baldwin, 19 Cal. 306.)

b. Act Ratifying Ordinance; Grant by Congress; Repeal of Ordinance.

194. The act of the state legislature of March, 1878, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and state, a title to the lands in said ordinance mentioned. (Hart v. Burnett, 15 Cal. 530, cited 17 Cal. 461, 19 Cal. 20, 23 Cal. 222, 33 Cal. 445, 34 Cal. 150; San Francisco v. Beideman, 17 Cal. 443, cited 18 Cal. 525.)

195. The act of 1858, ratifying and confirm-

ing ordinances 822 and 845 of the common council of the city of San Francisco, approved of the map of the Western Addition to said city with the streets and public squares thereon delineated, which was reported by the commissioners appointed by said council, and by said council approved. (*Sawyer v. San Francisco*, 50 Cal. 370.)

Cited 70 Cal. 324; 80 Cal. 59; 92 Cal. 416; 93 Cal. 245; 3 Mont. 87.

196. The act of the legislature passed May 11, 1858, ratifying and confirming the ordinance of the common council of San Francisco, approved June 20, 1855, by which the city relinquished the pueblo lands within its corporate limits to the possessors thereof, made said ordinance take effect by relation at the date of its passage. (*Pickett v. Hastings*, 47 Cal. 269.)

197. The statute of March 11, 1858, ratifying the Van Ness ordinance, gave to those claiming under the ordinance no new or additional ground of recovery not embraced in the ordinance itself. (*Pickett v. Hastings*, 47 Cal. 269.)

198. The act of the legislature of 1858, validating the alcalde grants, mentioned in the proviso to the second section of the Van Ness ordinance, is effectual for that purpose, whether the grants were originally valid or not, or whether the title of the city of San Francisco came by grant to the old pueblo, or had its origin, by presumption or grant, in the act of Congress. (*Payne v. Treadwell*, 16 Cal. 220.)

199. Whatever right or title, if any, the United States had in the lands embraced within the Van Ness ordinance, by the act of Congress of July 1, 1864, passed to the city of San Francisco, for the use and benefit of the persons in whom vested the Van Ness ordinance title. (*Pickett v. Hastings*, 47 Cal. 269.)

200. It is not clear that the order of the board of supervisors of the city and county of San Francisco repealing the Van Ness ordinance, before the passage of the act of 1858 confirming it, destroyed the power of the legislature to give due effect to the provisions of that ordinance. (*Hart v. Burnett*, 15 Cal. 530.)

201. Assuming that this repealing order was effectual to defeat the rights claimed to have vested under the ordinance, then the property claimed would belong to the city, and plaintiff here could not recover. (*Hart v. Burnett*, 15 Cal. 530.)

c. Construction of Ordinance; Who may Claim Benefit of.

202. The persons entitled to the benefit of the Van Ness ordinance consist of four classes: (1) Those who hold title by virtue of the grants and conveyances enumerated in the ordinance; (2) those who were in the actual possession by themselves, or by their tenants, on the first day of January, 1855, and so continued up to the twentieth day of June, 1855; (3) those whose possession had been "interrupted by an intruder or a trespasser," and "had been recovered by legal process"; and (4) those whose possession had been "interrupted by an intruder or trespasser,"

and "may be recovered by legal process." (*Pickett v. Hastings*, 47 Cal. 269.)

203. The persons embraced in such fourth class are such as might thereafter recover possession from such intruder, and such recovery was not one which might be had on one of the grants or conveyances mentioned in the ordinance, but a recovery on some right or title other than such grants or conveyances. (*Pickett v. Hastings*, 47 Cal. 269.)

204. By the words "legal process," used in the Van Ness ordinance, passed by the common council of San Francisco, and afterwards ratified by the legislature, is meant an action brought in a court of competent jurisdiction. (*Pickett v. Hastings*, 47 Cal. 269.)

205. Words "may be recovered" in the phrase "may be recovered by legal process," used in the Van Ness ordinance, mean "shall be recovered." (*Pickett v. Hastings*, 47 Cal. 269.)

206. The proviso in the Van Ness ordinance "Provided such possession has been continued up to the time of the introduction of the ordinance; or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process" only determines the right under the ordinance as between the actual possessor and a former possessor whom the first had deposed, and does not apply to the case of the city resuming possession of her own property, or, what is the same thing, a possession held by her license and permission, and does not operate to exclude her from her rights, and to deny her the benefits of her present lawful possession, from the mere fact that a long while before the passage of the ordinance some one else was in unlawful possession of her property, and was put out unlawfully by a succeeding trespasser having no better title. (*Hubbard v. Sullivan*, 18 Cal. 508.)

Cited 19 Cal. 25; 28 Cal. 223.

207. A confirmation by the Van Ness ordinance of the title to a lot granted by an alcalde inures alike to the benefit of all the tenants in common of the lot. (*Broad v. Broad*, 40 Cal. 493.)

Cited 44 Cal. 561; 54 Cal. 434.

Occupant of land reserved for school lots, rights of. See post, XV.

United States, whether a beneficiary under. See ante, 159, et seq.

Right of board of education against one claiming under Van Ness ordinance. See post, XV.

Right of occupant to beach and water lot. See post, XIV, 10, e.

Relinquishment by Congress, rights on. See ante, XIV, 1.

d. Possession, Sufficiency of and Evidence of; Ouster from Possession.

208. One claiming title to land in San Francisco under the Van Ness ordinance must show that either he or his grantors were in the actual possession of the land on the 1st of January, 1855, and thence next ensuing to the 20th of June, 1855. (*Boral v. Rollins*, 30 Cal. 408.)

209. Nature of possession required by the Van Ness ordinance discussed in the opinion

of Baldwin, J. (*Wolf v. Baldwin*, 19 Cal. 306.)

210. A title under the Van Ness ordinance does not accrue unless there is an actual possession of the premises. (*Judson v. Malloy*, 40 Cal. 299.)

211. By actual possession, as that term is used in the Van Ness ordinance, is meant that possession which is accompanied with the real and effectual enjoyment of the property. (*Davis v. Spring Valley W. W.*, 57 Cal. 543.)

212. The possession which the law requires to show a *possessio pedis* is the subjection of the land claimed to the will of the claimant, consisting in doing as he wishes with the land, and excluding others therefrom; and an actual and open occupation of a tract of land marked out by and within visible and defined boundaries, and a subjection of such land to the dominion of the occupant, to the exclusion of all others, is sufficient to show a *possessio pedis*, which, if continued long enough, will satisfy the requirements of the law, and establish title, under the Van Ness ordinance, whether there be an inclosure or not. (*Spotts v. Hanley*, 85 Cal. 155.)

213. The actual possession, by virtue of which parties obtain the title of the city of San Francisco to the pueblo lands under the second section of the Van Ness ordinance means a possession accompanied with the real and effectual enjoyment of the property: that possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriate use, according to the locality and character of the particular premises. An inclosure, by an ordinary fence, of the premises, without residence thereon, or improvements, or cultivation, or other acts of ownership, is of itself insufficient. (*Wolf v. Baldwin*, 19 Cal. 306.)

Cited 28 Cal. 223; 30 Cal. 633, 643; 40 Cal. 309; 57 Cal. 546.

214. What constitutes actual possession within this ordinance not here defined. (*San Francisco v. Beideman*, 17 Cal. 443.)

215. The nature of the possession in this case stated, and the conclusion reached that such possession brings defendant within the ordinance. (*San Francisco v. Beideman*, 17 Cal. 443.)

216. The proof of actual possession in this case is insufficient to enable plaintiffs to recover. (*Wolf v. Baldwin*, 19 Cal. 306.)

217. Occasional and casual acts of dominion exercised over land in San Francisco, without cultivating it or surrounding it with a fence, are not sufficient to establish title under the Van Ness ordinance. (*Pattee v. Moyle*, 44 Cal. 363.)

218. A mere inclosure by a fence is of itself only the declaration of an intention to appropriate and possess the premises; but does not, unaccompanied with any other acts, constitute the actual possession contemplated by the ordinance. (*Wolf v. Baldwin*, 19 Cal. 306.)

Cited 32 Cal. 18, 22; 39 Cal. 44, 46, 47; 41 Cal. 582; 3 Mont. 134.

219. The court cannot say that a fence built in San Francisco in 1850, and made of posts and boards, two boards and a cap high, was not a substantial fence, or that this in connection with building and occupying a house within it, and exercising control over the land, did not constitute an actual possession within the meaning of the Van Ness ordinance. The testimony was sufficient to require its submission to the jury. (*Satterlee v. Bliss*, 36 Cal. 489.)

220. The inclosure of a lot in San Francisco by building a fence around it made of posts eight feet apart and five feet high, with two boards nailed on the same, without actual occupation or cultivation of the lot, did not give such possession of the same to the person inclosing as to pass the title to him under the Van Ness ordinance. (*Polack v. McGrath*, 32 Cal. 15.)

221. Possession of a lot in San Francisco within the limits covered by the Van Ness ordinance, by a fence of posts and wires, four wires passing through each post, the fence being sufficient to turn cattle, but not goats and hogs, is sufficient to entitle the possessor to the benefit of the Van Ness ordinance. (*Howell v. Rogers*, 47 Cal. 291.)

222. A deed of a tract of land in San Francisco, only a portion of which has been so reduced to possession by the grantors as give them possession, or the right to possession or title under the Van Ness ordinance, will confer upon the grantees no right under the ordinance, except to the part actually inclosed and reduced to possession. (*Pattee v. Moyle*, 44 Cal. 363.)

223. One who entered on a tract of land in San Francisco, claiming the whole under a deed describing it by metes and bounds, and took actual possession of a part only, there being no adverse possession of the rest, acquired title under the Van Ness ordinance only to the extent of his actual and not of his constructive possession. (*Davis v. Perley*, 30 Cal. 630.)

Cited 31 Cal. 229; 32 Cal. 18; 40 Cal. 309.

224. The rule that one who enters into the actual possession of a part of a tract of land, claiming the whole, under a deed describing the whole, is in constructive possession of the whole, applies to land in San Francisco, within the district covered by the Van Ness ordinance, and to city lots. (*Donahue v. Gallavan*, 43 Cal. 573.)

225. If, on the first day of January, 1855, a person was in possession of land in San Francisco, within the limits of the Van Ness ordinance, as the tenant of another, or as against such person, an intruder who could have been evicted by legal process, the person thus in possession did not acquire title by the Van Ness ordinance, but the title vested in the landlord or the person who could have recovered possession. (*Brooks v. Hyde*, 37 Cal. 386.)

Cited 43 Cal. 476; 87 Cal. 335.

226. The court are inclined to consider the word "tenant," as used in the Van Ness ordi-

nance, as meaning a conventional tenant. (*Brooks v. Hyde*, 37 Cal. 366.)
Cited 44 Cal. 561.

227. The word "tenant," as used in the Van Ness ordinance, is not restricted in its meaning to a mere conventional tenant, as was intimated in *Brooks v. Hyde*, 37 Cal. 366, but applies to any party who holds the actual possession in subordination to another party under or by virtue of an agreement, either express or implied. (*Irvine v. Adler*, 44 Cal. 559.)

228. The actual possession of land in San Francisco within the boundaries of the Van Ness ordinance, by a tenant, was the possession of the landlord, so as to entitle him to the benefits of that ordinance, and the same result followed if the tenant assigned the lease, and his assignee took possession. (*McLeran v. Benton*, 43 Cal. 467.)
Cited 73 Cal. 344.

229. In determining whether title ever vested under the Van Ness ordinance, on a stale claim, all the acts and declarations, wherever made, are admissible against the party claiming, for the purpose of ascertaining what he did really do to bring himself within the purview of the ordinance. (*McFadden v. Wallace*, 38 Cal. 51.)

230. Certain testimony considered in the opinion, and held to be insufficient to establish possession of land within the meaning of the Van Ness ordinance. (*Davis v. Spring Valley Water Works*, 57 Cal. 543.)

231. After the facts tending to prove actual possession are in evidence it becomes a question of law whether those facts establish such actual possession as to confer title under the Van Ness ordinance. (*Davis v. Perley*, 30 Cal. 630.)

232. In determining the existence or non-existence of *possessio pedis* necessary to confer title to land in San Francisco, under the Van Ness ordinance, it is the peculiar province of a jury, under proper instructions of the court, to decide whether or not the acts of dominion relied on, considering the size of the tract, its peculiar condition, and appropriate use, were of such a character as usually accompany the ownership of lands similarly situated, and the court, when sitting without a jury should decide the same questions of fact upon the same basis. (*Spotts v. Hanley*, 85 Cal. 155.)

Object is to protect actual possessors. See ante, XIV, 7, a.

Right of occupant of beach and water lots. See post, XIV, 10, e.

Right of one in possession as against grantee of Mexican grant. See ante, XIV, 2.

233. The Van Ness ordinance was framed upon the theory that the better right to the bounty of the city rested with the first possessor, provided his possession was actual, and had not been voluntarily abandoned, and such prior actual possessor is entitled to the benefits of the ordinance, notwithstanding an interruption of his possession by the intrusion or trespass of others. (*Hubbard v. Barry*, 21 Cal. 321.)
Cited 28 Cal. 223.

234. The Van Ness ordinance vested the title in a person not in possession by himself or tenant on the first day of January, 1855, provided such person had been in possession before that time, and his possession had been interrupted by an intruder, and could be recovered by legal process. (*Valentine v. Mahoney*, 37 Cal. 389.)

235. One who was in possession of land in San Francisco, embraced within the area of the Van Ness ordinance, and who was ousted by an intruder before the ordinance took effect, in order to have acquired the Van Ness ordinance title, must have recovered possession from the intruder by virtue of his prior possession, in a suit commenced before his right of action on his prior possession was barred by the statute of limitations. He could not recover from such intruder by virtue of any title vested in him by the ordinance, but the recovery upon the prior possession vested in him the Van Ness ordinance title. (*Pickett v. Hastings*, 47 Cal. 269, cited 43 Cal. 19, 73 Cal. 344; *McLeran v. Benton*, 73 Cal. 329.)

236. A party who, on the first day of January, 1855, was in the actual possession of land in San Francisco, within the area covered by the Van Ness ordinance, claiming the same adversely to another party, and who continued in such possession up to the 20th of June, 1855, and up to the commencement of an action by such other, is *prima facie* entitled to the title conveyed by the Van Ness ordinance, and it devolves on the other party to show, not only that he was ousted from the possession, but also that his possession was such as, within the language of the ordinance, may be recovered by legal process. (*Pickett v. Hastings*, 47 Cal. 269.)

237. A defendant in ejectment for a lot in San Francisco, who had possession of the premises on the first day of January, 1855, and thence up to the passage of the Van Ness ordinance, cannot invoke the protection of that ordinance when the issue in the action is whether his possession was acquired by an intrusion upon the prior rights of the plaintiff. (*Keane v. Cannovan*, 21 Cal. 291.)

238. Persons who, before the passage of the Van Ness ordinance, had been in possession of land embraced within the area covered by it, and who had been ousted by intruders, and who had no other right or title than such as proceeded from prior possession, must have commenced their actions within the time prescribed by the statute of limitations, and the statute commenced running, as to such persons, on the eleventh day of April, 1855. (*Pickett v. Hastings*, 47 Cal. 269.)
Cited 43 Cal. 19; 73 Cal. 344.

Interruption of possession by city. See ante, 206.

e. Amount of Land Which may be Claimed Under.

239. The amount of land in San Francisco which, under the Van Ness ordinance, passed to a person in the actual possession was not limited to one block. (*Davis v. Perley*, 30 Cal. 630.)

240. The Van Ness ordinance does not limit

the quantity of land to which the actual possessor acquires the title of the city; and the courts cannot annex any limitation, but can only hold parties to clear proof of their actual possession. (*Wolf v. Baldwin*, 19 Cal. 306; *Davis v. Perley*, 30 Cal. 630.)

241. There is no limit as to the quantity of land to which parties in possession become entitled under the Van Ness ordinance. All that a claimant of lands within the limits of the city of San Francisco need show to entitle him to hold as against the city is that he was in actual possession of such lands on the first day of January, 1855. (*San Francisco v. Beideman*, 17 Cal. 443, cited 19 Cal. 318, 28 Cal. 223, 30 Cal. 637, 643; *Davis v. Perley*, 30 Cal. 630.)

f. Estoppel of One Claiming Under.

242. Plaintiff claiming through the Van Ness ordinance the right and title of the city is not in a position to say that the city had, at the time of the passage of the ordinance, no title or claim to the premises. (*Hubbard v. Sullivan*, 18 Cal. 508.) Cited 42 Cal. 557.

g. Time of Commencing Action Under.

243. The act of March 4, 1864 (Stats. 1863-64, p. 149), only prohibits a plaintiff in ejectment from relying on the Van Ness ordinance if he commences his action more than one year after its passage, and has not been in possession within the next preceding five years. It does not prohibit him from recovering on prior possession or paper title. (*Raimond v. Eldridge*, 43 Cal. 506.)

Action to recover land, when statute begins to run. See ante, 238.

h. Title Under.

244. Van Ness ordinance and act of legislature confirming same vested in the possessors described in the ordinance a title to the lands therein mentioned, as against the city of San Francisco. (*Carleton v. Townsend*, 28 Cal. 219.) Cited 42 Cal. 557.

245. If, as plaintiff contends in this case, the act of 1851 passed the title of the lot on which the Marine Hospital in San Francisco stands to the commissioners of the funded debt, then plaintiff cannot maintain his action, because, even conceding that the legislature had power to divest this title by the act of 1858 confirming the Van Ness ordinance, still that ordinance and that act only give the occupants the right, title, and interest of the city in the land so held. (*Hubbard v. Sullivan*, 18 Cal. 508.)

Title acquired by Van Ness ordinance. See ante, 235.

246. The effect of the Van Ness ordinance was to release to actual possessors, who were such on the 1st of January, 1855, the title and interest of the land so possessed. This interest was only the equity—in other words, the title subject to the trusts in favor of the city's creditors—of such property as was conveyed by the deeds to the commissioners of the sinking fund and the commissioners of the funded debt; and parties holding under the

ordinance hold, as to the property conveyed in these deeds, in subordination to this trust, just as the city itself holds. (*Board of Education v. Fowler*, 19 Cal. 11.) Cited 28 Cal. 223; 42 Cal. 556.

247. It was not the possession mentioned in the ordinance that conferred title, but the legislative confirmation of the ordinance. (*Valentine v. Mahoney*, 37 Cal. 389.)

248. Title under the Van Ness ordinance dates not from the time possession of the land was taken, but from the time of the passage of the act confirming the ordinance. (*Valentine v. Mahoney*, 37 Cal. 389.)

249. It cannot be said that one person acquired better title than another under the Van Ness ordinance. The one having the requisite possession took the title; the other took nothing. (*Valentine v. Mahoney*, 37 Cal. 389.)

Van Ness ordinance, title under. See *Homesteads*, 247.

i. Rights of Heirs.

250. The right or interest which a person held in the pueblo lands of San Francisco, by virtue of possession alone, prior to the passage of the Van Ness ordinance, if not devised by him, descended to his heirs, and could be distributed by the probate court. (*McLeran v. Benton*, 43 Cal. 467.)

8. Lease of Land.

251. If the charter of a city requires any sale or lease of the real estate of such city to be made at public auction to the highest bidder an ordinance of the council of the city making a lease of any portion of its realty to a corporation, upon the payment of a rent reserved, is void, and passes no title to the corporation. (*San Francisco etc. R. R. Co. v. Oakland*, 43 Cal. 502.)

Government reserve, rights of lessee of. See post, XIV, 11.

Lease of property. See ante, 185.

9. Whether Subject to Execution.

252. The municipal lands to which the city of San Francisco succeeded were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution. (*Hart v. Burnett*, 15 Cal. 530, cited 16 Cal. 291, 17 Cal. 484, 20 Cal. 482, 485, 21 Cal., 41, 28 Cal. 222, 74 Cal. 640; *Fulton v. Hanlow*, 20 Cal. 450, cited 42 Cal. 556.)

253. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. (*Hart v. Burnett*, 15 Cal. 530; *Fulton v. Hanlow*, 20 Cal. 450, cited 42 Cal. 456.)

254. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. (*Hart v. Burnett*, 15 Cal. 530; *Fulton v. Hanlow*, 20 Cal. 450, cited 42 Cal. 456.)

255. Sale of land in January and February,

1852, on an execution issued under a judgment against the city, rendered September 18, 1851, conveyed a legal title to the land, upon which ejectment can be maintained. (*Welch v. Sullivan*, 8 Cal. 165.)
Cited 70 Cal. 305; 1 Idaho, N. S., 289.

256. The act of Congress of 1851 vested the title of the ungranted lands within the city limits in the city of San Francisco, and a sheriff's sale in 1852, under a judgment against the city, entered in September, 1851, passed the title of the city in the purchaser. Per *Burnett, J.* (*Welch v. Sullivan*, 8 Cal. 165.)

Sale under execution en masse at inadequate price, validity of. See Executions, 154.
Lands of are not subject to execution. See Municipal Corporations, 199.

Redemption of city property sold on execution. See Municipal Corporations, 202, et seq.

Who may redeem from execution. See Municipal Corporations, 204, 205.

Beach and water lots whether subject to execution. See post, XIV, 10, f.

Judgment in action against does not affect subsequently acquired title. See Judgments, 326, et seq.

10. Beach and Water Lots.

a. Water-front of San Francisco, Line of and What Included in.

Conclusiveness of patent and survey as to ownership of tide lands. See ante, XIV, 1.

257. The act of March 26, 1851, which requires the city of San Francisco to deposit in the office of the secretary of state a map of the water lot property granted to the city by the same act, does not make such map conclusive evidence of the extent of said property, as the boundaries are completely specified in the act, and the question of what was the water line of the city at the date of the act is one of fact. (*Cook v. Bonnet*, 4 Cal. 397.)

258. The act of March, 1851, commonly called the San Francisco Water Lot Act, should be construed favorably to the city, and includes all land within the boundaries fixed by the survey referred to in the act. (*Hyman v. Read*, 13 Cal. 444.)

259. Nothing in the act of May, 1851, indicates any intention on the part of the legislature to exclude the public slips from the act of March. (*Hyman v. Read*, 13 Cal. 444.)

260. In an action of ejectment, where the question in controversy was the position of the red line, or water-front, of San Francisco, held, that a diagram made by the county surveyor, and believed by him to be correct, though not an official plat, was admissible in evidence for the purpose of showing what the party offering it claimed to be the true position of such line. (*People v. Klumpke*, 41 Cal. 263.)

261. In an action of ejectment by the state for land in San Francisco claimed to be outside of the red line, or water-front, held, that the map, purporting to have been made in 1864 by order of the state harbor commissioners, but not shown to have been approved or adopted by them, was not competent evidence in their favor to show the true location of the red line. (*People v. Klumpke*, 41 Cal. 263.)

262. The board of state land commissioners, appointed under the act of May 18, 1853, establishing such board (Stats. 1853, p. 219), was authorized to find the red line, or water-front, of San Francisco, as established by the act of March 26, 1851 (Stats. 1851, p. 307), and their map is competent evidence tending to prove the position of that line. (*People v. Klumpke*, 41 Cal. 263.)

263. In an action of ejectment by the state for land in San Francisco between Jackson and Pacific streets, and claimed by it to be outside of the red line, or water-front, held, that deeds of the state land commissioners, appointed under the act of May 18, 1853 (Stats. 1853, p. 219), for lands to the south of Jackson street, were not admissible for the purpose of showing the position of the red line. (*People v. Klumpke*, 41 Cal. 263.)

264. The question of the location of the San Francisco red line, or water-front, established by the act of March 26, 1851 (Stats. 1851, p. 307), is a question of fact; and the acts of official surveyors and boards in running and mapping out the line, though they tend to show its position, yet, as they could not change, they do not conclusively fix it. (*People v. Klumpke*, 41 Cal. 263.)

265. As the act of March 26, 1851, establishing the red line, or water-front of San Francisco (Stats. 1851, p. 307), mentioned a number of points on it with the same certainty as the initial point the true position of the line between any two of such points can be ascertained by drawing a line between them, and it is unnecessary for a survey to commence at the initial point. (*People v. Klumpke*, 41 Cal. 263.)

266. If the state land commissioners, appointed under the act of May 18, 1853 (Stats. 1853, p. 219), changed the red line, or water-front, of San Francisco, as laid down by the act of March 26, 1851 (Stats. 1851, p. 307), an alleged adoption and recognition by the state of the acts of the commissioners would not effect a change or create an estoppel in pais as against the state, unless it should be shown that the legislature and other officials, while adopting and recognizing such acts, knew that they had changed the line. (*People v. Klumpke*, 41 Cal. 263.)

Sale of land outside red line. See post, 287, et seq.

High-water mark, boundary in confirmation below, controls survey. See ante, 15.

Conclusiveness of patent to city. See ante, 16.

Survey of streets into tide water. See ante, XI.

b. Grant of to San Francisco; Nature of Interest in.

267. The fourth section of the act of March 26, 1851 (Stats. 1851, p. 307), commonly known as the Water Lot Act, did not constitute a contract between the state and the grantees under the act. (*Floyd v. Blanding*, 54 Cal. 41.)

Act granting water-front to San Francisco, construction of. See ante, XIV, 10, a.

268. The proviso in the act of March 26, 1851, granting certain beach and water lot

property in San Francisco to the city, that the city shall pay into the state treasury, within twenty days after their receipt, twenty-five per cent of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant. (*Holladay v. Frisbie*, 15 Cal. 630.)

Cited 16 Cal. 125; 42 Cal. 557; 64 Cal. 499; 84 Cal. 124.

269. Nor does the proviso create a trust in the city in favor of the state, so far as the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the state. The interest of the city in the property is a legal estate for ninety-nine years. When the property is once sold or disposed of by the city it is not charged with the payment of the percentage in the hands of the grantee or purchaser. That is a duty devolving on the city, with which the grantee or purchaser has no concern. (*Holladay v. Frisbie*, 15 Cal. 630.)

270. If there be any trust created by the proviso it is only a trust in the one-fourth of the proceeds which the city may receive, amounting only to a covenant on the part of the city, which in nowise qualifies the grant or affects the legal estate of the city in the premises. (*Holladay v. Frisbie*, 15 Cal. 630.)

271. The beach and water lot property mentioned in the act is not devoted by the grant of the state to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. (*Holladay v. Frisbie*, 15 Cal. 630.)

Cited 16 Cal. 125; 64 Cal. 499; 84 Cal. 124.

272. The proviso to the act operates only as a covenant on the part of the city, that if she make any sale or other disposition of the property, and realize from such sale or other disposition any moneys, twenty-five per cent of the same shall be paid into the state treasury. On the other hand, if the property be disposed of without the receipt of any moneys by the city, no obligation arises in favor of the state. (*Holladay v. Frisbie*, 15 Cal. 630.)

Grant did not pass control over Channel street. See ante, XI.

Acceptance of the act granting water-front. See post, 292.

273. The interest of the city and county of San Francisco in its beach and water lot property is a legal estate for ninety-nine years, and the right of the city for that term is as absolute a title and as free from public trust as if held by a private proprietor, and may be extinguished by adverse possession, under the statutes of limitation. (*City and County of San Francisco v. Straut*, 84 Cal. 124.)

274. Where legislature had before it an official map of the city at the time of the passage of an act concerning water lots, upon which was marked a selection called the "government reservation," to which map reference was made in the act, held, that

the map must be regarded as a part of the act, and that the legislature, in speaking of the reservation, must be presumed to have intended what was marked on the map as such. (*People ex rel. Burr v. Dana*, 22 Cal. 11.)

Tide lands were not part of pueblo of. See *Swamp and Overflowed Lands*, 25.

c. Rights of Owners Below Low-water Mark; Accretion.

275. The owner of a lot upon the water-front of San Francisco, as established by statute, below low-water mark, is not a "riparian proprietor" in the sense in which that term is used in the law of tide waters for the water-front of San Francisco is of statutory creation. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.)

276. The owner of a lot on the water-front of San Francisco does not become the owner of land adjoining the lot and lying in the harbor beyond it, which land has been gained from the sea by the gradual accretion of sand and earth caused by a purpresture, by the erection of a wharf in the public harbor beyond it. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.)

277. The doctrine that lands gained from the sea by washing up of sand or earth by little and little become the property of the owner of the land adjoining does not apply to a marine increase of alluvion caused by a purpresture, by the erection of a wharf in a public harbor. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.)

278. In case of an increase of land by the accretion of alluvion in the bay on the water-front of San Francisco, as established by statute, the owner of the lot adjacent has no right of entry thereon to the exclusion of the state, nor can he maintain ejectment against a stranger. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.)

d. Title of Commissioners of Funded Debt to; Mission Bay.

279. The legal title of the city of San Francisco in the beach and water lots granted to her for the term of ninety-nine years, by the act of March 25, 1861, vested, by virtue of the deed of the commissioners of the sinking fund, and the act of May 1, 1851, and by the acceptance by the city of the terms of that act, and its consent to the transfer, in the commissioners of the funded debt. (*Le Roy v. Dunkerly*, 54 Cal. 452.)

Title of commissioners. See post, 309, 310.

280. The deed of May 24, 1851, from the commissioners of the sinking fund to the commissioners of the funded debt of San Francisco, transferred to the latter the title to the tide land on Mission bay, vested in the city of San Francisco by the act of March 26, 1851. (*Friedman v. Nelson*, 53 Cal. 589.)

Sale of Mission creek, validity and effect of. See ante, 156, 157.

Power of commissioners to sell beach and water lots. See post, XIV, 10, e.

e. Conveyances of.

281. The city of San Francisco, in the sale of beach and water lot property, acted in the

capacity of a trustee of the state, under a delegated statutory power, which must be strictly pursued. (*Holland v. San Francisco*, 7 Cal. 361.)

Disapproved 16 Cal. 621; 21 Cal. 362.

282. The land directed by the terms of ordinance No. 481 to be sold was set apart and dedicated as a public dock by an ordinance passed in 1852, and, while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. (*McCracken v. City of San Francisco*, 16 Cal. 591.)

283. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the 3d of April, 1850, in some book of record in the possession and under the control of the recorder of San Francisco, are void. (*Chapin v. Bourne*, 8 Cal. 294.)

284. The Leavenworth alcalde grants could not pass title or affect the beach and water lot property of San Francisco, except as far as conceded by the act of March 26, 1851, and upon a compliance with the requisitions thereof. (*Chapin v. Bourne*, 8 Cal. 294.)

285. The board of tide land commissioners, under the act of April 1, 1870 (Stats. 1869-70, p. 541), had no authority to dispose of lands, at that time, lying above high-water mark. (*Knight v. Roche*, 56 Cal. 15.)

286. The board of commissioners of the sinking fund of San Francisco, created by an ordinance of the common council August 23, 1850, had no power to convey the wharves or city front of said city. (*Smith v. Moore*, 2 Cal. 524; *Heydenfeldt v. Hitchcock*, 15 Cal. 514; *People ex rel. Board of State Harbor Commrs. v. Broadway Wharf Co.*, 31 Cal. 33.)

287. The commissioners appointed under act of May 18, 1853, to sell land belonging to the state on the water-front of San Francisco had no power to sell any of said land without the "red-line map" of the water-front, required to be made by the fifth section of the act of March 26, 1851, commonly called the Beach and Water Lot Act. (*Knight v. Haight*, 51 Cal. 169.)
Cited 56 Cal. 20, 25.

288. In a suit by the state for land in San Francisco, outside of the red line, or water-front, claimed by defendants under deeds from the board of state land commissioners, appointed under the act of May 18, 1853, (Stats. 1853, p. 219). Held, that, as the board was destitute of authority to sell such lots, it was no error to exclude defendants' proffered evidence of the reports of the board to the legislature and the controller's receipts for the purchase money paid. (*People v. Klumpke*, 41 Cal. 263.)

289. Deeds from the state land commissioners, appointed under the act of May 18, 1853 (Stats. 1853, p. 219), so far as they include lands in San Francisco, lying outside of the red line, are void. (*People v. Klumpke*, 41 Cal. 263.)

290. The authority of the board of commissioners, under the act of May 1, 1855, relative to a sale of the state's interest in the water-line front of the city of San Francisco, as defined by the act of March 26, 1851, is limited to the property within the boundaries defined by the act; and a sale by them of lots not within those boundaries is a nullity, and cannot constitute cloud of title. Hence an injunction against such sale will not lie. (*Kisling v. Johnson*, 13 Cal. 56.)

291. The act of the 26th of March, 1851, granted to the city of San Francisco certain beach and water lot property in San Francisco for ninety-nine years. The sale to defendant of a portion thereof, by the state board of land commissioners, under the act of May 18, 1853, passed nothing but the state reversionary interest. (*Chapin v. Bourne*, 8 Cal. 294.)

292. Deeds executed by the treasurer of the city and county of San Francisco in accordance with the act of April 26, 1858, above named, do not pass to the purchasers the title of the city to the slip property sold in December, 1853, under ordinance No. 481, for the reason that the city has never accepted that act; and without such acceptance the legislature could not divest the estate of the city acquired by the legislative grant under the Water Lot Act of 1851. (*Grogan v. San Francisco*, 18 Cal. 590.)

293. Under the act of April 26, 1858, entitled "An act to authorize the treasurer of the city and county of San Francisco to execute certain deeds and cancel certain claims," and providing that the treasurer shall receive from purchasers at the sale of the city slip property in December, 1853, any sum remaining unpaid by them respectively for the property sold under ordinance No. 481, payable in, among other items, "any genuine city controller's warrants," issued on or after May 1, 1851, the treasurer had no authority to receive any controller's warrants except such as represented a genuine indebtedness of the city. It was not sufficient that the warrants were genuine in the sense that the signatures of the officers attached to them were not forged; but they must have been issued by authority of the city, and have been a valid obligation against the city. (*Grogan v. San Francisco*, 18 Cal. 590.)

294. Where the city of San Francisco, so far as she had any rights in the premises, had by her own voluntary acts, parted with them, any attempt on her part to resume them, by depriving the public of the easement, or denying to purchasers of lots the right of way, except on payment of wharfage, etc., was clearly illegal. (*Breed v. Cunningham*, 2 Cal. 361.)

295. Where a deed granted "all that beach and water property lying between Folsom street on the north, Ship's channel on the east, the city limits on the south, and Price street on the west, and known on the said map as blocks numbers one (1) to thirty-two (32) inclusive," held, that a block of "beach and water property" lying within the exterior boundaries was included, notwithstanding it was numbered thirty-three (33) on the map

referred to in the deed. (*Friedman v. Nelson*, 53 Cal. 589.)

296. The interest of plaintiff derived from a conveyance of the commissioners under the act of May 18, 1853, is only to the reversion after the ninety-nine years designated in the act of March 26, 1851. (*Holladay v. Frisbie*, 15 Cal. 630.)

297. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in her beach and water lot property on the first day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day, provided their possession was continued up to June 20, 1855, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process, by virtue of the Van Ness ordinance and the act of March 11, 1858 ratifying and confirming the same, and such parties can defeat the claim of plaintiff who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18, 1853, providing for the sale of the state's interest in the property within the water-line front, as defined by the act of March 26, 1851. (*Holladay v. Frisbie*, 15 Cal. 630.) Cited 15 Cal. 623; 28 Cal. 223.

298. A conveyance of the city's interest in tide lands by a majority of the commissioners of the funded debt, and held to be ineffectual by the decision in *Leonard v. Darlington*, 6 Cal. 123, for the reason that two of the five commissioners did not sign the deed, is cured by the act of April 14, 1857, ratifying and confirming such conveyance. (*Friedman v. Nelson*, 53 Cal. 589.)

299. The appropriation for municipal purposes of the moneys received from the sales in December, 1853, of the city slip property did not amount to a ratification of the sales. (*McCracken v. San Francisco*, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 590.)

300. The act of March 26, 1851, making provision for the disposition of the beach and water lot property of San Francisco, operated as a confirmation of all "ayuntamiento sales" and "alcalde grants" of said property theretofore made, and upon the passage of said act the title of the grantees and their successors in interest related back to the date of the sale or grant. (*Seabury v. Arthur*, 28 Cal. 142.)

301. Where there had been more than one grant of any portion of said property before the passage of the act by an Alcalde in the usual mode, or in pursuance of a sale, or by order of the ayuntamiento, the confirmation by relation attached to the oldest grant, and vested the title in the grantees of such eldest grant. (*Seabury v. Arthur*, 28 Cal. 142.)

302. Purchasers at the sales of the city slip property in San Francisco, in December, 1853, under alleged ordinance No. 481, acquired no title or claim of title by their bids and the payment of their money. The city obtained the money without consideration and used it, and is legally bound to refund it, unless some subsequent matter has released her from lia-

bility. (*Grogan v. San Francisco*, 18 Cal. 590.)

Cited 21 Cal. 366.

303. The complaint, in an action to recover back from the city of San Francisco purchase money paid upon the invalid sales of her city slip property in 1853, was filed April 21, 1856, and alleged that one installment of the purchase money was paid December 27, 1853, another February 27, 1854, and a third April 27, 1854, and that these several payments were received by the city on the respective days of their payment. The referee to whom the case was referred found, as a fact, that the several payments were made to the city and accepted by her as alleged in the complaint. Held, that the defense of the statute of limitations pleaded by the city must be sustained as to the first two installments, and disallowed as to the third. (*Pimental v. San Francisco*, 21 Cal. 351.)

Cited 1 N. Dak. 314.

304. Where the treasurer received in payment of sums remaining unpaid upon the sales of December, 1853, controller's warrants not representing any legal or equitable indebtedness of the city, and executed a deed under the act of 1858, which was accepted by the purchaser, the treasurer acted without authority, and his deed is inoperative to pass any interest in the property; the title remains in the city, and the purchaser may recover from her the money paid upon the alleged sale in December, 1853. (*Grogan v. San Francisco*, 18 Cal. 590.)

305. The several cases which have been before this court in relation to the liability of the city of San Francisco to the parties who bid off the city slip property at the attempted sale by the city authorities in December, 1853, under an alleged ordinance, designated as ordinance No. 481, commented upon, and held to have decided and settled the following points: (1) That the ordinance, so called, was never passed, and was, therefore, a nullity; (2) that the sale made in pursuance of it was, therefore, invalid, and passed no title to the bidders; (3) that the bidders were entitled to recover back from the city the purchase money paid by them, and received and appropriated by the city authorities; (4) that they were not precluded from a recovery either: (1) By reason of any want of privity between themselves and the city; or (2) by the alleged subsequent adoption by the city authorities of the ordinance directing the sale; or (3) by reason of a subsequent alleged ratification of the sale by an appropriation of the proceeds; or (4) by the clause in the city charter restraining the corporation from contracting liabilities beyond the sum of fifty thousand dollars; or (5) by the act of the legislature of 1858, authorizing the city treasurer to execute deeds to the purchasers on certain conditions. (*Pimental v. San Francisco*, 21 Cal. 351.) Cited 23 Cal. 318.

306. Claims against the city of San Francisco by the bidders at the attempted sale in December, 1853, for the purchase money paid on such sale, are within the fourth subdivision of the seventeenth section of the Limitation

Act, and are barred by a failure to sue within two years from the date of the receipt of the money by the city. (*Pimental v. San Francisco*, 21 Cal. 351.)
Cited 83 Cal. 140, 141.

Sale of Mission creek, validity and effect of. See ante, 156, 157.

Sale of swamp lands within five miles. See *Swamp and Overflowed Lands*, 63.

f. Sale of on Execution; Liability to Assessment.

307. The interest of the city of San Francisco in her beach and water lot property, under the act of March 28, 1851, is a legal estate for ninety-nine years, not qualified by any conditions, or subject to any specific uses, and therefore a leviable interest liable to sale on execution. (*Holladay v. Frisbie*, 15 Cal. 630; *Wheeler v. Miller*, 16 Cal. 124.)
Cited 54 Cal. 459.

308. *Smith v. Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1, 1851, may possess in this property are not passed on. (*Holladay v. Frisbie*, 15 Cal. 630.)
Cited 54 Cal. 459.

309. A purchaser of beach and water lot property, at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien, upon the property sold, previous to the act of May 1, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. (*Wheeler v. Miller*, 16 Cal. 124.)

310. In this case, as the record does not show that the judgment ever became such lien, the decision giving title to the purchaser must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. (*Wheeler v. Miller*, 16 Cal. 124.)

311. Lands, the title to which is vested in the state, under the act of Congress donating the swamp lands to the states, are not liable to the assessment in the city and county of San Francisco, levied under the order of the board of supervisors, called order No. 800, which assessment was made to raise a fund to pay the possessors of outside lands dedicated to public use the value of the lands so dedicated. (*Mason v. Austin*, 46 Cal. 335.)

11. Government Reserve and Point San Jose Military Reservation; Rights of Lessees or Occupants.

312. Under the confirmatory clause of the San Francisco Water Lot Act of March 28, 1851, a lessee of the property known as the "government reserve," under lease from Capt. Keyes in 1849, is entitled at the termination of the lease to remove the buildings erected upon the property during the lease. (*Friedman v. Macy*, 17 Cal. 226.)
Distinguished 19 Cal. 383.

313. The effect of this clause, if not to give validity to the lease, was to secure to the lessee the possession and enjoyment of the property for the time and in the manner therein named. The intention was to confirm to the lessee the particular estate and interest mentioned in the lease, with the privileges and immunities provided therein. (*Friedman v. Macy*, 17 Cal. 226.)

314. The term "estate," as used in the confirmatory clause of the Water Lot Act of March 28, 1851, is not restricted to the mere possession under the lease, the mere term of the lease, but means the right, title, and interest of the lessee. (*Friedman v. Macy*, 17 Cal. 226.)

315. The act of Congress of July 1, 1870, relinquishing to the city of San Francisco, in trust for the present or former occupants, the "Point San Jose Military Reservation," in the city of San Francisco, did not make those who, many years before the passage of the act, obtained deeds for large tracts from grantors out of possession, and who performed no act except to erect a house within the limits of the tract, its beneficiaries. (*Le Roy v. Cunningham*, 44 Cal. 599.)
Cited 60 Cal. 340; 87 Cal. 334.

316. The entry upon one hundred and sixty acres of said reservation, under a deed describing it, and the erection of a house on it, without inclosing or cultivating any part of it, did not constitute an actual possession of the whole one hundred and sixty acres, within the purview of said act of July 1, 1870. (*Le Roy v. Cunningham*, 44 Cal. 599.)

317. If a tenant, who has leased from one in possession of a portion of the "Point San Jose Military Reservation," sells out to a stranger, and puts him in possession, the stranger is not in bona fide possession, within the meaning of that phrase as used in said act of July 1, 1870, and is not entitled to the benefit of said act as a cestui que trust. (*Le Roy v. Cunningham*, 44 Cal. 599.)

318. The "actual bona fide possession" entitling a party to a conveyance of the legal title, referred to in the act of July 1, 1870, releasing to San Francisco, to hold in trust for the possessors, the "Point San Jose Military Reservation," is an actual possession, which was bona fide as between adverse claimants, and not as against the government. It is immaterial whether the possession, as against the government, was good or bad. (*Le Roy v. Cunningham*, 44 Cal. 599.)
Cited 47 Cal. 269; 3 Mont. 135.

319. The defendant, being a mere intruder upon the possession of the plaintiff, and having no claim to the title of the city and county, could not be permitted to show that the plaintiff was not a beneficiary under the act of July 1, 1870, granting the Point San Jose Military Reservation to the city, or that the city and county had no right to convey to him. (*Palmer v. Galvin*, 72 Cal. 183.)

320. A person who is not entitled to a conveyance from the city cannot raise the question whether the city of San Francisco made the conveyance of a portion of the "Point San Jose Military Reservation" to the person

who was entitled to it under the act of Congress of July 1, 1870. (*Le Roy v. Cunningham*, 44 Cal. 599.)
Cited 52 Cal. 261; 72 Cal. 186; 10 Col. 69.

XV. Schools in, and School Lands.

321. The general provision of the Political Code as to the control of city schools by the board of education are applicable to the city and county of San Francisco; and it is not governed by the Consolidation Act alone. The general statute which applies to all cities must control special statutes made applicable to particular cities. (*Kennedy v. Board of Education*, 82 Cal. 483.)

322. The salaries of teachers, under the Consolidation Act, should be paid in the same manner as other claims against the treasury. (*Knox v. Woods*, 8 Cal. 545.)

Act relating to salaries in cities over one hundred thousand. See *Schools*, 26, 27.

323. Schoolhouse sites set apart or reserved by the city of San Francisco for its own use within its corporate limits, as defined by the charter of 1851, did not pass, under the Van Ness ordinance, to a person or persons who might have been in the actual possession of the lots in 1855. (*Board of Education v. Martin*, 92 Cal. 209.)
Cited 92 Cal. 418; 93 Cal. 248; 99 Cal. 151.

324. A schoolhouse site reserved by the city for its use, under the Van Ness ordinance, was reserved for public purposes, and is public property, to which no title can be acquired by adverse possession; and the right of action to recover possession of the same for school purposes is not subject to the statute of limitations. (*Board of Education v. Martin*, 92 Cal. 209.)

325. The city of San Francisco, under the charter of 1851, had the power, by resolution of the two boards of aldermen, to reserve the lots in question from sale, and keep them for school purposes, subject only to the superior title of the commissioners of the funded debt; and the fourth section of the act of 1858, validating the Van Ness ordinance, so far as it mentions property reserved and set apart for school-sites, was intended to embrace such property as was reserved and set apart by resolution of the two boards. (*Board of Education v. Fowler*, 19 Cal. 11.)
Cited 99 Cal. 151.

326. The lots so set apart or reserved by the city for its own uses did not pass, under the Van Ness ordinance, to a person in actual possession of the same on the 1st of January, 1855. (*Board of Education v. Fowler*, 19 Cal. 11.)
Cited 92 Cal. 212.

327. This reservation of the lots for school purposes was not a sale or disposition of them so as to pass to third persons the interest of the city, but was simply a reservation of the lots for a particular town purpose. (*Board of Education v. Fowler*, 19 Cal. 11.)

328. If such reservation were an attempted sale, then there would be great force in the argument that such sale could only be by ordinance in the form of a law, and not by

mere resolution. (*Board of Education v. Fowler*, 19 Cal. 11.)

329. In 1856 commissioners were appointed by the common council of San Francisco to select lots for school purposes. The same year they submitted a report and accompanying map, designating twenty-eight lots as having been selected. The map was certified by the commissioners to be authentic and correct, and the lots selected were colored brown. The report and map were approved by the council. Held, that the map, with the accompanying certificate and report, sufficiently identify the lots reserved for school purposes. (*Board of Education v. Donahue*, 53 Cal. 190.)
Cited 55 Cal. 646, 650; 92 Cal. 417.

330. The deed, executed August 3, 1858, by the commissioners of the funded debt of San Francisco to the board of education of said city, in pursuance of the act of April 26, 1858 (*Stats.* 1858, p. 341), of certain lots in said city set apart by said commissioners in 1852, at the request of the common council, for school purposes, which lots were embraced in the deed of 1850 by the city to the commissioners of the sinking fund, vests such a title in the board of education as to maintain ejectment against parties claiming under the city, by force of possession on the 1st of January, 1855, and the Van Ness ordinance and the act of 1858 confirming it. (*Board of Education v. Fowler*, 19 Cal. 11.)

331. This deed of the commissioners passed whatever interest the city possessed in the premises, the city having by its previous acts assented to the reservation for schools of these school-sites. The commissioners themselves not objecting to the act of the legislature, but accepting and acting upon its provisions, and having large powers of discretion to be exercised for the benefit of the city, third persons, other than creditors holding the funded bonds of the commissioners, cannot question the validity of the deed; and even such creditors cannot question the deed, except by direct proceedings to subject the property to the purposes of the trust. They cannot interpose any objections to the deed in an action of ejectment founded upon it. (*Board of Education v. Fowler*, 19 Cal. 11.)

332. The purpose and effect of the funding act of May 1, 1851, in this aspect of it, that is, as a conveyance or the authority for a conveyance of this city property, are that it is a conveyance to the commissioners of this property upon certain express trusts, to be used only for such trusts, and the title to return to the city upon the fulfillment of the trusts. If the debts were paid by the city, or the creditors released their claims, the property would become again the property of the city in full ownership. The legal title, as in other cases of trust deeds for the security of debt, was in the grantee, the equity of redemption, and the residuum after the satisfaction of the trust debts in the city. The city could still sell or dispose of this residuary interest, could take care of and preserve the estate; perhaps could go in possession of it, subject only to the superior right of the commissioners so long as the debts were unpaid. (*Board of Education v. Fowler*, 19 Cal. 11.)

333. The board of education of the city and county of San Francisco is a legal body, capable of suing for lots conveyed to them by the fund commissioners. (Board of Education v. Fowler, 19 Cal. 11.)

334. The board of education of San Francisco may, under the statutes defining its rights and powers, maintain ejectment for a school lot. (Board of Education v. Donahue, 53 Cal. 190.)

335. A quitclaim deed in 1854 from B., who claimed under a Colton grant, releasing the grantor's title to the city, does not prevent a recovery by plaintiff in this suit, as such deed neither shows nor tends to show that the city had no other title, nor does it impair the effect of the previous acts of the city in favor of the board, or the acts of the fund commissioners. (Board of Education v. Fowler, 19 Cal. 11.)

336. After the transfer by the legislature to the board of education of sole power to sue for all lots, lands, and property belonging to or claimed by the school department, the city or county, or its attorney in her behalf, had no authority to submit to any court the determination of the rights of the board of education to a schoolhouse site, and any judgment rendered against the city and county in favor of a possessor of such site is no bar to an action by the board of education to recover possession thereof. (Board of Education v. Martin, 92 Cal. 209.)

337. In an action of ejectment brought by the board of education against the possessors of a schoolhouse site, where the title of the plaintiff depends upon a reservation by the city under the Van Ness ordinance, and that of the defendants, as derived under the same ordinance, depends upon the fact that it had not been so reserved, the trial court should find directly upon the issue as to whether or not such reservation had been made; and it is not sufficient to incorporate into the findings evidence upon that subject which would support a finding that such reservation had been made, there being no finding of the ultimate fact, or of probative facts from which the ultimate fact would necessarily result. (Board of Education v. Martin, 92 Cal. 209.)

Power of board of education to divert fund. See Schools, 11.

Supervisors cannot authorize school on public square. See Schools, 13.

Schoolhouse cannot be erected on public square. See Schools, 13.

Board of education cannot employ inspecting teacher. See Schools, 28.

Removal of teachers. See Schools, VI.

SAN FRANCISCO STOCK EXCHANGE.

See Stock and Exchange Board.

SANITARY LAWS.

See Public Health.

Constitutionality of. See Constitutional Law, VIII, 13, d.

Statutes relating to drainage. See Swamp and Overflowed Lands, XVI.

SAN JOAQUIN COUNTY.

The act entitled "An act making the county treasurer of San Joaquin county ex officio tax-

collector," passed April 2, 1866, was not designed to fill a vacancy in the office of tax-collector, but it was to make the treasurer, instead of the sheriff, of San Joaquin county tax-collector. In so far as the act provides for the transfer of said office to take place before an election of such treasurer occurs it is unconstitutional and void. (People ex rel. Rynerson v. Kelsey, 34 Cal. 470.)

SAN JOSE.

1. The mayor and common council of the city of San Jose can sue in the corporate name for the recovery of such real property as belongs to the city. (Wallace v. Mayor of San Jose, 29 Cal. 180.)

2. The mayor and common council of the city of San Jose have no power to enter into a contract by which the city becomes obligated to pay an attorney at a future time a sum of money if he succeeds in placing the city in possession of certain real estate, unless there is money in the treasury at the time to pay the same, after paying the expenses of the city government and all other demands legally due. (Wallace v. Mayor of San Jose, 29 Cal. 180.)

3. The mayor and common council of San Jose have no authority to bind the city by the creation of a debt to arise in future, unless there is money in the treasury at the time to pay the same, after paying the expenses of the government and all other demands legally due. (Wallace v. Mayor of San Jose, 29 Cal. 180.)

Cited 52 Cal. 608; 71 Cal. 633; 74 Cal. 337.

Ordinance abolishing street commissioner and substituting fees. See Ordinances, 106.

Justice of, jurisdiction over offenses. See Criminal Law, 23.

Confirming void execution sale of property, effect of. See Municipal Corporations, 201.

Evidence of want of funds in action against. See Municipal Corporations, 196.

SAN LUIS OBISPO.

Recorder of. See Recorders, 6.

Fees of recorder. See Offices and Officers, 122.

SAN MATEO COUNTY.

Special school tax in. See Taxation, 866.

Constitutionality of San Mateo road law. See Highways, 114.

Road laws in. See Highways, 19, et seq, 77.

Alteration of road in. See Highways, 113, 114.

SANTA BARBARA.

Rate of tax in. See Taxation, 465.

SANTA CLARA.

A person claiming title to land in the town of Santa Clara which, by virtue of the authority conferred by the act of Congress of March 1, 1867, "to quiet title to lands in the towns of Santa Clara and Petaluma," had been conveyed by the trustees of the town to another person who was in possession of the premises at the time of the passage of the act, must show that the grantee entered or held the possession by his license or in subordina-

tion to his title. (*Black v. Galindo*, 40 Cal. 171.)

Railroad bonds of, mandamus to compel payment. See Bonds, 66.

Act for opening private roads in provides compensation. See Highways, 91.

Power of supervisors to condemn road. See Highways, 26.

Estray law of. See Animals, 4.

Duty to fence against animals. See Animals, 12.

SANTA CRUZ.

A joint occupancy by a husband and wife of land in the town of Santa Cruz, which terminated by the death of the wife ten years before the passage of the act of Congress to quiet title to lands in said town, approved July 23, 1866, was not a bona fide occupancy at the date of its passage, and would not constitute the land community property, as against a grant made by the town to the husband as a bona fide occupant at the time of the passage of the act. (*Labish v. Hardy*, 77 Cal. 327.)

Cited 87 Cal. 334, 341.

Aid to railroads by. See Railroads, II.

Highway by user in. See Highways, 13.

Change of school district by incorporation of city. See Schools, 7.

SANTA ROSA.

The act of March 13, 1876, extending the corporate limits of the city of Santa Rosa is constitutional. (*City of Santa Rosa v. Coulter*, 58 Cal. 537.)

Cited 72 Cal. 168.

SATISFACTION.

See Accord and Satisfaction.

Effect of as a discharge in contempt. See Contempt, V, 7.

What may be taken in. See Executions, XII.

Judgment, satisfaction of. See Judgments, XIX.

SAVING CLAUSES.

In statutes. See Statutes, IX.

SAVINGS BANKS.

See Banks and Banking.

Taxation of. See Taxation, IV, 6.

SCHEDULES.

Insolvency, schedule in. See Bankruptcy and Insolvency, VI, 5.

Bankruptcy, effect of omission of creditors. See Bankruptcy and Insolvency, X, 6, b.

Want of. See Assignments for the Benefit of Creditors, V, 4.

SCHOOL LANDS.

See Public Lands.

Grant to state of sixteenth and thirty-sixth sections. See Public Lands, III, 2.

SCHOOLS.

I. Adoption of Public School System.

II. School Districts; Municipal Charter, How Far Controls.

III. Boards of Education.

IV. Schoolhouses and School Lots; Erection of Schoolhouses on Public Squares.

V. Admission of Children to Schools.

VI. Teachers.

VII. Superintendents.

VIII. Text-books.

IX. School Fund; Taxes; Bonds.

X. Requisitions; Warrants.

Colleges. See Colleges.

California School of Mechanical Arts. See Trusts and Trustees, III.

State University. See State University.

San Francisco, schools in. See San Francisco, XV.

I. Adoption of Public School System.

1. The provisions of article IX of the constitution making education and the management and control of the public schools a matter of state supervision, and directing the legislature to provide a "system of common schools," require the adoption of one system, which shall be applicable to all the common schools. (*Kennedy v. Miller*, 97 Cal. 429.)

II. School Districts; Municipal Charter, How Far Controls.

2. A school district when organized as provided by the Political Code is a public corporation of a quasi municipal character, possessing such authority as has been conferred by the legislature, to be exercised in the mode and within the limits prescribed by the statute. (*Hughes v. Ewing*, 93 Cal. 414.)

3. The legislative declaration, in section 1576 of the Political Code, that every incorporated city is a school district, though it makes each school district a public corporation, does not import into the organization any of the provisions of the city charter, or limit the powers and functions which, as a school district, it has by virtue of the Political Code. (*Kennedy v. Miller*, 97 Cal. 429.) Cited 97 Cal. 444.

Statute controls municipal charter. See post, VII.

4. The legislature has the power to change the boundaries of a school district, and in the exercise of such power it may make such provision respecting the property and obligations as it may deem equitable or proper, and its action is conclusive. (*Hughes v. Ewing*, 93 Cal. 414.) Cited 97 Cal. 432; 99 Cal. 27.

5. When the boundaries of a school district are changed, either by forming a new corporation out of the territory of the original one or by transferring a portion of the territory to another corporation, in the absence of any provision on the subject, the old corporation will be entitled to all the property and be solely liable for all the obligations, and the territory taken therefrom will not be entitled to any of the corporate property or liable for any of the obligations of the old corporation. (*Hughes v. Ewing*, 93 Cal. 414.)

6. By a change in the boundaries of a

school district the public corporation or district does not lose its identity or name or cease to be the same legal entity that it was before. (*Hughes v. Ewing*, 93 Cal. 414.)

Change of boundaries, effect on liability for tax. See post, 53.

7. That portion of Bay View school district which lies within the exterior boundaries of the city of Santa Cruz ceased to be a portion of such school district upon the incorporation of the city, which thereupon constituted a school district by virtue of section 1576 of the Political Code, and the maintenance of a school by such district within the city limits is not such a maintenance of a school within the district as entitles Bay View school district to demand an apportionment to it of the public school fund. (*Bay View School District of Santa Cruz County v. Linscott*, 99 Cal. 25.)

8. A school district is a corporation organized for educational purposes, and can, therefore, take by will. (*Estate of Bulmer*, 59 Cal. 131.)

Cited 97 Cal. 432.

San Diego, school districts in. See San Diego.

III. Boards of Education.

9. Powers and duties of boards of education in cities are the same as those of boards of trustees in other school districts, and cannot trench upon the system that the legislature has provided for the entire state. (*Kennedy v. Miller*, 97 Cal. 429.)

Cited 99 Cal. 152.

10. Each board of education, whether of a city and township or county, is local as to the territory of its jurisdiction, and, where portions of a county are subject to local boards, the county board is local as to the balance of the county. (*People ex rel. Beckwith v. Board of Education of Oakland*, 55 Cal. 331.)

11. Board of education of city and county of San Francisco is a creature of the legislature, and has only such powers as have been conferred on it, and has no authority to divert the moneys of the school fund to any purposes other than such as have been expressly authorized by law. (*Barry v. Goad*, 89 Cal. 215.)

12. The special act of March 25, 1874, establishing and defining the powers and duties of the board of education of Nevada school district, is constitutional and valid, notwithstanding that at the time the act was passed section 1593 of the Political Code contained provisions inconsistent therewith, there being nothing in the constitution at the time of its passage preventing special legislation, and the subject matter being properly controlled by the latest expression of the legislative will. (*Nevada School District v. Shoecraft*, 88 Cal. 372.)

Rules of board cannot control statute. See post, 29.

Power to employ inspecting teacher. See post, 23.

Allowance of compensation to superintendent. See post, VII.

Review of acts of. See *Certiorari*, III, 2, n.

Right of to sue for lots. See San Francisco, XV.

Compelling board to audit claims. See *Mandamus*, II, 13, c.

Compelling board to reinstate teacher. See *Mandamus*, II, 13, c.

Contract by interested trustee. See *Offices and Officers*, VII, 7.

Action by, judgment against city does not bar, when. See *Judgments*, 329.

Illegal acts of board of education, taxpayer may enjoin. See *Injunctions*, 279.

Appointee to fill vacancy in school director, term of. See San Francisco, 34.

Power to erect schoolhouse on public square. See post, IV.

IV. Schoolhouses and School Lots; Erection of Schoolhouses on Public Squares.

Title of board of education to school lots. See San Francisco, 330, et seq.

Map designating school lots, evidence as to. See *Evidence*, 388.

Dedication for is valid without donee. See *Dedication*, 15.

School lots, conveyances by funded debt-commissioners. See San Francisco, XIV, 6.

Compelling board of education to rebuild schoolhouse. See *Mandamus*, II, 13, c.

Location of schoolhouse site, taxpayer may compel. See *Mandamus*, 239.

Mechanic's lien cannot be filed against schoolhouse. See *Mechanics' Liens*, 121.

13. The board of education of the city and county of San Francisco has no authority to appropriate a public square in said city and county, or any portion thereof, as a site for the erection of a schoolhouse; nor has the board of supervisors any authority to authorize such appropriation. (*McCullough v. Board of Education*, 51 Cal. 418.)

14. If the board of education of the city and county of San Francisco contracts with a builder to erect a schoolhouse on a public square, the contract is ultra vires, and the builder can acquire no rights thereunder. (*McCullough v. Board of Education*, 51 Cal. 418.)

Bonds for erection of schoolhouses. See post, IX.

Tax for erection of schoolhouse. See post, IX.

V. Admission of Children to Schools.

15. The privilege accorded to a child, of attending the public schools, is not a privilege appertaining to a citizen of the United States as such, nor can any person demand admission into such schools on the mere status of citizenship. (*Ward v. Flood*, 48 Cal. 36.) Cited 66 Cal. 475; 82 Cal. 589.

16. The opportunity of instruction in public schools given by the statute to the youth of the state is in obedience to the special demand of the state constitution, and the privilege thereby granted is a legal right, as much so as a vested right in property. (*Ward v. Flood*, 48 Cal. 36.)

17. Children between six and twenty-one years of age, of Chinese parentage, who were

born and have always lived in the city and county of San Francisco, are entitled to admission into the public school of the district in which they reside. And teachers are not justified in excluding them, notwithstanding a resolution of the board of education purports to command them so to do. (*Tape v. Hurley*, 66 Cal. 473.)
Cited 82 Cal. 592.

18. The legislature cannot, while providing a system of education for the youth of the state, exclude from its benefits children, merely because of their African descent. (*Ward v. Flood*, 48 Cal. 36.)

19. Subsequent to the act of April 7, 1880, repealing sections 1669, 1670, and 1671 of the Political Code, and under the existing laws touching the education of children in public schools, it has not been, and is not now, within the power of boards of education or school trustees to establish public schools exclusively for children of African descent or to exclude them from the public schools established for white children. (*Wysinger v. Crookshank*, 82 Cal. 588.)

20. The law providing for the education of children of African descent in separate schools, to be provided at the public expense, the same as other public schools, is not in conflict with the constitution of this state, nor in conflict with the thirteenth and fourteenth amendments to the constitution of the United States. (*Ward v. Flood*, 48 Cal. 36.)

21. When such law exists colored children may be excluded from schools for white children, provided schools for colored children are established, affording the same facilities for education; but if, such schools for colored children are not established, they cannot be excluded from the schools kept for white pupils. (*Ward v. Flood*, 48 Cal. 36.)

22. A principal of a public graded school may refuse a child admission as a scholar provided such child has not sufficient education to enter the lowest grade of such school. (*Ward v. Flood*, 48 Cal. 36.)

23. Teacher is only necessary defendant in a proceeding to compel the admission thereto of a child unlawfully excluded. (*Tape v. Hurley*, 66 Cal. 473.)

24. If the principal of a public graded school refuses to receive a child into the school for a reason which is not good in law, but there is a good legal reason for the refusal, the principal, on mandamus to compel him to admit such child, will not be precluded from relying on the true reason why the child should have been refused admittance. (*Ward v. Flood*, 48 Cal. 36.)

VI. Teachers.

25. Fixing of salaries of teachers is part of management of the schools, and comes within the meaning of that term as used in subdivision 27, section 25, article IV, of the constitution. (*Earle v. Board of Education of San Francisco*, 55 Cal. 489.)
Cited 60 Cal. 81.

26. The act approved April 2, 1880, entitled "An act to add a new section to the Political Code, to be known as section 1618, relating to

salaries of schoolteachers in cities having one hundred thousand inhabitants or more," is local in its character, and therefore unconstitutional. (*Earle v. Board of Education of San Francisco*, 55 Cal. 489.)

Cited 58 Cal. 569; 60 Cal. 81; 76 Cal. 446; 83 Cal. 404; 91 Cal. 251.

27. The act referred to is not an amendment of the Political Code. (*Earle v. Board of Education of San Francisco*, 55 Cal. 489.)

28. The power of the board of education of the city and county of San Francisco to employ "teachers" for the public schools confers upon them no authority to employ "inspecting teachers," whose duties, under the resolution appointing them, in no respect pertain to instruction, but are simply those which would pertain to a superintendent or director of the several schools to which their attention is directed. (*Barry v. Goad*, 89 Cal. 215.)

29. The rules adopted by the board of education cannot control the provisions of the statute, and are immaterial in determining the statutory rights of a teacher. (*Kennedy v. Board of Education*, 82 Cal. 483.)
Cited 97 Cal. 608.

30. The statute does not forbid the transfer of a teacher by the board of education from one school to another of the same grade, but merely guarantees the right of the teacher to continue in the grade into which he was elected under his city certificate. Removal from the grade in which the certificate and the statute confer the right to teach is as much a violation of the statute as if the teacher were dismissed without cause, and not given another position. (*Kennedy v. Board of Education*, 82 Cal. 483.)

31. Construing section 1793 of the Political Code with section 1617 of the same code (which should be done since they form part of the same statute upon the same subject), a teacher elected by a city board of education, without limitation as to time, is entitled to hold the position while competent and faithful, and can only be dismissed for violation of the rules of the board of education, or for incompetency, or for unprofessional or immoral conduct; nor can such teacher be transferred against his will to a school of lower grade without contravention of the law. *Fox, J., and McFarland, J., dissenting.* (*Kennedy v. Board of Education*, 82 Cal. 483.)

32. The clause of section 1793 of the Political Code, forbidding the removal of teachers except for cause, which was added by amendment in the year 1881, applies to all teachers elected by boards of education, and protects them in the right to continue in their positions, whether they were elected before or after its enactment. (*Kennedy v. Board of Education*, 82 Cal. 483.)

33. Where the records of the board of education of a city recite that the board "went into executive session for the election of teachers for the ensuing year," and thereupon certain teachers were declared elected, a teacher so elected, who begins teaching under such authorization, and continues holding after the expiration of the year for two years more without any new employment, is not elected for life, subject to removal only for cause,

but may be dismissed at any time after the expiration of year. (Marion v. Board of Education of City of Oakland, 97 Cal. 606.)

34. The ignorance of the teacher as to the term of her employment being fixed for one year only, and her honest supposition that she held a life position, cannot avail her, to prevent a dismissal by the board of education, or to compel payment of salary after such dismissal. (Marion v. Board of Education of City of Oakland, 97 Cal. 606.)

35. If it be conceded that the board of education had no power to elect a teacher for a year, an election for a year cannot constitute an election for life, but a void election would be no election, and she would hold the position at the mere pleasure of the board, subject to be discharged at any time. (Marion v. Board of Education of City of Oakland, 97 Cal. 606.)

36. The fact that another teacher has been placed in the position from which the teacher originally entitled thereto has been unlawfully removed cannot affect the right of the removed teacher to a mandamus to regain the position. The position is not in the nature of an office, within the rule that mandamus cannot be used to regain an office claimed by or in possession of another. Fox, J., and McFarland, J., dissenting. (Kennedy v. Board of Education, 82 Cal. 483.) Cited 97 Cal. 608.

Teachers' salaries, how paid in San Francisco. See San Francisco, XV.

Law fixing salary, effect of new constitution on. See Constitutional Law, 88.

Assignment of unearned salary is subject of forgery. See Criminal Law, 1598.

VII. Superintendents.

37. Section 1552 of the Political Code clearly contemplates the allowance of a salary to the county superintendent of education by the board of supervisors before it shall be paid. (Peachy v. Redmond, 59 Cal. 326.)

38. In default of action by the board the auditor cannot fix the salary at the minimum provided in the code. The law does not authorize him to draw his warrant for the payment of a salary which has not been fixed. (Peachy v. Redmond, 59 Cal. 326.)

39. The power to fix the salary of superintendent of schools of the city of San Diego is vested by section 1793 of the Political Code in the board of education of the city, which, as a general law regulating the public school system, prevails over a provision of the city charter directing the common council to fix such salary. (City of San Diego v. Dauer, 97 Cal. 442.)

San Diego, superintendent of schools, compensation of. See San Diego.

Liability of superintendent for warrants forged by deputy. See post, X.

School superintendent, office of is civil office. See Offices and Officers, 3.

Act allowing traveling expenses of county superintendent. See Offices and Officers, 168.

Mandamus to compel president to draw warrant. See Mandamus, 186.

County superintendents, misconduct in office. See Criminal Law, 2494, 2495.

Superintendent, enjoining acts of. See Injunctions, II, 11.

VIII. Text-books.

40. Section 7, article IX, of the constitution, providing that "the local boards of education, and the boards of supervisors and county superintendents of the several counties which may not have county boards of education, shall adopt a series of text-books for the use of the common schools within their respective jurisdictions," is self-executing, and operated as a repeal of the act of December 13, 1875, which provided that the text-books in use in the years 1873-75 should be continued in use until otherwise provided by statute. (People ex rel. Beckwith v. Board of Education of Oakland, 55 Cal. 331.) Distinguished 55 Cal. 495.

41. A question stated as to how the powers of the county superintendents and boards of supervisors are to be executed, in cases where the selection of the text-books devolves upon them, and held, that as to such cases, the section may not be self-executing, and we might thus have a section self-executing as to one class of officers, and not so as to another. (People ex rel. Beckwith v. Board of Education of Oakland, 55 Cal. 331.)

42. The state board of education cannot change the books once adopted as a part of a uniform series for the public schools, without giving six months' notice of the proposed change. (People ex rel. Bellmer v. State Board of Education, 49 Cal. 684.) Cited 54 Cal. 378; 18 Nev. 181.

43. Such notice must be given by authority of the board. The publication in a newspaper, as a matter of news, of the proceedings of the board, in which their intention to effect a change was declared, is not sufficient notice. (People ex rel. Bellmer v. State Board of Education, 49 Cal. 684.)

Adopting series of readers, review of action. See Certiorari, 127.

IX. School Fund; Taxes; Bonds.

44. The clause of section 2, article IX, of the constitution, which provides "and such other means as the legislature may provide shall be inviolably appropriated to the support of schools throughout the state," includes as such "means" any fund arising from annual taxation for school purposes levied under general laws passed for that purpose. (Crosby v. Lyon, 37 Cal. 242.)

45. Whenever the legislature of this state raises a fund, by taxation or otherwise, for the support of common schools, any contemporaneous or subsequent legislation having for its object the diversion of such fund to any other purpose is in contravention of the second section of article IX of the state constitution, and is void. (Crosby v. Lyon, 37 Cal. 242.)

Apportionment of fund on change of boundaries. See ante, II.

46. Where there is a substantial compliance with the law in relation to the levying of a school tax the tax cannot be successfully assailed. (People v. Pratt, 59 Cal. 77.)

47. School district taxes cannot be imposed unless the provisions of the Political Code relating to the same are substantially complied with. (*People v. Seale*, 52 Cal. 72.)

48. An act authorizing the board of supervisors of a county to levy and collect, for county school purposes, a rate of taxation which will produce an amount not exceeding a given sum, and which rate may be as high as fifty cents on the one hundred dollars, is in conflict with, and repealed by, a subsequent act passed for the whole state, in which it is provided that the board of supervisors of each county shall annually levy a school tax not exceeding thirty-five cents on each one hundred dollars of the property in the county. (*People v. Sargent*, 44 Cal. 490.)

Cited 68 Cal. 304.

49. Though the assessment-roll may be *prima facie* evidence of its contents it is not conclusive in a proceeding directly based upon its correctness. Held, accordingly, in an action to recover a district school tax, that it was error to exclude evidence offered by defendant to show that the assessment-roll was simply copied from the assessment-roll of the county, and that no assessment was in fact made. (*People v. Lansing*, 55 Cal. 393.)

50. Statute having effect to exempt taxable property of railroad company in any county from the payment of a school tax lawfully levied upon the taxable property within such county is in contravention of section 13 of article XI of the constitution, which provides that "taxation shall be equal and uniform throughout the state," and in so far is void. (*Crosby v. Lyon*, 37 Cal. 242.)

Cited 51 Cal. 22.

51. The word "district," as used in section 1837 of the Political Code, providing that, if the electors of a school district vote to build a schoolhouse, the trustees are to certify this fact to the board of supervisors, who, when levying the county taxes, must levy a tax sufficient to raise the amount voted "upon all the taxable property in the district voting such tax," is not the equivalent of "territory within the district," but is a synonym for the "corporation" voting the tax; and the tax to be levied by the supervisors is limited to the property within the boundaries of such corporation at the time of the levy. (*Hughes v. Ewing*, 93 Cal. 414.)

Cited 97 Cal. 27, 432.

52. The authority of the supervisors to levy a tax in a school district for the erection of a schoolhouse is not only limited to the amount voted by the district, but is to be levied only upon the property within the district voting the same. (*Hughes v. Ewing*, 93 Cal. 414.)

53. Where the electors of a school district have voted to build a schoolhouse, but, before the levying of the tax therefor by the supervisors, the boundaries of the district have been changed, the territory transferred from the limits of the district is not liable for the tax so levied; though the rule would be otherwise if the tax had been levied before the change in the boundaries. (*Hughes v. Ewing*, 93 Cal. 414.)

Obligations, effect of change of boundary on. See ante, II.

54. An election held for the purpose of imposing a tax in a school district must be held in strict conformity with the law, and the polls must be kept open from one hour after sunrise until sunset. (*People v. Seale*, 52 Cal. 620.)

55. Notices of election were posted at a store and two saloons, occupying three of the corners formed by two roads crossing each other, and within a circumference of eighty feet; and the court found that the notices were posted in three of the most public places in the district. Held, that the finding was justified by the evidence. (*People v. Lansing*, 55 Cal. 393.)

56. The notice to be published of an election to be held in the school district for the imposition of a tax must state the time at which the election will be held, and if it states that the polls will be open between the hours of 1 o'clock and 6 o'clock P. M. it is illegal. (*People v. Seale*, 52 Cal. 72.)

57. The council of the city of Oakland, as distinguished from its board of education, had power, under the act of March 19, 1889, to determine that the public interests and necessities of the city demanded the acquisition, construction, and completion of certain designated schoolhouses, and that the cost thereof would be too great to be paid out of the ordinary income and revenue of the city, and to submit the question of issuing bonds therefor to the voters of the city at a special election, and to issue such bonds in pursuance of that act after two-thirds of the voters at such election had voted therefor. (*In re Wetmore*, 99 Cal. 146.)

58. The provisions of sections 1880-87 of the Political Code for the issuance by the supervisors of the county of school-district bonds, whenever the electors of the district shall vote therefor, do not limit or qualify the power conferred by the act of March 19, 1889, upon an incorporated city to issue its own bonds for the same purpose, notwithstanding the provisions of section 1575 of the same code, making each incorporated city a school district. (*In re Wetmore*, 99 Cal. 146.)

School tax. See Taxation, XVI.

Sacramento school tax, discretion of supervisors. See Sacramento.

Action for tax, clerk cannot enter default. See Defaults, 32.

X. Requisitions; Warrants.

59. An order for a requisition drawn on the county superintendent of public schools by two of the trustees of a school district, one of whom is personally interested in it, and therefore incompetent to act, is void for want of the sanction of a competent majority of the board of trustees, whether the interested trustee has acted fairly or unfairly in the matter. (*Shakespeare v. Smith*, 77 Cal. 638.)

60. An order for a requisition on the county superintendent is not a negotiable instrument in the sense that an innocent holder for value

is protected. (*Shakespear v. Smith*, 77 Cal. 635.)

61. A superintendent of schools is not liable to a bona fide purchaser of school warrants for the amount paid to the deputy superintendent for warrants forged by such deputy, and presented and sold by him to the purchaser. (*Fresno National Bank v. Hawkins*, 93 Cal. 551.)

62. The indorsement of the date of filing upon forged school warrants gives them neither validity, negotiability, nor additional value, aside from fixing the date of filing in the superintendent's office; and such an indorsement by a deputy superintendent of schools creates no personal liability against the superintendent of schools in favor of a purchaser of the forged warrants. (*Fresno National Bank v. Hawkins*, 93 Cal. 551.)

Forged order, indictment for drawing. See Criminal Law, 1629, et seq.

Order for requisition for school warrant, forging. See Criminal Law, 1609.

Duty of treasurer to pay warrants on school fund. See Treasurers, 9.

SCIRE FACIAS.

The writ of scire facias is a remedy unknown to our practice, and cannot be employed for the revival or enforcement of a judgment. (*Humiston v. Smith*, 21 Cal. 29.)

SCRIP.

See Public Lands, VI.

SEALED VERDICT.

See Verdict, XII.

SEALS.

1. A seal is sufficient where the impression is made upon the paper only, and not upon wax. (*Connolly v. Goodwin*, 5 Cal. 220.) Cited 5 Cal. 318.

2. An impression upon paper constitutes a good seal, and this may be made as well by a pen as by a stamp; therefore, a scrawl, with the word "seal" written within it, or with the initials "L. S.," is sufficient. (*Hastings v. Vaughn*, 5 Cal. 315.)

3. Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument it will not be such, even though the characters (L. S.) are added to the signature. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)

4. By the common law the equitable title to realty may be conveyed by instrument not under seal, if otherwise sufficient; and this equitable title, accompanied by possession, is sufficient, under our system, to give the right of possession. (*Ortman v. Dixon*, 13 Cal. 33.)

5. A written, but unsealed, transfer of a legal estate in land is good as a contract to convey, under the statute of frauds. (*Owen v. Frink*, 24 Cal. 171.)

6. An equitable right to a conveyance of real estate existing under a parol contract and part performance passes to the purchaser by a bill of sale not under seal. (*Owen v. Frink*, 24 Cal. 171.)

7. The difference between instruments sealed and unsealed is, at this day, a mere unmeaning and arbitrary distinction made by technical law, unsustained by reason. (*Ortman v. Dixon*, 13 Cal. 33.)

8. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor in the same manner as a promissory note by the maker. The intention of the legislature was to place bonds and notes on the same footing in respect to defense. (*Comstock v. Breed*, 12 Cal. 286.)

Mexican law, seals were unknown under. See Agency, 29.

Consideration, seal imports. See Contracts, I, 1, c, B; Pleading and Practice, 195. Seal is not necessary. See Statute of Frauds, 110.

In certifying copy of deed. See Evidence, 122.

Contract for mortgage need not be under seal. See Agency, 28.

Lease need not be sealed. See Landlord and Tenant, 7.

Want of in bond will not vitiate, when. See Bonds, 132.

Not necessary to assignment. See Assignments of Contracts, 20.

Necessity of on conveyance of mining claim. See Mines and Mining, 402, et seq.

Unsealed instrument not entitled to record. See Mortgages, 168.

Unsealed instrument, record of as notice. See Registration, 35, 36.

Assignment of judgment need not be under. See Judgments, 779.

Power of attorney, necessity of seal. See Agency, II, 2, c.

Deeds, seal to. See Deeds, II, 1.

On issuance of letters. See Executors and Administrators, I, 3.

Acknowledgments, seal in. See Acknowledgments, III, 1.

Corporate, to contracts. See Corporations, VI, 8, a.

Fraud in sealed instrument, effect of. See Fraud, 62.

Omission to record. See Ordinances, 40.

Presumptions as to on appeal. See Appeals, 2727.

SEAMEN.

See Shipping, XI.

SEARCHERS OF RECORDS.

Action against, when barred. See Statute of Limitations, 217, 218.

One who holds himself out as an examiner of titles is bound to exercise skill and care in making the examination, and is liable in damages for a failure to exercise such skill and care. (*Lattin v. Gillette*, 95 Cal. 317.)

SEARCH WARRANTS.

See Criminal Law, VIII.

Obstructing execution of. See Contempt, 68.

SECESSION.

See Unincorporated Associations, VII.

SECONDARY EVIDENCE.

See Evidence, II.

SECOND STREET CUT.

Commissioners' report on. See Streets, 87.
Curing illegal proceedings. See Streets, 251.

SECRETARY OF STATE.

Recording trademark with. See Trademarks, II.

Duty in regard to election returns. See Elections, 99, 100.

Mandamus to compel issuance of certificate of election. See Mandamus, 42.

Action against. See Statute of Limitations, 181, 182.

Additional salary to. See Offices and Officers, 156.

SECRETARY OF THE INTERIOR.

See Public Lands, XVIII, 3.

SECRET PARTNERS.

See Partnership, IX, 11.

SECTIONS.

Division of statute into. See Statutes, VIII, 13.

SEDUCTION.

See Criminal Law, XXI, 52.

1. The word "seduction," as used in section 374 of the Civil Code, providing that an unmarried female may prosecute an action for damages for her own seduction, means the use of some influence, promise, art, or means upon the part of the male, by which he induces the female to surrender her chastity and her virtue to his embraces. There must be something more than a mere reluctance on the part of the woman to commit the act, and her consent must be obtained by flattery, false promises, artifice, urgent importunity based on professions of attachment, or the like, for the woman; and that, relying solely on such promises or professions of flattery, or artifice, or importunity, she, then being chaste, surrendered her person and chastity to her alleged seducer. (Marshall v. Taylor, 98 Cal. 55.)

2. It is not necessary, in order to constitute a seduction, that there should be a promise of marriage; but it may be committed by a married man, though the girl is aware of his marriage, if she is young and inexperienced, and advantage is taken of her. (Marshall v. Taylor, 98 Cal. 55.)

3. In an action by an unmarried female to recover damages for her seduction by the defendant, evidence of the plaintiff that at the time of the alleged offense she was but sixteen years of age, and until that time was a chaste and virtuous girl; that she was at the time an employee of the defendant, who was then engaged in keeping a hotel; that she was stopping alone in a cottage near the hotel, where she was visited after dark by her employer, a man of wealth and years, with whom she was upon friendly terms;

that, after a conversation upon ordinary topics lasting some time, he gave her a glass of wine, which she drank, by which her mind was seriously affected, and she became unable to stand up alone without assistance, whereupon he placed his arms around her and assisted her to the bed, and, after expressing affection for her, repeatedly caressing her and making promises of future friendship and assistance, he had intercourse with her, is sufficient to sustain a verdict in her favor, though her testimony was contradicted in every essential point by the defendant's evidence. (Marshall v. Taylor, 98 Cal. 55.)

4. It is immaterial in such case whether the plaintiff's evidence indicated that she had lost consciousness from the effect of the wine at the time the act was committed so that the defendant was guilty of rape, or that she was conscious at the time and consented thereto, as in either case the plaintiff is entitled to exemplary damages. Proof of rape, or the use of force, does not defeat the action for seduction, but only aggravates the injury. (Marshall v. Taylor, 98 Cal. 55.)

Evidence in action by husband for criminal conversation with wife. See Husband and Wife, IV, 4.

5. A verdict for the plaintiff for twenty-five thousand dollars, in an action for the seduction of a chaste young girl by a married man of wealth and mature years, cannot be said to be excessive, and will not be reversed upon appeal upon that ground. (Marshall v. Taylor, 98 Cal. 55.)

Judgment in action by infant does not bar action by guardian. See Judgments, 442.

Limitation of actions for. See Statute of Limitations, VI, 11.

SEGREGATION.

Spanish grant, segregation of. See Mexican Lands, I, 11.

Necessity of. See Sales, VI, 3.

SEISIN.

Covenant of. See Covenants, I, 3.

SELECTION.

State land, selection of. See Public Lands, III, 6.

SELF-DEFENSE.

See Criminal Law, XXI, 31, e.

Burden of proving. See Death.

Assault to commit murder. See Criminal Law, XXI, 7, c.

Trespass, right of self-protection against. See Trespass, II.

SEMINARY LAND.

Mistake in affidavit. See Public Land, 403.

Selection of. See Public Lands, 57.

SENATE.

See Legislature.

SENTENCE.

See Criminal Law, XVIII, 19, b.

In particular offense. See Criminal Law, particular offense.

Larceny, sentence in prosecution for. See Criminal Law, XXI, 36, j.

Rape, punishment for. See Criminal Law, XXI, 49, e.

Robbery, sentence for. See Criminal Law, XXI, 50, e.

SEPARATE DEFENSES.

How stated. See Pleading and Practice, IX, 20.

SEPARATE PROPERTY.

See Husband and Wife, II.

SEPARATE TRIALS.

See Pleading and Practice, XX, 3.

SEPARATION.

Offices, separation of. See Offices and Officers, XI, i.

Agreements between husband and wife for. See Husband and Wife, I, 6, d.

Jury, admonishing on separation. See Jury and Jurors, XI.

Jurors, separation of. See Jury and Jurors, XVI, 5.

SEPULTURE.

Violating. See Criminal Law, XXI, 55.

SERVANTS.

See Master and Servant.

SERVICE.

Petition for prohibition, service of. See Prohibition, II, 1.

Petition for mandamus, service of. See Mandamus, III, 7.

Summons, service of. See Summons, IV.

Failure to serve copy of complaint, demurrer for. See Pleading and Practice, X, 6, b.

Demurrer, service of. See Pleading and Practice, X, 3.

Answer, service of. See Pleading and Practice, IX, 2.

Amendment, service of. See Pleading and Practice, XI, 18.

Cost bill, service of. See Costs, III, 2, a.

Notice of motion for new trial, failure to serve, and waiver of. See New Trial, V, 3, b.

Statement on motion for new trial, service of. See New Trial, V, 7, h.

Notice of appeal, service of. See Appeals, V, 5, e.

Transcript on appeal, service of. See Appeals, VI, 4, b.

Service by publication. See Summons, IV, 7, a.

Mail, service by. See Notice, VII.

Proof of. See Summons, IV, 6.

Admission of service. See Summons, IV, 5.

Evidence of service of notice. See Notice, VII.

SERVICES.

See Master and Servant.

Cotenant, services of. See Cotenant, II, 5.

Liability of husband for services rendered reputed wife. See Husband and Wife, I, 3.

Rendered to parent. See Parent and Child, III.

County, services performed for. See Counties, VIII, 3.

Personal, enforcement of contracts relating to. See Specific Performance, IV, 11.

Contract for services on commission, necessity of writing. See Statute of Frauds, I, 3.

Bequest in payment of services and renunciation of. See Wills, XI, 19.

Agreement to pay for past services rendered another. See Statute of Frauds, 32.

Under contract void by statute of frauds. See Statute of Frauds, VI.

Verdict for value in legal tender notes. See Verdict, 66.

Evidence as to value of. See Evidence, 509.

Implied contract for services by wife to partnership. See Husband and Wife, 468.

Assumpsit for. See Assumpsit, II, 4.

SERVITUDE.

See Easements; Slavery.

SESSIONS.

Court of, creation and organization. See Courts, III, 4.

Court of, jurisdiction of. See Jurisdiction, XI, 6.

Courts, sessions of. See Courts, IV.

SETOFF.

I. What Subject of.

II. In Equity.

III. In Justices' Court.

IV. Pleading and Evidence of; Neglect to Assert.

Claim of setoff, effect of on appellate jurisdiction. See Appeals, 83, 84.

I. What Subject of.

1. Cross-demands, to be the subject of set-off, under section 438 of the Code of Civil Procedure, must be mutual, and co-exist as separate causes of action at the commencement of the action upon the principal demand. (*Lyon v. Petty*, 65 Cal. 322.)

2. To authorize a setoff at law the debts must be between the parties in their own right, and must be of the same kind and quality, and be duly ascertained or liquidated—they must be certain and determinate debts. (*Naglee v. Palmer*, 7 Cal. 543.)

3. Under the forty-seventh section of the Practice Act a claim, to constitute a setoff, must be such that the party pleading it might obtain a several judgment against his adversary upon it; and this excludes a joint debt as a setoff against a several one. (*Howard v. Shores*, 20 Cal. 277.)
Cited 23 Cal. 627; 70 Cal. 112.

4. An execution in favor of Peyser and against Calderwood cannot be set off against an execution in favor of Calderwood and Douglass (his former wife) against Peyser—the apparent fact being that the parties to the two executions are not the same. (*Calderwood v. Peyser*, 42 Cal. 111.)

5. Action on an appeal bond, in which defendants claim the right to offset the balance of a decree in a foreclosure suit, which they

have purchased and now hold against James R. Duff and James T. Ryan, and eleven other defendants in that suit, upon the ground that James R. Duff and James T. Ryan are the parties beneficially interested in the claim in suit in this action, and that they and the other eleven defendants in the decree sought to be offset are insolvent. Held, that the set-off cannot be allowed, as well because of the provisions of section 47 of the Practice Act, which requires a counterclaim to be between parties to the record, between whom a several judgment might be had in the action, as of the provisions of sections 176 and 199, which would require a judgment for the excess to be given against the plaintiff, although, as against him, it is not claimed that defendants have any demand. (*Duff v. Hobbs*, 19 Cal. 646.) Cited 23 Cal. 626, 628, 629; 65 Cal. 326.

6. In such case the matter set up in the answer is not a defense, legal or equitable, in any other sense than as being purely an offset, and therefore such matter cannot be relied on as an equitable defense, independent of and beyond the right of offset given by the Practice Act. (*Duff v. Hobbs*, 19 Cal. 646.)

7. Where action was brought by administrator to foreclose mortgage given to secure a note which matured after the death of the intestate, held, that a promissory note of the deceased, assigned to the mortgagor, and which was due and payable at the time of the intestate's death, but was not presented to the administrator for allowance, cannot be set off against the mortgage debt. (*Lyon v. Petty*, 65 Cal. 322.)

8. Nor can such cross-demand be set off against the mortgage debt, if it is barred by the statute of limitations at the time of the commencement of the foreclosure suit. (*Lyon v. Petty*, 65 Cal. 322.)

9. Debtor has right to purchase cross-demands against partnership, and to set them up as a defense to the debt due by him to the partnership. (*Naglee v. Minturn*, 8 Cal. 540.)

10. The captain of a vessel drew on his owner for six hundred dollars, to defray the expenses of the first mate, who was injured on the voyage, and whom it became necessary to leave on shore for his recovery. In an action by the captain against the owner for wages the owner claimed to set off four hundred and fifty dollars of the amount of the draft against the claim, on the ground that he was liable for it, but did not produce the draft, or show payment of it. Held, that the court below properly rejected the setoff. (*Wakeman v. Vanderbilt*, 3 Cal. 380.)

11. No right of action can accrue upon a draft until payment. And, where there is no right of action, there is no right of setoff. (*Wakeman v. Vanderbilt*, 3 Cal. 380.)

12. A defendant, who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation. (*Kilburn v. Ritchie*, 2 Cal. 145.)

Improvements, setoff of. See Ejectment, XVIII, 2; Vendor and Vendee, 181.

Improvements, setoff of against rent. See Landlord and Tenant, IX, 5, e.

Improvements, setoff against use and occupation. See Use and Occupation, 12.

13. Unliquidated claim for damages not the subject of offset, legal or equitable. (*Ricketson v. Richardson*, 19 Cal. 331.)

14. A claim of A and B to recoup damages from C, by way of setoff against the promissory note of A, B, and D, held by C, cannot be sustained, nor can such claim for damages be set off against an aliquot part of the sum due on the note. (*King v. Wise*, 43 Cal. 628.)

15. When money deposited by a defendant with a sheriff, as security for property released on attachment, is withdrawn by the attorneys of the parties, and divided between them, and each gives his note to the other for one-half of it, with a stipulation that it was to be held in like manner as if it remained in the sheriff's hands, after the plaintiff recovers judgment the defendant's attorneys may be sued on the note given by them, and they cannot set off, either the note of plaintiff's attorneys to them, or what is due to them by their client, for their services in the action. (*Hathaway v. Patterson*, 45 Cal. 295.)

16. A court of equity will not permit a cestui que trust who is insolvent to enforce and collect through his trustee a judgment against a party who holds a just and valid demand against the cestui que trust, which he has no means of enforcing or collecting if a setoff is denied. (*Hobbs v. Duff*, 23 Cal. 596.)

Cited 2 N. Dak. 107.

17. Where, in the same action, two judgments were entered, one for the plaintiff for a certain sum, and one for the defendant for a less sum, held, that defendant had a right to set off his judgment pro tanto against that of the plaintiff, and that this right could not be defeated by any assignment by plaintiff of his judgment before application for the setoff. (*Porter v. Liscom*, 22 Cal. 430.)

18. The plaintiff recovered judgment against the defendant for a sum of money. Afterward the defendant recovered a judgment against the plaintiff in the same court for a smaller amount. Held, that the defendant had a right of offset against the plaintiff to the extent of the judgment in her favor, and that an assignee of the plaintiff took subject to such right. (*McBride v. Fallon*, 65 Cal. 301.)

19. A decree, rendered in an action on a bond, and to foreclose a mortgage given to secure the bond, which, after reciting the amount found due on the bond, directed that the mortgaged premises be sold, and out of the proceeds the costs and the amount found due on the bond and accruing interest be paid, and that, if there was a surplus, the sheriff pay such surplus into court, but that, if the proceeds were insufficient to pay the debt, interest, and costs, the sheriff should report the amount of such deficiency or balance, and that, therefore, the plaintiff have execution against the defendants, merges the original debt in such judgment, at least so far as to make it a certain and liquidated demand, existing at the date when the amount of balance was ascertained, by the report of the sheriff,

sufficient as a foundation of a right of action or setoff. It is not necessary that the demand sought to be used as a setoff should be in the form of a personal judgment. (*Hobbs v. Duff*, 23 Cal. 596.)

Cited 65 Cal. 324; 6 Or. 188.

20. Where the parties to two judgments are not the same, a court of common-law jurisdiction cannot set off one against the other; but a court of equity will look beyond the nominal to the real parties in interest, and adjudicate the rights of the parties accordingly. (*Hobbs v. Duff*, 23 Cal. 596.)

Cited 70 Cal. 112.

21. A person may receive the money due on a judgment rendered in favor of himself and several others, coplaintiffs, but he cannot, without authority from his coplaintiffs, set off a judgment due to him and them jointly against another judgment held by the defendant in such joint judgment against himself alone. (*Corwin v. Ward*, 35 Cal. 195.)

22. When a creditor, having a debt due him secured by a mortgage, assigns the debt and mortgage, a judgment in favor of a third person against the creditor, purchased by the debtor after the assignment, but before notice of it to him, constitutes an offset pro tanto to the debt in an action upon it by the assignee. (*McCabe v. Grey*, 20 Cal. 509.)

Cited 23 Cal. 626.

23. Upon a motion of the defendant to set off against a judgment rendered against him a judgment against the plaintiff assigned to him by another he must show that he is the absolute and beneficial owner of the judgment, or he cannot set it off. (*Jones v. Chalfant*, 55 Cal. 505.)

24. Where a judgment, against which a right to set off another judgment rendered in the same action exists, is assigned, the assignee may be brought into the court upon a proceeding by petition and motion, and will be bound by an order made therein directing a setoff. (*Porter v. Liscom*, 22 Cal. 430.)

25. An assignee of a judgment, although a purchaser for a valuable consideration and without notice, takes subject to a right of setoff against the judgment existing at the time of the assignment. (*Porter v. Liscom*, 22 Cal. 430.)

Judgments, setoff of in equity. See post, II.
Purchaser of judgment takes subject to. See Judgments, 785, et seq.

Unreversed judgment as. See Costs, 7.

Action to enforce setoff of judgments. See Statute of Limitations, 32.

Sheriff, right of to set off judgments. See Sheriffs, IV, 3, u.

Forcible entry, setoff in. See Forcible Entry and Unlawful Detainer, VI, 10.

Setoff in action on building contract. See Building Contracts, 44, 45.

Street assessments, right of setoff against. See Streets, 400.

Pledgee may set off debt in action for article pledged. See Pledges, 95.

Recoupment of damages for breach of warranty. See Sales, 174, et seq.

Of executors' commissions. See Executors and Administrators, 477.

II. In Equity.

26. The jurisdiction of a court of equity in relation to setoffs is more extensive than that of common-law courts. (*Hobbs v. Duff*, 23 Cal. 596.)

Cited 2 N. Dak. 107.

27. In equity the right of setoff depends, not on the statutes of setoff, but upon the right and the equitable jurisdiction of a court of chancery over its suitors. (*Hobbs v. Duff*, 23 Cal. 596.)

28. As a general proposition the mere existence of cross-demands will not justify a setoff in a court of chancery. There must be some peculiar circumstance, based upon equitable grounds, to warrant the court in interfering. (*Naglee v. Palmer*, 7 Cal. 543.)

Cited 23 Cal. 627; 65 Cal. 324; distinguished 19 Cal. 659.

29. To justify allowance of setoff of joint debt due from plaintiff and another against the individual claim of plaintiff, upon equitable grounds, it is not sufficient to show that the joint debtors owe a considerable amount, and that their property is encumbered by judgments, mortgages, and attachments, without showing that they are insolvent, or that the defendants are in danger of losing their demand. (*Howard v. Shores*, 20 Cal. 277.)

30. Equity, upon bill filed will compel equitable setoff, when the parties have mutual demands against each other which are so situated that it is impossible for the party claiming a setoff to obtain satisfaction of his claim by an ordinary suit at law or in equity. (*Russell v. Conway*, 11 Cal. 93.)

Cited 19 Cal. 659; 23 Cal. 627, 629; 65 Cal. 324.

31. Where the defendant in one of the judgments is insolvent, and the plaintiff in the other is not the real party in interest, but a trustee for the insolvent defendants in the other judgment, a court of equity will decree a setoff. (*Hobbs v. Duff*, 23 Cal. 596.)

32. Insolvency of party against whom the setoff is claimed is sufficient ground for the exercise of the jurisdiction of the court of equity. (*Russell v. Conway*, 11 Cal. 93.)

33. So held when the claim against the party praying for a setoff was not a personal claim, but a judgment in rem against property belonging to him, while his claim against the other party was on a judgment. (*Russell v. Conway*, 11 Cal. 93.)

34. In such a case, where the prayer of the bill is that the judgment against the property of the plaintiff may be satisfied, upon his crediting the judgment obtained by him against the defendant in another court, the application for setoff must be made in the court in which the judgment adverse to the plaintiff was entered, that court having control over that judgment, and the plaintiff having the power to credit or satisfy the judgment held by him against the defendant. (*Russell v. Conway*, 11 Cal. 93.)

35. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And, if the judgment be partnership assets, the individual creditor has no claim to any part of it

until adjustment of the firm accounts. (*Colins v. Butler*, 14 Cal. 223.)

36. Where the plaintiff filed his bill, as receiver of an insolvent firm, to foreclose a mortgage given to plaintiffs in that capacity to secure a certificate of deposit for one hundred thousand dollars, originally deposited by the receiver, and defendants admitted the debt, but claimed that the amount is to be distributed pro rata among the creditors of the insolvents, whom the plaintiff represents; that the claims of the creditors have been filed and reported upon; that defendants are large creditors of the insolvents, and that they will, upon the distribution of the assets, be entitled to fifty thousand dollars as their dividend; and that defendants have advanced a further sum to the former custodians of the assets of about fifty thousand dollars, which they pray to have ascertained, and the whole amount set off against the certificate of deposit, and, until then, that plaintiff be restrained, held, that a court of equity will not compel them to pay the money into court, which they would immediately be entitled to receive back; nor will it put them to the cost of so large a judgment, but will order an account and allow the setoff. (*Naglee v. Palmer*, 7 Cal. 543.)

37. The execution and delivery of the certificate of deposit by defendants changed their character from being custodians of the funds to that of mere debtors of the insolvents. (*Naglee v. Palmer*, 7 Cal. 543.)

Judgment at law is not bar to suit in equity to enforce, when. See Judgments, 333.

Setoff of judgments in equity where parties not the same. See ante, 16, 20.

Legal setoff, pleading in suit in equity. See Vendor and Vendee, 331.

III. In Justice's Court.

38. In an action in a justice's court upon a money demand the defendant cannot set up in his answer, as a counterclaim or setoff, a demand, amounting, exclusive of interest, to more than two hundred dollars. (*Malsof v. Vaughn*, 23 Cal. 61.)

39. A justice of the peace has no jurisdiction to pass upon a counterclaim or setoff, unless it be for such a sum as the defendant might have maintained an action on against the plaintiff in a justice's court. (*Malsof v. Vaughn*, 23 Cal. 61.)

IV. Pleading and Evidence of; Neglect to Assert.

40. To entitle a defendant to set off a claim against the demand of the plaintiff he must set forth in his answer the nature of the claim which he intends to set off, and where this was not done, held, that the court below properly rejected evidence of the claim proposed to be set off. (*Bernard v. Mullott*, 1 Cal. 368.)

Cross-complaint. See Cross-complaint.

Factor, answer need not set forth, claim of setoff. See Factors, 18.

41. A party does not lose his right to bring an action for a demand which he might have pleaded as a setoff in a former action, but

neglected to do. (*Hobbs v. Duff*, 23 Cal. 596.)

42. Where a claim which has been assigned to a party defendant in the action, and paid by him, is offered in evidence as an offset against the demands of the plaintiff, the burden of the proof as to settlement of the claim by plaintiff rests upon the plaintiff, and the defendant has a right to have the credibility of the testimony upon the point submitted to the jury. (*Saxton v. Kneeland*, 45 Cal. 116.)

Payment not necessary before setting off claim, when. See ante, 36.

Setoff is admissible under general issue. See Assumpsit, 72.

To what court application for setoff to be made. See ante, 34.

SETTING CAUSE.

See Pleading and Practice, XX, 4.

SETTLEMENT.

Statement on appeal, settlement of. See Appeals, VI, 1, h.

Statement on motion for new trial, settlement of. See New Trial, V, 7, g.

Instructions, settlement of. See Instructions, XVII, 6.

SETTLERS.

Actual. See Public Lands, XIV, 10; Swamp and Overflowed Lands, VI.

SEVERANCE.

Fixtures, severance of. See Fixtures, IV.

SEVERANCE OF ACTIONS.

See Joinder and Severance of Actions, II.

SEWERS.

Questions relating to. See Municipal Corporations, XVI.

Prohibiting action to condemn right of way. See Prohibition, 55, 56.

Taking private property for. See Eminent Domain, IV, 3, c.

Compensation on laying sewers. See Eminent Domain, X, 4.

Overflow, whether nuisance, is question for jury. See Nuisance, 24.

Statutes relating to drainage. See Swamp and Overflowed Lands, XVI.

Rock gutters. See Streets, 205.

SHAM ANSWERS.

See Pleading and Practice, IX, 10.

SHARES.

See Croppers.

Working mine on shares. See Mines and Mining, XVI.

SHELLEY'S CASE.

Rule in. See Wills, XI, 9.

SHERIFFS.

I. Nature of Office of Sheriff.

II. Appointment of; Vacancy in Office; Coroner as Sheriff.

III. Sheriff as Tax-collector.**IV. Powers, Duties, and Liabilities of Sheriffs.**

1. *Power to Sue.*
2. *Expiration of Term of Office; Effect of.*
3. *Duties and Liabilities.*
 - a. In Relation to Prisoners or Insane.
 - b. Diligence Required in Executing Process; Herein of Process Received on Sunday.
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 - f. Where Property Rightfully Seized.
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 - j. Right to Retain Possession; Duty to Release Property Pending Appeal.
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 - p. Return, Conclusiveness of; Failure to Make; Paying Over Proceeds; Summary Proceedings Against.
 - q. What Amounts to Release of; Instructions to Seize as a Defense.
 - r. Justification Under Process.
 - s. To Whom Sheriff Liable; What Constitutes a Taking.
 - t. Pleadings and Parties in Actions Against Sheriff and His Sureties.
 - u. Offer to Return Property; Right to Set Off Judgment.
 - v. Summoning Jury in Action Against Sheriff.
 - w. Damages and Penalty, Measure of and Evidence as to; Joinder of.

V. Indemnity Bonds.**VI. Compensation, Mileage, Fees.****VII. Death of Sheriff.****VIII. Deputies.**

Elisors. See Elisors.
 Marshals. See Marshals.
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 Irregularity in conduct of, new trial for. See New Trial, IV, 6, c.
 Misconduct of. See Jury and Jurors, XVI, 2.
 Jury-room, sheriff may testify as to what transpired. See Jury and Jurors, XIII, 4.

De facto, powers of. See Mortgages, XIX, 18, c.

Executions. See Executions.

Approval of bond of. See Bonds, 93.

Power, when ceases. See Contempt, 71.

Power of constable to serve process out of township. See Process, 5.

Adjournment of court by. See Courts, 50, 51.

Liability of county for jail guard hired by. See Counties, 54.

Liability of sureties. See Suretyship, 35, 36.

I. Nature of Office of Sheriff.

1. A sheriff, in enforcing an execution, acts as an officer of the court and under color of its process. (*McMann v. Superior Court*, 74 Cal. 106.)

2. It seems the office of sheriff and tax-collector are constitutional offices. (*People ex rel. Attorney General v. Squiers*, 14 Cal. 12.)

Sheriff is not a judicial officer. See post, 10.

II. Appointment of; Vacancy in Office; Coroner as Sheriff.

3. Though the appointment of a sheriff by a county judge was void, yet the acts of such sheriff, as a de facto officer, are good. (*People v. Roberts*, 6 Cal. 214.)

4. Strictly speaking, there can be no vacancy in the office of sheriff caused by the death, removal, or resignation of the incumbent; for, upon the happening of such an event, the coroner, by operation of law, becomes sheriff. (*People ex rel. Attorney General v. Phoenix*, 6 Cal. 92.)

5. The coroner only holds the office of ex officio until the appointment of a new sheriff by the board of supervisors. (*People ex rel. Attorney General v. Phoenix*, 6 Cal. 92.)

III. Sheriff as Tax-collector.

6. The sheriff acquires his authority to act as tax-collector in those counties where he so acts under the Revenue Act of 1857, which invests the person elected to the office of sheriff with another distinct office—that of tax-collector; and though he is elected, eo nomine, sheriff, he is, in fact, also elected to the office of tax-collector, and the two offices are distinct. (*Lathrop v. Brittain*, 30 Cal. 680.)

7. No provision is to be found in constitution under which sheriff, as sheriff, may perform the duties of tax-collector. (*Lathrop v. Brittain*, 30 Cal. 680.)
 Cited 38 Cal. 77; 68 Cal. 515; 76 Cal. 116; 19 Nev. 205; 1 Wyo. 333.

8. The law authorizing sheriffs to act as tax-collectors does not authorize the sheriff, as tax-collector, to appoint an under tax-collector; wherefore the undersheriff cannot perform the duties of tax-collector. (*Lathrop v. Brittain*, 30 Cal. 680.)

Power of undersheriff to collect taxes. See post, 223.

9. Duties of sheriff, as such, are more or more or less connected with the administration of justice; they have no relation to the collection of the revenue. (*People v. Edwards*, 9 Cal. 286.)

10. The sheriff is not a judicial officer. And, though the offices of sheriff and tax-collector are distinct by the constitution, yet they may be united in the same hands. (People ex rel. Attorney General v. Squiers, 14 Cal. 12.)

11. Offices of sheriff and tax-collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. They are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other. (People v. Edwards, 9 Cal. 286.)

Cited 14 Cal. 16; 30 Cal. 684; 38 Cal. 77; 55 Cal. 306; 68 Cal. 514, 515; 76 Cal. 607; 11 Nev. 141; 19 Nev. 205; 1 Wyo. 333.

12. The sheriff, being ex officio tax-collector of foreign miners' licenses by an act of the legislature, may be deprived of the office of tax-collector before the expiration of his term. (People ex rel. Attorney General v. Squiers, 14 Cal. 12.)

13. The Revenue Act of 1854 made the sheriff ex officio tax-collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff except when he acts as collector of foreign miners' licenses. Held, that the bond in suit, entered into in 1856, must be deemed to have been executed in view of the provisions of the Revenue Act, and that all delinquencies in the collection of taxes, except foreign miners' licenses, are covered by the bond. (People v. Edwards, 9 Cal. 286.)

14. An act of the legislature, which makes the sheriff of a county its tax-collector, and also makes the sheriff and his bondsmen responsible for the payment of all taxes collected by him, has the effect of making the bond of the sheriff his bond as tax-collector. (People v. Love, 25 Cal. 523.)

Cited 29 Cal. 643; 30 Cal. 684; 38 Cal. 77; 19 Nev. 205; 1 Wyo. 333; distinguished 68 Cal. 515.

Office of tax-collector is constitutional. See ante, I.

Office of sheriff and tax-collector are distinct. See Bonds, 104.

Acting as tax-collector. See Taxation, XVII.

Separation of offices. See Offices and Officers, 124.

As tax-collector, statute repealing law. See Statutes, 242.

IV. Powers, Duties, and Liabilities of Sheriffs.

1. Power to Sue.

15. When an attachment was issued by the court of first instance against the property of a debtor, and the sheriff had executed the same, and was ordered to make the amount due the creditor out of the goods, chattels, and property of the debtor, held, that the sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person for goods

sold and delivered. (Sublette v. Melhado, 1 Cal. 104.)

2. Expiration of Term of Office, Effect of.

16. A different rule applies to a portion of the business of a sheriff from that applying to district attorneys, as to their powers on the expiration of their terms. (Cole v. McKune, 19 Cal. 422.)

17. On the election of a new sheriff the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office. (People ex rel. Dunn v. Boring, 8 Cal. 406.)

Cited 9 Cal. 104.

18. It is not the duty of a sheriff, at the expiration of his term of office, to turn over to his successor in office personal property held by him under a writ of attachment. (Sagely v. Livermore, 45 Cal. 613.)

19. Where property which has been attached by a sheriff has not been released before the expiration of his term of office he retains its custody, and it is incumbent upon a party wishing to procure its release to seek the outgoing sheriff and procure the release from him. A tender of the amount due to the outgoing sheriff's successor in office is unavailing to affect the former's right to retain the property, and the party making the tender cannot complain of the additional expenses incurred in leaving the property in the custody of the outgoing sheriff after the expiration of his term of office and before a release is sought from him. (Perrin v. McMann, 97 Cal. 52.)

20. A sheriff who sells land under execution and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. (Anthony v. Weessel, 9 Cal. 103.)

Cited 7 Nev. 370.

21. Where the plaintiff's complaint in ejectment averred title in plaintiff under a sheriff's sale made by one sheriff, and a deed executed by his successor, held, that the plaintiff could not recover. (Anthony v. Weessel, 9 Cal. 103.)

22. The authority to sell land, conferred by a writ in his hands, carries with it authority to execute all the instruments required by law to the completion of the sale, viz., a certificate, and, in case of no redemption, a conveyance, to the purchaser. (People ex rel. Dunn v. Boring, 8 Cal. 406.)

23. Deputy sheriff may, after the expiration of the term of office of his principal and in the absence of the latter from the state, execute a deed to the purchaser at a judicial sale, made by the sheriff while in office. The authority of the deputy is not impaired by the act of 1858, allowing the deed in such cases to be executed by the succeeding sheriff. (Mills v. Tukey, 22 Cal. 373.)

24. Where the defendant, as sheriff, collects money on an attachment more than sufficient to satisfy the attaching creditor, and, after the expiration of his term of office, another attaching creditor attaches the surplus, and seeks to make the ex-sheriff liable therefor on his

official bond, held, that the demurrer to the complaint was properly sustained, as there was no relation between the defendant and plaintiff to render defendant officially liable. (*Graham v. Endicott*, 7 Cal. 144.)

25. The defendant could only be garnisheed as a private individual. (*Graham v. Endicott*, 7 Cal. 144.)

Execution of deed after term. See Executions, XI, 1.

Outgoing, powers of, when acting as tax-collector. See Taxation, 878, et seq.

Outgoing sheriff, sale by. See Executions, IX, 1.

3. Duties and Liabilities.

a. In Relation to Prisoners or Insane.

26. The duty imposed by the statute on sheriffs to take prisoners to the state prison, and insane persons to the insane asylum, is an official duty, and none the less so because some portion of it must be performed without the limits of the county. (*Adams v. San Francisco*, 60 Cal. 117.)
Cited 77 Cal. 595.

27. Sections 1613 and 1614 of the Penal Code, which provide that certain prisoners may be required to labor on the public works or ways in the county by an order of the board of supervisors and the County Government Act (Laws 1891, sec. 25, subd. 30, p. 306), which confers authority upon a board of supervisors of a county "to provide for the working of prisoners," do not impose upon the sheriff any duties in addition to the general duties prescribed by section 1600 of the Penal Code and section 4176 of the Political Code, in relation to the custody of prisoners, and do not make it the duty of the sheriff to keep the prisoners in his immediate custody while they are at labor. (*Hicks v. Folks*, 97 Cal. 241.)

28. The authority conferred by the County Government Act (Laws 1891, sec. 25, subd. 30, p. 306) upon the board of supervisors of a county "to provide for the working of prisoners" upon public works or ways, "under the direction of some responsible person," includes the custody of the prisoners while absent from the jail, by the "responsible person" under whose direction they are required to labor, and they may be taken out of the custody of the sheriff for such purpose; and, upon a refusal by the sheriff to deliver such prisoners to a person duly appointed overseer of them, he may be required to do so by a writ of mandate. (*Hicks v. Folks*, 97 Cal. 241.)

Order to produce prisoner. See Contempt, IV, 2.

Refusal to produce prisoner. See Contempt 37.

Making arrest when guilty of kidnaping. See Criminal Law, XXI, 35.

Executing warrant of arrest outside county. See Criminal Law, 71.

b. Diligence Required in Executing Process; Herein of Process Received on Sunday.

29. It is the duty of an officer, after he has once entered upon the execution of an attachment, to complete its execution with diligence. (*Wheaton v. Neville*, 19 Cal. 41.)

30. In service of process sheriff is responsible only for unreasonably, or not reasonably, executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to any thing else. (*Whitney v. Butterfield*, 13 Cal. 335.)
Cited 3 Wash. Ter. 65.

31. Reasonable diligence in execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because defendant is about to leave the state, or remove his property, and the like. (*Whitney v. Butterfield*, 13 Cal. 335.)

32. Where a sheriff received a writ of assistance, commanding him forthwith to deliver possession of certain real estate to plaintiff, and went with plaintiff to the premises for the purpose of putting him in possession, but for some reason not stated—in opposition to plaintiff's wishes and against his protestations—he declined to take any action in the matter, and then, on a subsequent day, the sheriff proceeded to execute the writ, but the parties in possession—being the parties against whom the writ run—had, in the mean time, destroyed a number of valuable fixtures, and by their willful and malicious acts had injured the premises in other respects, held, that the sheriff is liable for the damage thus done; that he is presumed to have known what his duty was, and to have acted in willful violation of it; and that as his duty was to execute the writ at the earliest practicable moment, and he neglected and refused so to do, it was through his fault that the parties in possession were enabled to commit the injury; and he must respond in damages, however remote. (*Chapman v. Thornburgh*, 17 Cal. 87.)

Duty to serve writ of restitution. See Ejectment, XXI, 2.

What may take in satisfaction of execution. See Executions, 392.

33. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. (*Whitney v. Butterfield*, 13 Cal. 335.)
Cited 6 Mont. 206.

34. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter-past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. (*Whitney v. Butterfield*, 13 Cal. 335.)

c. Compelling Sheriff to Execute Writ.

35. If a sheriff has received an order of sale on a decree foreclosing a mortgage, and refuses to execute it, on the ground that an appeal has been taken, and the undertaking on appeal is insufficient to stay proceedings, the court may make an ex parte order requiring him to proceed and sell. (*Société D'Epargnes v. McHenry*, 49 Cal. 351.)

Compelling sheriff to execute writ, showing required. See Ejectment, 553.

d. Failure or Refusal to Levy; Defense of Claim of Property.

36. If an execution is placed in the hands of a sheriff, with directions to levy on a sum of money in the hands of a corporation, and he exhibits the execution to the company and demands the money, the facts that the company, while admitting that it has the money, refuses to deliver it to the sheriff, and that the sheriff cannot seize or take manual possession of the money, and that the plaintiff's attorney has notice of these things at the time, do not excuse the sheriff for failing to levy the execution, whether the company has the money as a distinct sum belonging to the defendant, or he is its creditor for the amount. (*Howe v. White*, 49 Cal. 658.)

37. In an action against a sheriff for refusing to levy an attachment on certain property as belonging to the attachment debtor testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible when those facts have not been set up as new matter of defense in the answer. (*Strong v. Patterson*, 6 Cal. 156.)

38. As under the statute the plaintiff, after the introduction of such testimony, would be bound to show that he had tendered an indemnity bond, he may well complain that he is taken by surprise, the issue not being tendered by the pleadings. (*Strong v. Patterson*, 6 Cal. 156.)

39. The objection to the introduction of such testimony, on the ground that it is irrelevant, is sufficient. (*Strong v. Patterson*, 6 Cal. 156.)

To whom sheriff liable for failure to levy. See post, IV, 3, s.

e. Excessive Levy.

40. In an action against a sheriff for the recovery of personal property alleged to have been improperly attached, or for its value, where the complaint contains no allegation that the levy was excessive, the plaintiff cannot avail himself of the fact that the evidence showed that the levy was excessive, so as to entitle him to a recovery as to the excess. (*Sexey v. Adkison*, 40 Cal. 408.)

f. Where Property Rightfully Seized.

41. Sheriff rightfully taking property from defendant in an action of replevin cannot be held liable in an action by such defendant. (*Fleming v. Wells*, 65 Cal. 336, 339.)

g. On Seizure of Mortgaged Chattels.

42. Sheriff held liable in trespass for levying on personalty in possession of the plaintiff by virtue of a chattel mortgage. (*Meyer v. Gorham*, 11 Cal. 392.)

43. If an officer, under process, seizes personal property mortgaged, without paying or tendering the amount due, the detriment proximately caused by the seizure is not the value of the property, but the amount of the mortgage debt; and this detriment the officer, in seizing the property, assumes to make good. (*Wood v. Franks*, 56 Cal. 217.)

Cited 67 Cal. 59; 89 Cal. 183; 1 Wash. 154; 3 Wash. 422; distinguished 91 Cal. 123; disapproved 91 Cal. 24.

44. The action was brought against a sheriff to recover damages for the conversion of certain personal property, of part of which the plaintiffs were the owners, and on the remainder of which they held a chattel mortgage. On the trial the court instructed the jury that if they found that the plaintiffs were the owners or entitled to the possession of the property as pledgees, and that the defendant wrongfully converted it, the detriment caused thereby was presumed to be the value of the property at the time of the conversion, with interest from that time, and a fair compensation for the time and money properly expended in pursuit of the property. It further instructed them that if they found that the defendant levied upon, sold, and converted that portion of the property upon which the plaintiffs held a chattel mortgage, and that he neither paid nor tendered to the plaintiffs the amount of the mortgage debt with interest, nor deposited the amount thereof with the county clerk to their order, then, as to that particular property, the plaintiffs were entitled to a verdict for the amount of the mortgage debt with interest. Held, that the instructions were proper. (*Sherman v. Finch*, 71 Cal. 68.)

Distinguished 91 Cal. 123, 124.

45. Where the property levied upon consisted of a crop upon which a mortgage had been recorded, which was released by the officer after the bringing of an action against him by the mortgagee for damages for its conversion, and the court finds that it was redelivered to the mortgagor, and was never removed from the field where it was situated by the defendant or by his authority, and awards a judgment in favor of the plaintiff for nominal damages only, the failure to find as to whether the plaintiff had or had not the benefit of the property after its release is error, for which the judgment must be reversed upon an appeal of the plaintiff. (*Irwin v. McDowell*, 91 Cal. 119.)

What constitutes a taking on seizing mortgaged chattel. See post, IV, 3, s.

Measure of damages on seizure of mortgaged chattel. See post, 155.

Levying on mortgaged personalty without paying debt, liability of. See Attachments, 136.

h. On Seizure of Property of Third Person.

46. If sheriff levies upon property of person not a party to the execution he is responsible in an action at law. (*Markley v. Rand*, 12 Cal. 275; *Van Pelt v. Littler*, 14 Cal. 194, cited 63 Cal. 465, 99 Cal. 499, distinguished 78 Cal. 218, 219; *Wellman v. English*, 38 Cal. 583, cited 63 Cal. 464.)

47. A constable is liable to the owner of personal property for the seizure and sale thereof under an execution against a third person, and he is not relieved from liability by professing to sell merely the interest of the execution debtor. (*Rankin v. Ekel*, 64 Cal. 446.)

48. Where order of court directed sheriff to

seize certain specific property, and the property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. (*Rhodes v. Patterson*, 3 Cal. 469.)

49. That attaching creditor had reason to believe that the property was the property of his debtor does not justify the sheriff in seizing such property, and is no defense to an action by the owner for a conversion. (*Angell v. Hopkins*, 79 Cal. 181.)

50. Fact that they were taken by the coroner, under writ against sheriff, before the latter had removed them, does not excuse his tort, where the sheriff wrongfully took possession of the goods, and thereby deprived the plaintiff of them. (*Squires v. Payne*, 6 Cal. 664.)

51. Sheriff is not protected in sale of personal property by verdict of jury on a trial of the right of property, under the provisions of section 218 of the code. The proceedings before the sheriff in such a trial are not judicial. (*Perkins v. Thornburgh*, 10 Cal. 189.) Cited 28 Cal. 123.

52. Mere fact that judgment debtor was found upon mining ground of plaintiff did not justify the sheriff, who had the execution, in going on the ground and digging up the soil, and taking the gold it contained. (*Rowe v. Bradley*, 12 Cal. 226.)

53. In such case no ouster is necessary to maintain an action of trespass; any unlawful entry is sufficient. An officer, when he puts a receiver in possession of the property of another, against whom he has no process, or asserts through himself or another an unlawful dominion over such property, is a trespasser. (*Rowe v. Bradley*, 12 Cal. 226.)

54. Assent of ordinary agent, who had general charge of his principal's affairs during her temporary absence, will not justify the sheriff, who holds an execution against a third person, in levying it upon property in the possession of the principal, in her absence. (*Fitch v. Brockmon*, 2 Cal. 575.)

55. Where, at the time of the levy of a second execution, the goods first levied upon were mixed with others which W. had also bought of S. & M., which last goods were alleged to be liable to the execution, held, that if they were so mixed or confounded with other goods as that they could not be identified or distinguished, and W. failed to point out to the sheriff or designate the goods which were not subject to execution, the sheriff could not be liable for levying on the whole. But the sheriff would be bound, after the levy, on notice to him of the goods not liable, to restore them; but this notice must be specific, apprising him of and designating the particular goods improperly seized, and must be given previously to suit brought. (*Wellington v. Sedgwick*, 12 Cal. 469.)

56. Where the goods of a third party are mixed with the property, or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. (*Daumiel v. Gorham*, 6 Cal. 43.)

Cited 6 Cal. 514; 12 Cal. 476, 495; 30 Cal. 191; 3 Nev. 563.

57. Where no such notice or demand was proved, it was error to charge the jury "that the sheriff was a trespasser, and that they were to find the value of the goods." (*Daumiel v. Gorham*, 6 Cal. 43.)

58. In an action against a sheriff for seizing and selling certain personal property, alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to Teal, held, that evidence tending to prove that it was the partnership property of Teal and plaintiff was proper, and that if they were partners, and, as such, owned the property, plaintiff could not recover. (*Hughes v. Boring*, 16 Cal. 81.)

59. The owner of property seized has his remedy and the right of recovery against any one, whether sheriff or not, unless it be held by legal process against himself. (*Rhodes v. Patterson*, 3 Cal. 469.)

60. If a sheriff, by virtue of an execution, seizes the property of a person other than the judgment debtor, whether by mistake or design, it is not necessary for the owner of the property thus seized to make a demand on the sheriff before commencing suit. (*Boulware v. Craddock*, 30 Cal. 190, cited 38 Cal. 584, 55 Cal. 560, 63 Cal. 235, 97 Cal. 483; *Ledley v. Hays*, 1 Cal. 160, cited 12 Cal. 495, 30 Cal. 191, 38 Cal. 584, 55 Cal. 560; *Moore v. Murdock*, 26 Cal. 514; *Wellman v. English*, 38 Cal. 583, cited 55 Cal. 560, 63 Cal. 235; *Black v. Clasby*, 97 Cal. 482.)

61. Certain personal property owned by plaintiff, but which had been used by A. & G. under a contract of hire, was seized by the sheriff from the possession of the plaintiff by virtue of an attachment against G., subsequent to which plaintiff, having made a demand for the property upon the sheriff, but not upon A. & G., commenced this action against the former for its recovery, held, that the demand, if necessary at all, was properly made upon the defendant in whose possession the property was at the time. (*Woodworth v. Knowlton*, 22 Cal. 164.)

62. In an action by the parties whose property has been wrongfully taken under legal process, all who join or participate in the trespass are jointly liable as joint trespassers. (*Lewis v. Johns*, 34 Cal. 629.) Cited 63 Cal. 465.

63. Plaintiff's property was illegally seized by defendant J., as sheriff, by levy under writs of attachment against E. J. O., sued out by the other defendants, D. & S., and L. & G.; the levy under the writ of D. & S. taking precedence only because it first came to the hands of J. At the time of making said seizure J. acted without special directions from the other defendants, but immediately thereafter all the defendants were duly notified of plaintiffs' claim to said property, and that a redelivery was demanded by plaintiffs of J., whereupon D. & S. and L. & G. executed and delivered separately to J. bonds of indemnity against the plaintiffs' said claim. The property seized, which consisted of grain in field in process of harvesting, was sold as perishable by J.,

whereby it became lost to plaintiffs, and the proceeds of the sale were applied to the satisfaction in full of the attachment debt of D. & S., and the residue to the satisfaction, in part, of the like debt of L. & G., for both of which lawful judgments against E. J. O. had in the mean time been recovered. Held, that all the defendants were joint trespassers, and jointly liable to plaintiffs for the damages sustained. (*Lewis v. Johns*, 34 Cal. 629.)

64. In an action against a sheriff to recover the possession of goods, or their value, held by him under a levy on attachment or execution in his hands, against the property of the plaintiff, it may well be doubted whether it is necessary for the defendant to allege fraud, or do more than allege that the goods levied on by him were the property of the defendant in the writ, or that he had an attachable interest therein; but the point is not decided. (*King v. Davis*, 34 Cal. 100.)

65. In action of trover by a vendee of personal property against a sheriff for conversion thereof under an attachment against the vendor, it is error to instruct the jury that if plaintiff was the owner or in possession of the goods at the time of the attachment, he is entitled to recover. The ownership of the property is the sole question in issue. (*Zaro v. Dakan*, 76 Cal. 565.)

66. In an action on the official bond of a constable for the wrongful seizure of plaintiff's property on execution against a third party, the title of plaintiffs to the property seized at the time of the seizure is in issue, and should be found. But a finding that the property was taken from plaintiffs' possession, and converted by the defendant to his own use, though defective as being a finding of evidence of title rather than of the ultimate fact of title, when considered in connection with a finding that plaintiffs were the owners and entitled to the possession of the property at the time of the commencement of the action, is an error or defect which does not affect the substantial rights of the parties, and should be disregarded. (*Averett v. Sobrunes*, 79 Cal. 207.)

Liability of sheriff seizing property of party not served. See Executions, 101.

Levy on property of tenant in common. See Executions, 119.

Seizure by sheriff, under execution, when joint trespass. See Executions, 410.

Attaching property, liability on claim of property. See Attachments, V.

Fraudulent conveyance, right of sheriff to set aside. See Fraudulent Conveyances, III, 5.

Pleading fraudulent conveyance, sufficiency. See Appeals, 2338, 2339.

Attaching property fraudulently conveyed, evidence not objected to. See Appeals, 2370, 2371.

i. Taking Insufficient Replevin Bond.

67. If property attached by sheriff is replevied by a third person who claims the property the sheriff is liable in the subsequent loss of the property, if he accepts the undertaking in replevin without taking any steps to find out whether the sureties are sufficient and does not compel them to justify. (*Noble v. Desmond*, 72 Cal. 330, 334.)

j. Right to Retain Possession; Duty to Release Property Pending Appeal.

68. The defendant in this case, as sheriff, under a writ of attachment, at the suit of the plaintiff, seized thirteen hundred and ninety-nine dollars and eleven cents coin as the property of the judgment debtor, which was claimed by one S., who on the same day brought suit for its recovery. The defendant having demanded indemnity, the plaintiff gave him a bond, and also signed a written agreement that the defendant might retain for a reasonable time all moneys that might come into his hands by reason of said attachment or any execution to be issued in said action. After the plaintiff recovered judgment the court, pending the suit of S. against the defendant, made an order directing the sheriff, upon the delivery to him of a written undertaking approved by the court in the sum of eighteen hundred dollars, to pay into court, or to his successor in office holding the execution, the money taken under the attachment. Held, the reasonable time stipulated for in the contract is to be considered with reference to the fact that S. claimed the money, and might endeavor to establish that claim in the courts. The plaintiff by his agreement has authorized the defendant to rely for his security against the claim of S. not only on the bond but on the money, and he is not entitled to the order while the action of S. is pending. (*Scherr v. Little*, 60 Cal. 614.)

69. Under section 946 of the Code of Civil Procedure, which provides that the effect of the perfecting of an appeal and the giving of an undertaking to stay the execution of the judgment or order appealed from is not only "to stay all further proceedings in the court below upon the judgment or order," but also to "release from levy property levied upon under execution issued upon such judgment," it is the duty of the sheriff to release from levy all property taken under execution upon notice of the filing of the notice of appeal and the giving of the bond to stay execution, regardless of any question as to the sufficiency or insufficiency of the sureties, and he cannot retain possession until the sureties have justified, or until their justification has been waived. (*Sam Yuen v. McMann*, 99 Cal. 497.)

Property held by sheriff after expiration of term. See ante, IV, 2.

k. Duty to Hold Property; Liability for Loss from Negligence.

70. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law; and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. (*Sanford v. Boring*, 12 Cal. 539.) Cited 45 Cal. 41; 1 Idaho, 178; s. c. 1 Idaho, N. S., 539.

71. Measure of the obligation of a sheriff in respect to property seized is that of a person of ordinary discretion and judgment in respect to his own property. (*Noble v. Desmond*, 72 Cal. 330, 333.)

72. A constable and the sureties on his official bond are responsible for the nonperformance of his official duty in so carelessly or negligently using goods attached by him that they are damaged through such negligence while in his custody, though they were seized under a proper writ. (*Witkowski v. Hern*, 82 Cal. 604.)

l. Sale of Exempt Property.

73. Sheriff who levies upon and sells property exempt from execution is liable for the value of such property, if claimed as exempt prior to the sale. (*Spencer v. Long*, 39 Cal. 700.)

74. A complaint against a sheriff and his sureties for selling, under execution, the homestead of plaintiff, which sets out that the sheriff was in possession of a certain execution against plaintiff, J. Kendall, and, under color of said execution, wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of two thousand dollars, the value of the property is insufficient, as the same does not state facts sufficient to constitute a cause of action. (*Kendall v. Clark*, 10 Cal. 17.)
Cited 46 Cal. 292.

m. Sale Contrary to Order of Court, or Where Injunction Issued.

75. The provision of law punishing the sheriff for acting in defiance of an order of court is more for the sake of the public than the redress of the private grievance involved in such delinquency. (*Buffandeau v. Edmondson*, 17 Cal. 436.)

76. A sheriff who sells property on an execution issued by a justice of the peace, after the justice has notified him that a writ of certiorari has been issued, and commanding him to stay all proceedings upon the execution, is liable for the value of the property. (*Spencer v. Long*, 39 Cal. 700.)

77. Where a sheriff has levied on and is about to sell property of an execution debtor, and the defendant in execution obtains from the court in which the judgment was rendered an injunction restraining the plaintiff in the judgment, his servants, etc., from proceeding to sell under such execution, and this injunction is served upon the sheriff, who, in defiance of it, afterwards makes the sale, he is a naked trespasser, and liable in damages, even though he be not a party to the injunction suit. (*Buffandeau v. Edmondson*, 17 Cal. 436.)
Cited 28 Cal. 286.

78. Whether the sheriff could set up in defense that the property was justly subject to plaintiff's debts, and has been so applied, query? (*Buffandeau v. Edmondson*, 17 Cal. 436.)

79. Whether a sheriff in such case be a necessary party to the injunction, query? But if so, he is a merely formal party, and the failure to include him in the suit does not absolve him from the duty of obeying the injunction, if he be notified of it. (*Buffandeau v. Edmondson*, 17 Cal. 436.)

Indemnity against sale in violation of injunction. See post, V.

Power to sell depends upon judgment. See Executions, 143.

n. Sale Without Notice.

80. The remedy against a sheriff for selling property on insufficient notice is confined to the statutory remedy. (*Shores v. Scott River W. Co.*, 17 Cal. 626.)
Cited 23 Cal. 320; 70 Cal. 302.

81. An action cannot be maintained by the defendant in an execution to recover of the officer the penalty prescribed by section 222 of the Practice Act for selling without proper notice, unless, by a sale so made, the complainant has been deprived of his property. If the attempted sale is a nullity and passes no title, no injury has been sustained, and no right of action for the forfeiture accrues. (*Askew v. Ebberts*, 22 Cal. 263.)
Cited 63 Cal. 518.

82. A purchaser at an execution sale is not an "aggrieved party" within the meaning of section 693 of the Code of Civil Procedure, which prescribes a penalty for selling real property without notice, recoverable by the party aggrieved. *McKee, J.*, and *McKinstry, J.* (*Kelley v. Desmond*, 63 Cal. 517.)

o. Refusal to Execute Deed.

83. In an action against a sheriff for special damages, resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, when there is no allegation in the complaint of title, nor any averment that, in case the deed had been executed, plaintiff would have been able to recover possession of the premises, or the rents and profits, held, that such complaint is insufficient. (*Knight v. Fair*, 12 Cal. 296.)

Power and duty of in making foreclosure sale. See Mortgages, XIX, 18, c.

Execution of deed by sheriff. See Executions, XI.

Refusal to sell property and turn over proceeds. See Contempt, 29.

p. Return, Conclusiveness of; Failure to Make; Paying Over Proceeds; Summary Proceedings Against.

84. Sheriff is concluded by his return of the amount of a sale under execution, and can make no defense to an action against him inconsistent with such return. (*Harvey v. Foster*, 64 Cal. 296.)

85. In an action against a sheriff for damages for a failure to return an execution, if the complaint avers only its receipt by him, and that he has collected the money, and has failed to return the execution, this court will not assume, upon a failure to deny the allegations of the complaint, that the sheriff has failed to pay the money to the plaintiff. (*Hoag v. Warden*, 37 Cal. 522.)

86. It is not necessary, in an action against a sheriff for damages for failure to return a writ of execution, to allege in the complaint that the fees of the sheriff were paid. If the fees were not paid, and the writ was not served or returned on that ground, it must be pleaded by the sheriff as matter of defense. (*Van Cleave v. Bucher*, 79 Cal. 600.)

87. In an action against a sheriff for damages for failure to return a writ of execution, if the defendant is described as sheriff in the title of the cause, and the complaint avers his official capacity, and that the writ in question was delivered to him as sheriff, and that, in violation of his duty as sheriff, he failed to return the same, to the damage of plaintiff in the amount of the writ, the complaint shows that the action is brought against the defendant as sheriff, and is not demurrable for ambiguity in not showing whether he was sued in his official or in his individual capacity. (*Van Cleave v. Bucher*, 79 Cal. 600.)

88. In an action against the sheriff and his sureties, for failure to make return of an order of sale of mortgaged property, no laches can be imputed to the plaintiff for failure to enforce a personal judgment taken in the foreclosure suit by execution; for though he had his election to treat it as a personal judgment and issue execution upon it, or to issue his order of sale, he could not do both, nor could the personal judgment be enforced as such, after issuance of an order of sale, until the return thereof by the sheriff, and then only for the deficiency. (*Boyd v. Desmond*, 79 Cal. 250.)

89. In an action on a sheriff's official bond for damages for negligence in failing to return an order of sale of mortgaged property, whereby plaintiff was prevented from collecting the debt for the deficiency, it is not enough for the defendants to show that the return was found in the clerk's office without a file-mark, among a bundle of bulky papers, where loose papers were not kept, there being no evidence, either in the sheriff's office or clerk's office, tending to show that a return had been made to or filed in the clerk's office. If the filing can be proved by parol the proof must show an actual delivery of the paper to the clerk or one of his deputies for the purpose of filing, and the proof should be clear and positive. (*Boyd v. Desmond*, 79 Cal. 250.)

90. It is competent in an action for the sheriff to prove the order of sale, and the indorsement of a return thereon, as one of the acts necessary to be done in making the return, without first proving that they had been filed in the clerk's office, although such order and indorsement are not sufficient to prove the whole case in favor of the sheriff. (*Boyd v. Desmond*, 79 Cal. 250.)

91. The fact that the sheriff is charged with official negligence, and that he made the sale and indorsement of return through his deputy, does not raise the question as to the deputy's general fitness for the office, and it is not competent to prove that he was a competent, prudent, and careful man, especially where it appears that the failure to deliver the return to the clerk for filing was owing to the neglect of the sheriff's book-keeper. (*Boyd v. Desmond*, 79 Cal. 250.)

92. In action against a sheriff, the sheriff being charged with a specific act of negligence, there can be no presumption in favor of the sheriff and his sureties that the sheriff had performed his official duty, where such presumption in his favor would necessarily result in a counter-presumption that the clerk had

failed to perform his duty as a public officer. (*Boyd v. Desmond*, 79 Cal. 250.)

93. The measure of damages in an action against a sheriff is the actual loss incurred by the plaintiff, if there is no prayer for recovery of the penalty imposed by statute upon the sheriff for failure to make a return. (*Boyd v. Desmond*, 79 Cal. 250.)

94. When there is evidence in an action against a sheriff tending to show that the mortgagor had property out of which a judgment for deficiency could have been made prior to his death, and that only part thereof could now be collected out of his estate, without fault or laches of the plaintiff in not obtaining a judgment which was entitled to priority of payment, owing to the failure of the sheriff to return the order of sale, there is sufficient proof of actual damage to prevent affirmance of an erroneous order refusing a new trial, upon the ground that the plaintiff could not have been damaged by the failure of the sheriff to prove a return of the writ. (*Boyd v. Desmond*, 79 Cal. 250.)

95. In an action against a sheriff to recover damages for failure to return an execution, a finding by the court that the sheriff has not returned the execution is not a finding that actual damages were sustained, if there is nothing in the record to show but what the evidence might have disproved damages. (*Glascock v. Ashman*, 52 Cal. 420.) Cited 2 Idaho, 1174.

96. The general statute defines the duties of the sheriff in respect to final process. It declares "that the sheriff shall execute the writ (of fieri facias) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess, he shall return the same to the judgment debtor." These acts are to be construed in *pari materia*. (*Wilson v. Broder*, 10 Cal. 486.)

97. Where at a judicial sale property brings more than the amount of the execution, it is the duty of the sheriff to pay the excess, or see that it is paid, to the defendant. If he fails to do this, he and the sureties upon his official bond are liable in an action for such excess at the suit of the defendant. (*Harvey v. Foster*, 64 Cal. 296.)

98. Where a sheriff fails to pay over money collected on execution, the action should be for a false return. (*Egery v. Buchanan*, 5 Cal. 53.)

99. In an action against a sheriff, under section 4181 of the Political Code, to recover certain money belonging to the plaintiff which had come into the hands of the defendant by virtue of his office, and which he had refused to pay over on demand, the plaintiff is not entitled to recover the penalty provided by the section, if the demand made on the sheriff was for the payment of a larger amount than the plaintiff was entitled to. (*Shumway v. Leakey*, 73 Cal. 260.)

Penalty for failure to pay over proceeds. See post, IV, 3, w.

100. A motion against a sheriff and his sureties, under the provisions of the ninth section of the "Act Concerning Sheriffs,"

passed April 29, 1851, is a summary proceeding, in derogation of the rules of the common law, and is penal in its character; and, for these reasons, the act must be strictly construed. (*Wilson v. Broder*, 10 Cal. 486.) Cited 2 Nev. 378; distinguished 16 Nev. 414.

101. The motion must be made in the name of the plaintiff in the execution. (*Wilson v. Broder*, 10 Cal. 486.)

102. The remedy by motion against a sheriff and his sureties, to compel him to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designed to embrace a case in which he declined to pay over moneys collected under circumstances of a bona fide well-grounded doubt of the authority of the party to demand it. (*Wilson v. Broder*, 10 Cal. 486.)

Application of proceeds of execution sale. See Executions, IX, 6, k.

Execution sale, receipt of excess. See Executions, IX, 6, k.

Liability for failure to return execution. See Executions, 406.

q. What Amounts to Release of; Instructions to Seize as a Defense.

103. No parol instruction of the plaintiff in an attachment or execution, respecting property seized by the sheriff under either writ, will discharge such sheriff from liability. The statute is express that such instruction must be in writing. (*Sanford v. Boring*, 12 Cal. 539.)

104. The evident meaning of the language of the act embraces all acts done by the sheriff in respect to the execution of process, including the care and disposition of the property levied upon. (*Sanford v. Boring*, 12 Cal. 539.)

105. Where the sheriff had an execution against C., and levied and sold the property of F., who sued him for the trespass and conversion, proof that C., the defendant in the execution, had made a settlement with F. raises no presumption that the settlement included the claim of F. upon the sheriff, for the trespass, or operated as a satisfaction of it. (*Fitch v. Brockmon*, 2 Cal. 575.) Cited 22 Cal. 592.

106. It is error in the court to infer satisfaction of the plaintiff's claim upon the sheriff from such settlement. (*Fitch v. Brockmon*, 2 Cal. 575.)

107. Where an action of replevin is brought to recover property in the possession of a sheriff under attachment, and the parties stipulate that the property shall be turned over to a third party to await the final judgment in the cause, the sheriff is released from all liability, and a judgment in form only can be taken against him. (*Temple v. Alexander*, 53 Cal. 3.)

108. Defendant, as sheriff, levied on goods claimed by the plaintiffs. After suit had been brought, one of the attaching creditors procured a release from one of the plaintiffs, executed in the name of both, of all actions and causes of action, etc. Held, that, if this

release was obtained by fraud, it was void, and the sheriff could derive no advantage from it, although he was not implicated in and knew nothing of the fraud. (*Pelberg v. Gorham*, 23 Cal. 549.)

Instructions to by attorney. See Attorney and Client, VI, 2.

r. Justification Under Process.

109. Execution is sufficient justification to a sheriff for the seizure of the property of the debtor, whether it be in his actual possession, or in the possession of an agent or parties holding it for his benefit. (*Bickerstaff v. Doub*, 19 Cal. 109.) Cited 19 Cal. 622.

110. In an action to recover possession of personalty defendant may justify on the ground that he holds the property as sheriff under attachment, judgment, and execution. (*Stephens v. Hallstead*, 58 Cal. 193, 194.) Cited 13 Cal. 585.

111. In an action of replevin the complaint, and also the affidavit and the order indorsed, described the property simply as "four hundred sheep." Held, the process was regular on its face, and justified the sheriff in seizing the property. (*Lawrence v. Coyne*, 62 Cal. 124.)

112. In an action by the owner to recover possession of personal property from an officer, who had levied upon it under an attachment against a third person, in whose possession it was found, the writ of attachment is admissible in evidence as a prima facie justification of the act of the officer in making the levy, if the writ be regular upon its face, and issued by a court having jurisdiction of the subject matter, and in a case where the law authorizes its issuance. (*Brichman v. Ross*, 67 Cal. 601.)

113. A sheriff makes out a prima facie case of justification of the seizure of property under a writ of attachment, by the production of the writ and affidavit on which it was issued, notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure, if the property was in the possession of the defendant and attached as his property. (*Babe v. Coyne*, 53 Cal. 261.) Cited 67 Cal. 604.

114. The sheriff is entitled to show such justification, irrespective of any question as to the validity of the sale to the plaintiff's lessor. (*Babe v. Coyne*, 53 Cal. 261.)

115. Action for the recovery of personal property, or its value, and damages. Plaintiff did not claim the delivery of the property to him before judgment. The defendant, sheriff, justified under a writ of attachment and an execution; the property was not taken from the possession of the plaintiff. Held (per Myrick, J., and Morrison, C. J., concurring), conceding that the writ of attachment was inadmissible as evidence because the affidavit for the writ was defective in stating that the amount claimed was due upon either an express or implied contract, the execution, which was valid on its face, and which was offered by the defendant, was admissible in evidence as the basis of the defense that the transfer of the property in controversy from

the defendants in the writ to the plaintiff in this action was void as to creditors of such defendants. (*Norcross v. Nunan*, 61 Cal. 640.) Cited 13 Col. 585.

116. Irregularities in the proceedings for the judgment do not prevent the officer from justifying under an execution valid on its face. (*Norcross v. Nunan*, 61 Cal. 640.)

117. Rule that irregularities in the proceedings do not prevent an officer from justifying under process regular on its face applies to a court of limited jurisdiction if the subject matter of the suit is within that jurisdiction, and nothing appears on the face of the process to show that the person was not also within it. (*Norcross v. Nunan*, 61 Cal. 640.)

118. To sustain his defense of justification set up in his answer the defendant offered in evidence an affidavit and undertaking on attachment, and a writ of attachment in an action entitled *James Murphy, plaintiff, v. John Doe Gordon and Richard Roe Cory, defendants*, to which plaintiff objected on the ground that the person alleged to be indebted to Murphy is a fictitious person. Held, this objection is clearly untenable. (*Norcross v. Nunan*, 61 Cal. 640.)

119. The execution offered in evidence by the defendant appears to be sufficient in form and substance, and it was error to exclude it. (*Norcross v. Nunan*, 61 Cal. 640.)

120. Where a stranger to an execution is in possession of property, claiming it as his own by virtue of a transfer to him from the debtor, which would prevent the latter himself from retaking the possession, the sheriff cannot justify without producing both execution and judgment. (*Bickerstaff v. Doub*, 19 Cal. 109.) Cited 63 Cal. 466; 6 Mont. 241.

121. Where the property seized by a sheriff is in the possession of a stranger to the execution it is not sufficient, as a justification of the seizure, to prove the execution only; the judgment upon which it was issued should also be proved. (*Paige v. O'Neal*, 12 Cal. 483.) Cited 6 Mont. 241.

122. Where a stranger to an execution is in possession of personal property, claiming it as his own by virtue of such a transfer to him from the execution debtor as would prevent the latter himself from retaking possession, whether the transfer be by sale or pledge, a sheriff cannot justify a seizure of the property under the writ without producing both the writ and the judgment. (*Knox v. Marshall*, 19 Cal. 617.)

123. When property is taken from the possession of the defendant by the officer levying thereon it is sufficient to introduce in evidence the attachment or execution under which the levy is made; but, when found in the possession of a stranger claiming title to the property so seized, it is likewise necessary to show a judgment, or prove the debt for which judgment is demanded in the attachment suit. (*Sexey v. Adkinson*, 34 Cal. 346.) Cited 67 Cal. 604.

124. A sheriff who, by virtue to an attachment, seizes property in the possession of the

judgment debtor, may justify by producing the writ; but if he seizes property in the possession of a third person, as the judgment debtors, he must prove, when sued for damages, not only the attachment, but the proceedings on which it was based. (*Horn v. Corvarubias*, 51 Cal. 524.) Cited 58 Cal. 197; 67 Cal. 604.

125. In the suit of *H. against C., A.*, as sheriff, under a writ of attachment regularly issued in said action, seized, in the hands of *S.*, personal property as the property of *C.* *S.* sued *A.* to recover said property, alleging ownership, and on the trial demanded title through a sale to him from *O.*, made prior to said seizure under attachment. *A.*, in defense, pleaded said attachment suit and proceedings, and that said sale was fraudulent and void as against *H.* On the trial *A.* introduced in evidence the complaint, summons, answer, affidavit, and undertaking for attachment, and the writ of attachment in said suit of *H. against C.*, but introduced no judgment therein or other evidence of the existence of the debt demanded in said complaint. Held, that the admission of said evidence under the objections of *S.* was proper, but that said attachment suit and proceedings were unavailable to *A.* as a defense to said action, in the absence of proof of a judgment therein, or of the existence of said debt. (*Sexey v. Adkinson*, 34 Cal. 346.)

126. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of *F. v. C.*, and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from *C.*, and that such purchase was fraudulent as to *F.*, a creditor of *C.* After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment, and execution, and all evidence justifying thereunder, on the ground that defendant had not proved all of the debt upon which the attachment issued. Held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit, paying *C.*'s debt, if it really were his property, or subject, as his, to the process because of the fraud. (*Walker v. Woods*, 15 Cal. 66.) Cited 34 Cal. 351; 1 Idaho, N. S., 152.

127. But even if any proof aliunde of *C.*'s indebtedness were required, when the attachment papers, affidavit, undertaking, etc., were regular on their face, the judgment was prima facie sufficient to admit the attachment papers in proof. (*Walker v. Woods*, 15 Cal. 66.)

128. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution, and levy, and then that the sale by *C.* to plaintiff was fraudulent.

No proof of the indebtedness of C. to F. was necessary, after showing the affidavit, undertaking, and attachment; and no irregularities, in justifying sureties and the like, could be availed of by plaintiff. (*Walker v. Woods*, 15 Cal. 66.)

129. Where property of wife is seized under execution against husband the officer is not in a position to justify the seizure, unless, in addition to the execution, he also produces the judgment on which it was issued. (*Kane v. Desmond*, 63 Cal. 464.)

130. A constable is not justified in taking the property in controversy in an action of claim and delivery from the possession of the defendant, upon a direction so to do by the plaintiff, unless he receives from the plaintiff an affidavit, order, and undertaking substantially complying with sections 510, 511, and 512 of the Code of Civil Procedure. (*Laughlin v. Thompson*, 76 Cal. 287.)

131. An officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint. (*Glazer v. Clift*, 10 Cal. 303.)

132. An answer justifying the seizure of personal property by virtue of a writ of attachment issued against a person other than the plaintiff does not state facts constituting a defense if it fails to allege that the defendant in the attachment suit was the owner of the property. (*Richardson v. Smith*, 29 Cal. 529.)

133. Where, in an action against the sheriff for taking goods, he justifies under an attachment against a third person, it is not necessary that his answer should set forth minutely every fact relating to the attachment suit. An answer which stated the time of commencement of the action, the names of parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, held to be sufficient. (*Towdy v. Ellis*, 22 Cal. 650.)

134. If, in justification by the sheriff under attachment, judgment, and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. (*Walker v. Woods*, 15 Cal. 66.)

135. In an action of claim and delivery for certain personal property against an attaching officer the judgment-roll in the case in which the attachment was issued is admissible in evidence in support of the defendant's plea of a justifiable taking, notwithstanding the plaintiff was not a party to the attachment suit. (*Watrous v. Cunningham*, 71 Cal. 30.)

Duty to serve irregular execution. See Executions, 36.

Justifying trespass on ground of official duty. See Trespass, 41.

a. To Whom Sheriff Liable; What Constitutes a Taking.

136. In an action against the maker and two indorsers of a promissory note (brought at the written request of the junior indorser), an attachment was issued and placed in the hands of the sheriff, with instructions to levy upon property of the maker and first indorser, but the sheriff failed to make the levy, and thereby the junior indorser was compelled to pay the debt. Held, in an action by the latter against the sheriff and his sureties, for failure to make the levy, that the sheriff owed no duty to the plaintiff with regard to the attachment, and that the action therefore could not be sustained. (*Thompson v. Miller*, 56 Cal. 425.)

137. In an action by a mortgagee of personal property against a sheriff, for taking the same under attachments against the mortgagor, a levy upon a part of the property in the possession of the mortgagor and the appointment of a keeper was a taking, although the property was not moved or otherwise disturbed, and though it was released before any demand from the plaintiff. (*Rider v. Edgar*, 54 Cal. 127.)

Cited 91 Cal. 122; 19 Or. 455.

Forcible entry, sheriff not guilty of in serving writ. See Ejectment, 543.

t. Pleadings and Parties in Actions Against Sheriff and His Sureties.

138. The sureties upon the official bond of a sheriff are properly joined as parties defendant in an action against the sheriff for the recovery of personal property wrongfully taken under execution by him in his official capacity, and of damages for its wrongful detention. (*Sam Yuen v. McMann*, 99 Cal. 497.)

139. An objection that the sureties upon the official bond of a sheriff are improperly joined with the sheriff in an action against him is waived by a failure to demur to the complaint upon that ground. (*Sam Yuen v. McMann*, 99 Cal. 497.)

140. A complaint against a sheriff and his sureties which alleges that the sheriff as principal, and the other defendants as sureties, made and delivered his official bond as sheriff, by which the defendants became jointly and severally bound for the faithful performance by the sheriff of his official duties, and then proceeds to state the alleged wrongful act of the sheriff in his official capacity for which damages are sought, is sufficient to show a liability upon the part of the sureties. (*Sam Yuen v. McMann*, 99 Cal. 497.)

141. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which avers that the other defendants than the sheriff are the securities on his official bond, does not state a cause of action against the sheriff on the bond. (*Ghiradelli v. Bourland*, 32 Cal. 585.)

Cited 99 Cal. 499.

142. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff, which merely avers that the

sureties are the securities on his official bond, and that the same was duly filed, executed, and recorded, does not state a cause of action on the bond. (*Ghiradelli v. Bourland*, 32 Cal. 585.)

143. A complaint in an action against a sheriff and his sureties for an alleged trespass of the sheriff should allege that the bond was the sheriff's official bond, and set out enough of its contents to show that those who signed it were bound to indemnify parties injured by the sheriff's malfeasance. (*Ghiradelli v. Bourland*, 32 Cal. 585.)

144. In an action for damages caused by the sale of the plaintiffs' real estate under an execution issued on an erroneous judgment, afterward reversed, it is not necessary in the complaint to make a direct averment of the existence of the property if that fact appears by necessary inference drawn from the facts stated. (*Reynolds v. Hosmer*, 45 Cal. 616.)

Action against sheriff for trespass, complaint in. See ante, 64.

Complaint against sheriff for unlawfully selling homestead. See ante, IV, 3, 1.

Complaint against sheriff for failure to make return. See ante, IV, 3, p.

Complaint for refusal to execute deed. See ante, IV, 3, o.

Recovery cannot be had for excessive levy where no allegation. See ante, IV, 3, e.

145. In an action against a sheriff for a violation of his duty in the service of an attachment, if he relies on matters occurring after its issuance and operating as a dissolution of the same, such matters must be specially pleaded. (*McComb v. Reed*, 28 Cal. 281.) Cited 87 Cal. 556.

Defense of claim of property should be set up. See ante, IV, 3, d.

Pleading justification. See ante, IV, 3, c.

Actions against. See Statute of Limitations, 185.

Replevin against. See Replevin, 12, et seq.

Actions against sheriff and bondsmen, joinder of. See Joinder and Severance of Actions, I, 2, h.

Pledge, actions against sheriff by. See Pledges, VII, 4.

Deputy is competent witness in action against sheriff. See Witnesses, V, 3, c, B.

Findings in action against sheriff for illegal seizure, conclusiveness of. See Appeals, 2621.

u. Offer to Return Property; Right to Set Off Judgment.

146. In an action against a sheriff and the sureties upon his official bond to recover property seized under execution, with damages for its detention, letters of the sheriff offering to return part of the property sued for are properly excluded. (*Sam Yuen v. McMann*, 99 Cal. 497.)

Return of property where crop subject to mortgage is seized. See ante, 45.

Effect of recapture of property. See post, 161.

147. Plaintiff recovered judgment against defendants for seizing, as sheriff, under execution, certain exempt property. Defendant then procured an assignment to him of the

judgment on which the execution issued, and moved the court to set off this latter judgment against the former. Held, that the motion was properly denied; that defendant being sued as a wrongdoer, the judgment of plaintiff for the value of the property must, as between plaintiff and defendant, be regarded as standing in place of the property; and that, if defendant were allowed in this way to take advantage of his own wrong, he would practically defeat the purpose of the exemption law. (*Beckman v. Manlove*, 18 Cal. 388.)

v. Summoning Jury in Action Against.

148. In trespass against a sheriff the court below, on plaintiff's motion, may order a special jury to try the case, instead of the regular panel. The sheriff, being interested, ought not to summon a jury. And there being no coroner, an elisor may be appointed to summon the jury. (*Pacheco v. Hunsacker*, 14 Cal. 120.)

w. Damages and Penalty, Measure of and Evidence as to; Joinder of.

149. In an action against a sheriff for wrongfully seizing and selling property, under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. (*Phelps v. Owens*, 11 Cal. 22.) Cited 18 Cal. 325; distinguished 14 Cal. 557.

150. In an action against a sheriff for damages for the wrongful seizure of goods the true measure of damages is the value of the goods at the time of the taking. (*Pelberg v. Gorham*, 23 Cal. 349.)

151. The court charged the jury: "In estimating the value of the property you will take, as the basis of your verdict, the cash value of the articles in the market at the time they were taken out of the possession of plaintiff by defendant. What amount of money will it take in the market to replace the articles seized by the sheriff? That sum will be the measure of damages." Held, that the latter part of the charge must be taken in connection with the first portion, and that both together give the true standard of damages. (*Cassin v. Marshall*, 18 Cal. 689.) Cited 12 Cal. 203.

152. In such case it was not competent for defendant to show, as a measure of damages, that the property when sold by the sheriff "brought full and fair auction prices," or to show what the property sold for at the sheriff's sale or that he was instructed by the attaching creditor to employ a competent auctioneer to make the sale, and that he obeyed such instruction. (*Cassin v. Marshall*, 18 Cal. 689.)

153. Attachment in suit of B. & Co. v. V. Y. & L. as firm of V. & Co. under which defendant, as sheriff, seized plaintiff's stock in trade, claiming that L. was partner of plaintiff. Held, that in action by plaintiff against sheriff for damages proof of injury to plain-

tiff's business as a merchant was inadmissible as a criterion of damage. (*Dexter v. Paugh*, 18 Cal. 372.)

154. In such case the attachment papers of B. & Co. v. V. & Co. were admissible in evidence in favor of defendant. (*Dexter v. Paugh*, 18 Cal. 372.)

155. The measure of damages in an action by a mortgagee of personal property, for a conversion thereof by an officer, is the full amount of the mortgage debt if the property is worth enough to pay it; and if not, then such amount only as it is worth, and also, in either case, a fair compensation for the loss of time and expenses properly incurred in pursuit of the property. (*Irwin v. McDowell*, 91 Cal. 119.)

156. In an action against a sheriff to recover damages for the conversion of personal property, to entitle the plaintiff to compensation for time and money spent in pursuit of the property, the evidence must show that money was properly spent, and time lost in the pursuit, and the amount thereof. When that is done, it is for the court or the jury, as the case may be, to allow a fair compensation therefor. (*Sherman v. Finch*, 71 Cal. 68.)

157. The rule giving vindictive or exemplary damages in cases of malicious trespass applies as well to officers of the law, acting under color of process, as to private persons. (*Nightingale v. Scannell*, 18 Cal. 315.)

158. In suit against a sheriff and the plaintiff in a judgment for a wrongful seizure of property on an execution upon such judgment, the sheriff, who acted without improper motives, cannot be made liable in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ. The motives of plaintiff cannot be given in evidence in aggravation of damages against the sheriff. (*Nightingale v. Scannell*, 18 Cal. 315.)
Cited 18 Cal. 376.

159. In such a suit the property seized, being a merchant's stock in trade, evidence of the retail value of the goods is inadmissible as a basis for damages. The object of such evidence is to estimate the profits plaintiff might have made by a sale of the goods; and this would be mere conjecture. The value of the goods was what it would cost in the market to replace them. (*Nightingale v. Scannell*, 18 Cal. 315.)

160. There may be cases in which damages may be based upon a calculation of profits; but this is not one of them. There was no sufficient data for a calculation of profits. (*Nightingale v. Scannell*, 18 Cal. 315.)

161. Defendant Scannell, as sheriff, levied upon and sold under execution, in favor of Crowther v. Gilbert, the undivided half interest in the stock in trade of McCombe & Nightingale. Crowther bought in the property. Nightingale, claiming to be owner of a one-third interest in the property, sued the sheriff and Crowther for damages, for a malicious trespass. Defendants asked the following instruction: "If the jury find that the goods named in the complaint were not taken into possession by Crowther after the purchase by

him at the sheriff's sale, but that the same were recaptured by McCombe & Nightingale, then no damages should be awarded as for the value of the property or any part of it; and a recapture by McCombe alone would, in legal effect, be a recapture on the joint account of himself and Nightingale." Held, that this instruction ought to have been given; and that it was immaterial whether the recapture was before or after the commencement of this suit, or how it was effected. (*Nightingale v. Scannell*, 18 Cal. 315.)

Failure to make return, damages for. See ante, 93.

On seizure of property subject to a chattel mortgage. See ante, IV, 3, g.

Recovery cannot be had for excessive levy where no allegation. See ante, IV, 3, e.

162. The statute penalties against sheriffs, for the nonpayment of moneys collected on execution, are only recoverable when the sheriff, by his return, admits the collection of the money, but refuses to pay it over. (*Egery v. Buchanan*, 5 Cal. 53.)
Cited 6 Cal. 196; 10 Cal. 53; 2 Nev. 378; distinguished 16 Nev. 414.

163. Statutory penalties against a sheriff are only recoverable when, by the return of the sheriff, he admits the collection of the money, and refuses to pay it over, and not where his failure to pay over arises from his inability to decide between conflicting claims of different execution creditors. (*Johnson v. Gorham*, 6 Cal. 195.)
Cited 10 Cal. 489; 2 Nev. 378; distinguished 16 Nev. 414.

Penalty, one demanding more than amount due cannot recover. See ante, 99.

Penalty, sheriff selling without notice when not liable for. See ante, IV, 3, n.

164. It is not necessary, in an action against a sheriff, to recover damages (in addition to the two hundred dollars imposed by law as a penalty), for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. (*Pearkes v. Freer*, 9 Cal. 642.)
Cited 14 Nev. 243.

Instruction as to amount of verdict. See Instructions, 132.

V. Indemnity Bonds.

165. An agreement to indemnify a sheriff for seizing property under execution is valid if the parties are in good faith seeking to enforce a legal right. (*Stark v. Raney*, 18 Cal. 622.)
Cited 67 Cal. 599.

166. A bond to indemnify a sheriff takes effect from the time of its delivery. (*Buffendeau v. Brooks*, 28 Cal. 641.)

167. A bond given to a sheriff to indemnify him for any loss or damage he may sustain by selling property levied on by him by virtue of an execution in violation of an order enjoining its sale is void, because an unlawful contract. (*Buffendeau v. Brooks*, 28 Cal. 641.)

168. The fact that a bond was given to a sheriff to indemnify him against selling prop-

erty in violation of an order enjoining its sale may be shown, though the bond discloses no unlawful purpose on its face. (*Buffendeau v. Brooks*, 28 Cal. 641.)

169. Where the sheriff, under a writ of attachment in the suit of plaintiff against D. M. Eder and P. M. Eder, as the firm of D. M. Eder & Co., is about to levy upon the property of said firm, and a bond is executed by L. and J. as sureties, conditioned to keep harmless and indemnify the sheriff against all damages, costs, charges, trouble, and expense he may be put to by reason of the nonseizure of the property, and also "to pay whatever judgment may be rendered against said defendants," and judgment was obtained against one only of the defendants, plaintiff failing on the trial to prove the other to be a partner, held, that the sureties are liable on the bond for the amount of the judgment; that the bond, though not strictly an undertaking under the statute, conforms substantially to its requirements, and must be read by the light of the statute, and interpreted according to the intention of the parties. (*Heynemann v. Eder*, 17 Cal. 433.)

170. Such bond will be presumed to have been executed with reference to the provisions of the statute; and as the security required by the statute is a security for the satisfaction of any judgment that may be obtained, the bond will be held to be such a security. This is the sense of the instrument, and the fact that judgment was obtained against one only of the defendants satisfies the condition to "pay whatever judgment may be rendered against said defendants." (*Heynemann v. Eder*, 17 Cal. 433.)

171. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and, the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. (*White v. Fratt*, 13 Cal. 521.)

172. Whether each obligor is liable to the sheriff for the whole amount of any judgment against him, leaving the question of contribution to be settled between them, query? (*White v. Fratt*, 13 Cal. 521.)

173. Where property was seized under two attachments and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, that the bonds in question were independent securities for the same object of holding the sheriff harmless in respect to the same act of retaining the property, and that they amount to an undertaking on his part to detain and hold it at the request of each of the creditors, and to a separate covenant by each of these obligors, in consideration of this agreement, to see him harmless from any consequences arising from such detention, commented on and doubted, and the opinion intimated, in *Davidson v. Dallas*, 8 Cal. 227. The question, therefore, is left open for review. (*Davidson v. Dallas*, 15 Cal. 75.) Distinguished 34 Cal. 633.

174. Where an indemnity bond is given to

a sheriff to hold him harmless, and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. (*White v. Fratt*, 13 Cal. 521.)

175. When an indemnity bond is given to a sheriff by execution creditors to prevent the release of property which the sheriff had theretofore seized under execution, and which was claimed by the debtor as exempt from execution, which bond is conditioned to save the sheriff harmless from all loss and liability by reason of his taking or retaining the property under said execution, the fact that before the original writ of execution could have been or was fully executed, an alias writ was necessary to be and was issued in order to sell the property, could not affect the right of the sheriff to resort to the indemnity bond or the liability of the sureties thereon. The liability of the sureties was fixed by the judgment which fixed the liability of the sheriff, whose liability attached under the original execution the moment he refused to surrender the property to the execution debtor. (*Tunstead v. Nixdorf*, 80 Cal. 647.) Cited 81 Cal. 273.

176. A cause of action in favor of a sheriff for the breach of a covenant in a bond of indemnity to save him harmless from "all damages, expenses, costs, and charges," which he might sustain by reason of the sale or retention of certain property taken under an execution, does not accrue until the sheriff has been compelled to pay and has paid such damages. (*Oaks v. Scheifferly*, 74 Cal. 478.) Cited 80 Cal. 651.

177. If, in a bond to indemnify a sheriff for replevying property claimed by a person other than the defendant in the writ, the obligors undertake to indemnify him from any damage he may sustain by reason of any costs, suits, judgments, and executions, that shall come or be brought against him, the sheriff cannot maintain an action on the bond because a judgment has been recovered against him, but must first pay the judgment. (*Lott v. Mitchell*, 32 Cal. 23.) Cited 74 Cal. 480.

178. In an action on a bond to indemnify the plaintiff against damages he might sustain by levying an attachment on certain property, and where the complaint alleged the recovery of judgment against plaintiff for damages, against which he was indemnified, and the payment of said judgment, held, that said averment of payment was material to plaintiff's right to recover for the amount of such judgment. (*Roussin v. Stewart*, 33 Cal. 208.)

179. The sheriff is entitled to recover, not simply the value of the property which he has been compelled to pay, but also the costs incurred by him in defending the suit brought to recover such value; his claim to indemnity extends to the entire damages to which he has been subjected on account of

the seizure. (*Stark v. Raney*, 18 Cal. 622.) Cited 33 Cal. 212; 58 Cal. 439.

180. The plaintiff, as sheriff, under an execution in favor of the defendants, levied on certain personal property; but before the sale S. & Co., and also one S., each claimed the property pursuant to section 689 of the Code of Civil Procedure. Written notice of the latter claim, and also (it was claimed) of the former, was given by plaintiff to the defendant, who delivered to the plaintiff an indemnity bond against the claim of S., and ordered him to sell. After the sale S. & Co. sued the plaintiff for the value of the property, which was paid. In an action to recover the amount of the judgment, also one hundred dollars paid as counsel fees, the court found (among other facts) that the plaintiff notified the defendants of the claim of S. & Co., and was thereupon directed to sell. Held, that upon the former point the evidence was conflicting, and therefore sufficient to sustain the finding; and held, further, that the plaintiff was entitled to recover not only the amount of the judgment, but the expenses attending the action which he had to defend. (*Graves v. Moore*, 58 Cal. 435.)

181. A bond was given by a plaintiff to a constable to indemnify him from liability for selling certain property claimed and actually owned by persons other than the execution debtor; and the property having been sold, and the owners having sued the constable and recovered judgment against him, the latter assigned the bond to them, and they released him from liability on the judgment. Held, that the release of the constable did not operate to release the obligors on the bond. (*McBeth v. McIntyre*, 57 Cal. 49.) Cited 74 Cal. 480; 80 Cal. 651; 81 Cal. 273.

182. The sureties on a bond given by an execution creditor, to indemnify a sheriff for any damage sustained by him by reason of his enforcing the execution against property claimed by a third person, are not discharged from liability thereon by reason of the fact that the sheriff wrongfully paid the proceeds arising from the execution sale to the execution creditor, instead of to the person claiming the property. (*Oaks v. Scheifferly*, 74 Cal. 478.)

183. The provision of the Practice Act making the judgment, in an action against a sheriff, conclusive evidence against his indemnifier, where the latter has been notified of the action, is founded upon the principle that the action, under such circumstances, is in substance against the indemnifier—the real party in interest—and that he has in that action an opportunity to make any defense that may exist. (*Dutil v. Pacheco*, 21 Cal. 438.) Cited 81 Cal. 273.

184. Where, therefore, the indemnifier has been notified of the action against the sheriff, he cannot maintain a bill in equity to set aside the judgment obtained therein, except under such conditions as would have enabled him to maintain it had he been the nominal as well real party defendant to the first action. (*Dutil v. Pacheco*, 21 Cal. 438.) Cited 22 Cal. 208.

185. If a sheriff is indemnified for an act done by virtue of his office, and an action is brought against him to recover damages for the act, and judgment is recovered against him, the sheriff cannot afterward have judgment against the sureties on the indemnifying bond upon a notice of five days, unless he gave the sureties written notice of the action brought against him. (*Dennis v. Packard*, 28 Cal. 101.)

Indemnity to, on serving writ of restitution. See Ejectment, XXI, 2.

Indemnity to, necessity of writing. See Statute of Frauds, 51.

Indemnity to, judgment by default in action on. See Defaults, 17.

Probate court cannot authorize assignment of bond of indemnity. See Probate Courts.

Indemnitors as witnesses. See Witnesses, V, 8, c, J.

VI. Compensation, Fees, Mileage.

186. The statute providing for the payment of a salary to the sheriff of the city and county of San Francisco is continued in force by the Political Code. (*Adams v. San Francisco*, 50 Cal. 117.)

187. The compensation of a city marshal of a municipal corporation of the sixth class, as fixed by the board of trustees under section 855 of the Municipal Corporation Act, is for all duties imposed on the marshal by the act. (*Mundell v. City of Pasadena*, 87 Cal. 520.)

188. Sheriff cannot maintain an action against a county for compensation for "taking care of the courthouse, and keeping and guarding the jail of the county during his incumbency of the office of sheriff." The law fixes his compensation for the performance of such official duty. (*Stockton v. County of Shasta*, 11 Cal. 113.)

Compensation. See Offices and Officers, 124.

Salaries of constables. See Constitutional Law, 261, 262.

Constable, ordinance diminishing compensation is valid. See Ordinances, 105.

Fees of. See Fees.

Appealability of order refusing to fix fees. See Appeals, II, 26.

189. The sheriff of a county, if he is dissatisfied with the amount of compensation allowed him by the board of supervisors for meals furnished to prisoners confined in the county jail, may bring an action against the county for the amount which he claims to be reasonable. (*Fulkerth v. Stanislaus County*, 67 Cal. 334.)

190. Section 9 of the statutes of 1869-70, which provides that the sheriff may charge "for mileage in any criminal case or proceeding," does not authorize him to charge mileage for other traveling than that which is expressly mentioned in the statute, but simply fixes the rate which may be charged when mileage is allowed by any other law or statute; the statute does not allow mileage for traveling in different directions in looking for one charged with a crime, who is not arrested. (*Broughton v. County of Santa Barbara*, 65 Cal. 257.)

Cited 100 Cal. 65.

191. Constables in counties of the thirty-ninth class are entitled under the County Government Act to charge mileage for the distance traveled in conveying a prisoner to jail after he has been arrested, as well as mileage for the distance traveled for the purpose of making the arrest. (*Nelson v. Breen*, 98 Cal. 24.)

192. Section 9 of the act of 1870 does not entitle the sheriff to mileage for the distance traveled in going from the county seat to other towns in which he has made several arrests for misdemeanor without warrants, when he went to the towns where the arrests were made without any knowledge of any crime having been committed by any of the persons arrested. (*Overall v. County of Tulare*, 100 Cal. 61.)

193. Under section 9 of the act of March 5, 1870 (*Stats.* 1869-70, p. 159), fixing the fees of the sheriff of Tulare county, that officer is not entitled to recover from the county mileage for the distance traveled in an unsuccessful search for persons charged with the commission of a crime, although the persons are subsequently found and arrested by him upon a second search. (*Overall v. County of Tulare*, 100 Cal. 61.)

194. A sheriff or constable, under the statute of 1870, for executing a warrant of arrest, is entitled to mileage both for the distance traveled in going to make the arrest and for that traveled from the place of arrest to the magistrate. They are also entitled to mileage for distance traveled outside the county in making an arrest, and in taking the prisoner toward a magistrate. (*Cunningham v. San Joaquin County*, 49 Cal. 323.)
Cited 82 Cal. 189, 190, 192; 98 Cal. 240.

195. The sheriff charged, and the court below held, he was entitled to receive thirty-one dollars and fifty cents for taking each of five prisoners from the same magistrate to the county jail, a distance of one hundred and five miles. Held, under the provisions of the act "To regulate fees of office," etc. (*Stats.* 1869-70, p. 148), the plaintiff was entitled to charge mileage for each service in all cases, except those specified in the proviso, namely, those of jurors and witnesses. (*Sherman v. County of Santa Barbara*, 59 Cal. 483.)

196. Subdivision 14, section 201, of the County Government Act of 1889 (*Stats.* 1889, p. 297), which provides that constables in counties of the thirty-ninth class are authorized to receive "such fees as are now or may hereafter be allowed by law, except that the constable's mileage shall not exceed twenty-five cents for each mile traveled, in going only, in the discharge of the duties of his office," was intended merely to change the rate of mileage and not the subjects for which it should be received, as provided in the previous act of 1869-70, page 148. (*Nelson v. Breen*, 98 Cal. 245.)

197. By an act passed in 1855 constables in El Dorado county were allowed the same fees as sheriffs. In 1859 an act was passed allowing the sheriff of that county fifty cents per mile for travel in making an arrest. In 1860, by a special act making no reference to constables,

the sheriff in that county was made a salaried officer, and allowed no fees—section 15 provides that all former acts "conflicting with the provisions of this act are hereby repealed so far as they relate to the said several officers herein named." In 1862 an act amendatory of the act of 1860 was passed, the second section of which provided, as an amendment to section 8 of the original act, that two deputies should be allowed the sheriff, and that "the said deputies or other officers performing such service should receive twenty cents per mile in criminal cases for each mile actually traveled in going only; and section 5 of which declared that "so much of any acts or parts of acts (as are) inconsistent with the provisions of this act are hereby repealed." Held, that the last act applied to constables, and repealed all the provisions of former acts in reference to their mileage in criminal cases, and that they are entitled therefore to only twenty cents per mile for travel in such cases. (*Simonton v. El Dorado County*, 22 Cal. 554.)

198. The sheriff is entitled to such fees only as are allowed by law. (*Overall v. County of Tulare*, 100 Cal. 61.)

199. A constable who makes an arrest outside of his county is entitled to fees for taking his prisoner before the magistrate, as well as for going to make the arrest. (*Allen v. Napa County*, 82 Cal. 187.)
Cited 98 Cal. 246, 247.

200. The city marshal cannot recover from the city any fees for services rendered in arresting offenders, and summoning witnesses and jurors, by virtue of warrants of arrest, subpoenas, and venire, issued out of the recorder's court of the city. (*Mundell v. City of Pasadena*, 87 Cal. 520.)

201. A violation of section 9 of the act of April 1, 1878, providing for the punishment, by a fine, of any one who should fraudulently evade, or attempt to evade, the payment of his railroad fare, constitutes a public offense within the meaning of section 15 of the Penal Code, defining a public offense; and a constable has a right to charge the county for services rendered in arresting, transporting, and feeding prisoners charged with such offense. (*Dyer v. County of Placer*, 90 Cal. 276.)

202. The sheriff of the city and county of San Francisco is required to pay to the treasurer of said city and county the sums which he receives from the state for the transportation of prisoners to the state prison, and of insane persons to the insane asylum. (*Adams v. San Francisco*, 50 Cal. 117.)

203. Under the provisions of the County Government Act of 1883, as amended on March 14, 1885, the money paid to a sheriff by the state, in pursuance of the act of March 14, 1885, for the time necessarily consumed by him in transporting prisoners to the state prisons, and insane persons to the insane asylums, must be paid by him into the county treasury. The sheriff has no right to retain it for his own use. (*County of Santa Clara v. Branham*, 77 Cal. 592.)

204. Where attachment is levied on separate pieces of real estate the sheriff is entitled

to fees for each levy. (*Young v. Miller*, 63 Cal. 302.)

205. An attachment debtor, upon effecting a settlement with his creditor, cannot require the sheriff to release the property attached, except upon payment of his fees. (*Robinet v. Connolly*, 76 Cal. 56.)

206. A sheriff is not entitled to keeper's fees, or the expense of feeding stock under attachment, unless the court from which the writ issues certifies that the charges are just and reasonable. (*Geil v. Stevens*, 48 Cal. 590.)

Cited 49 Cal. 424; 73 Cal. 262; 16 Nev. 410.

207. Under section 9 of the act of March 5, 1870, entitled "An act to regulate fees of office," etc., the sheriff of Kern county is not entitled to be paid for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution or other process, until the allowance for the same is fixed or taxed by the court. (*Bower v. Rankin*, 61 Cal. 108.)

Cited 73 Cal. 262.

208. Under the act of 1869, fixing the fees of the sheriff of Lassen county for his trouble and expense in taking and keeping possession of and preserving property under attachment at such sum as the court shall order, the sheriff is not entitled to any fees for such services, unless the court makes an order allowing them. (*Shumway v. Leakey*, 73 Cal. 260.)

Cited 73 Cal. 264.

209. A sheriff who levies upon personal property and who incurs expense for keepers' fees while unlawfully retaining it in his possession is not entitled to hold the property so levied upon as security for such keepers' fees, and he cannot justify his retention of property, the levy upon which is released by a stay bond, because of the nonpayment of his fees and disbursements incurred prior to the release, unless he has demanded the payment of such fees and disbursements, and offered to return the property upon payment of the amount of fees for which he claimed the right to retain the property. (*Sam Yuen v. McMann*, 99 Cal. 497.)

210. Whether a sheriff, under the fee bill of 1855 (Stats. 1855, p. 85), providing that "he shall also be allowed such further compensation for his trouble and expense in taking possession of property under attachment or execution, or other process, and of preserving the same, as the court from which the writ or order may issue shall certify to be just and reasonable," is entitled to the expenses of pasturing, herding, and keeping cattle attached, without obtaining a certificate from the court that such expenses are reasonable, not decided in this case, because it was held that such certificate was virtually given by the court in allowing the expenses as taxed in a bill of costs. (*Smith v. Richmond*, 19 Cal. 476.)

211. The complaint in effect alleged that the plaintiff, as sheriff, levied an attachment upon a restaurant, and, under written instructions, kept the same open, and rendered services and incurred expenses, "in and about

the levy, the preservation of land and property. There was no evidence of any instructions to keep the restaurant open; but written instructions of their attorneys to that effect were admitted for the purpose only of showing that . . . defendants had notice that the property had been attached, etc., . . . and not for the purpose of showing anything in regard to running of restaurant," the attorneys for plaintiff expressly disclaiming any intention to demand any amount for running the restaurant. The court instructed the jury that, if they found that the plaintiff rendered the services and incurred the expenses for the defendants, and at the request of their attorneys, they should find for the plaintiff. Held, under the decision of the court in this case, on the former appeal, the court erred in admitting the evidence and in giving the instruction. Thornton, J., concurring in the last point only. (*Alexander v. Denaveux*, 59 Cal. 476.)

212. The order allowing fees of a sheriff must be made in the attachment suit; and an order for their allowance made in another action, or a direction to pay them given by the judge to the sheriff on the street, is insufficient. (*Shumway v. Leakey*, 73 Cal. 260.)

213. In a complaint in an action brought by a sheriff for official services in levying an execution it is not necessary to aver the value of the services rendered, as the law fixes their value. (*Lane v. McElhany*, 49 Cal. 421.)

Cited 73 Cal. 262; 16 Nev. 410.

214. In such complaint it is not necessary to allege a demand. An allegation of a special request by the defendant, that the plaintiff should perform the services, is sufficient. (*Lane v. McElhany*, 49 Cal. 421.)

215. In such complaint it is not necessary to aver that the sums due the plaintiff were not collected by the sheriff by a sale of the property levied on. (*Lane v. McElhany*, 49 Cal. 421.)

216. In an action by a sheriff, to recover for his services in keeping property levied on by virtue of an execution, the complaint is insufficient which neither avers what the services were reasonably worth, nor that the court, from which the execution issued, had certified that the amount was just and reasonable, and such certificate is the proper evidence of the value of the services. (*Lane v. McElhany*, 49 Cal. 421.)

217. In an action by the constable to recover from the county his fees for executing a warrant of arrest outside of his county, the complaint need not allege that the warrant was indorsed. It is sufficient if it alleges that the arrest was made under and by virtue of the warrant, etc. (*Allen v. Napa County*, 82 Cal. 187.)

Cited 98 Cal. 246, 247.

218. Code does not require that the sheriff shall give an attaching creditor notice of the levy of his attachment, and it is not necessary in an action by the sheriff for his fees that he prove that defendant had notice. (*Alexander v. Denaveux*, 59 Cal. 476, 478.)

VII. Death of Sheriff.

219. Where the ex-sheriff, who made the sale of land under a writ partially executed by him while in office, dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser is to apply to the court for the appointment of a commissioner or master to execute the conveyance. (*People ex rel. Dunn v. Boring*, 8 Cal. 406.)

VIII. Deputies.

220. A constable, like any other ministerial officer, has the right to appoint as many deputies as he pleases, and the deputy is not guilty of any trespass in levying by virtue of legal process in his hands. (*Taylor v. Brown*, 4 Cal. 188.)

Cited 35 Cal. 713.

221. In the absence of statutory provisions as to the appointment of deputies by constables the common-law rule applies, and constables may act by deputy in the exercise of their ministerial functions. (*Jobson v. Fennell*, 35 Cal. 711.)

222. A deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. (*Krum v. King*, 12 Cal. 412.)

223. The undersheriff is a general deputy or vicesheriff, who possesses all the powers and may perform all the duties attached by law to the office of his principal; and has authority to collect taxes and receipt for the same, so as to bind the sheriff as ex officio tax-collector and the sureties on his official bond. (*People v. Otto*, 77 Cal. 45.)

224. Act and return of deputy sheriff is nullity unless done in the name and by the authority of the sheriff. (*Reinhart v. Lugo*, 86 Cal. 395; *Joyce v. Joyce*, 5 Cal. 449, cited 23 Cal. 403, 86 Cal. 398; *Rowley v. Howard*, 23 Cal. 401.)

Undersheriff cannot act as tax-collector. See ante, III.

225. The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the sheriff impossibilities, or to impose unconscionable exactions. (*Whitney v. Butterfield*, 13 Cal. 335.)

226. The mere omission of a deputy to inform the sheriff of having process in hand is not such negligence as to charge the sheriff, in case a writ last in hand was executed first. (*Whitney v. Butterfield*, 13 Cal. 335.)

Cited 39 Cal. 318.

227. It is not necessary to prove that the defendant directed his deputy to seize the particular property in question, in order to hold the defendant liable. (*Poinsett v. Taylor*, 6 Cal. 78.)

228. In an action of trespass against a sheriff, where he is declared against personally, and not as sheriff, it is competent to prove that the defendant was sheriff, and

that his deputy as such committed the trespass. (*Poinsett v. Taylor*, 6 Cal. 78.)

Cited 39 Cal. 318.

229. Averment that certain person acted as undersheriff, without allegation that he wrongfully acted as such, implies that he was undersheriff de jure as well as de facto. (*People v. Otto*, 77 Cal. 45.)

Deputy may execute deed after expiration of term. See ante, 23.

Evidence as to qualifications of deputies. See ante, 91.

Indemnity bond to by deputy. See Bonds, 115.

Acts must be done in name of principal. See Offices and Officers, 118.

Deputy, agreement to compensate for procuring evidence. See Contracts, 174.

Certificate by deputy of service of summons, when void. See Summons, 58.

SHERIFF'S DEEDS.

See Executions, XI.

Tax deeds. See Taxation, XIII.

Parol evidence of sheriff to vary. See Evidence, 356.

SHIPPING.

I. Ownership of Vessels, Evidence of; Partnership in.

II. Charter Party, Construction of.

III. Actions Against Vessels; Jurisdiction Over Questions Relating to.

IV. Lay Days and Demurrage.

V. Duty to Give Bond on Entering Port.

VI. Harbor Dues.

VII. Pilots.

VIII. Master, Powers, Contracts, and Liabilities of; Supplies; Liability of Owner or Charterer.

IX. Liens on Vessels.

X. Collisions; Position in Berth.

XI. Seamen.

XII. Mortgage, Sale, Delivery, and Registration of Vessels; Sale Under Execution.

XIII. Freight, and Questions Relating to.

Admiralty. See Admiralty.

Bills of lading. See Bills of Lading.

General average. See General Average.

Towage. See Towage.

Hiring of lighter. See Bailments, 5.

Vessels, taxation of. See Taxation, IV, 12.

Sale of goods to arrive. See Sales, 287, 288.

Fire caused by, declarations of master, admissibility. See Negligence, 39.

Marine protest as evidence. See General Average, 4.

I. Ownership of Vessels, Evidence of; Partnership in.

1. The register of a ship is admissible in evidence in favor of the person claiming to be the owner, in connection with other evidence tending to establish the ownership. (*Brooks v. Minturn*, 1 Cal. 481.)

Possession of vessel is presumptive evidence of ownership. See Possession, 53.

2. An agreement between part owners of a ship to use it in a joint enterprise, and share the profit and loss in certain proportions, creates a partnership in the use of the ship, as distinguished from the ship itself. (*Hendy v. March*, 75 Cal. 568.)

Purchaser of interest in vessel on execution, rights of. See post, XII.

Control of vessel. See post, XII.

II. Charter Party, Construction of.

3. Where, by the terms of the charter party, made in England, the charterer agreed to insure the advanced freight, at the ship's expense, it being deducted from the freight money paid, but failed to do so until long after the risk had commenced, by reason whereof the owner was compelled to insure for his own protection, the owner can recover of the charterer the amount by him paid for insurance. (*Lawson v. Worms*, 6 Cal. 365.)

4. In such a case the owner is the party for whose benefit the advance freight is insured, as he is liable to refund it, on loss of the ship; and, having been compelled to pay the insurance premium twice, by the default of the charterer, he is entitled to recover back one of the payments. (*Lawson v. Worms*, 6 Cal. 365.)

Suit by owner of vessel chartered by agent. See Agency, 332.

Guaranty on charter party, validity and consideration. See Guaranty, 4, 5.

III. Actions Against Vessels; Jurisdiction Over Questions Relating to.

5. The district courts have jurisdiction of actions to recover from the owners the value of goods sold and delivered at the request of the master, for the use of a vessel engaged in navigating the high seas. (*Crawford v. Roberts*, 50 Cal. 235.)

6. A British seaman, on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a state court. (*Pugh v. Gillam*, 1 Cal. 485.)

7. Where materials and supplies are furnished domestic vessel at her home port, under a contract with the master of the vessel, the United States courts have exclusive original jurisdiction of proceedings in rem to enforce a lien against the vessel for the same. (*Crawford v. Bark Caroline Reed*, 42 Cal. 469.)

Actions against boats and vessels. See Admiralty.

Attachment against boat navigating waters of state. See Attachments, 128.

Bond on attachment and release of vessel, liability on. See Attachments, 219.

Offense committed on vessel in inland waters. See Criminal Law, 178, 179.

Libel of vessel for nondelivery, effect of on action for freight. See post, 57.

IV. Lay Days and Demurrage.

8. In the absence of any custom to the contrary Sundays are computed in the calculation

of lay days at the port of discharge; but, where the contract specifies working lay days, Sundays and holidays are excluded in the computation. (*Brooks v. Minturn*, 1 Cal. 481.)

9. It seems that where a chartered vessel is seized and detained by a revenue officer of the United States the charterer cannot be made liable for demurrage during the period of such detention. (*Brooks v. Minturn*, 1 Cal. 481.)

V. Duty to Give Bond on Entering Port.

10. Where a statute required the owners or consignees of every vessel entering the harbor of San Francisco to give a several bond to the state in the penalty of two hundred dollars for every passenger and member of the crew on board of such vessel, but no penalty was given by the statute for the neglect or refusal to give such bond, and an action was brought to recover two hundred dollars for each passenger brought on the defendant's steamer into the port of San Francisco, as a penalty for neglecting to give such bond, held, that the action could not be sustained. (*Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 197.)

11. If, in such case, any action at all can be brought, it must be to recover such damages as the plaintiffs can show they have actually sustained by reason of the refusal to give the bond; but they cannot succeed in an action to recover a penalty. Per Bennett, J. (*Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 197.)

VI. Harbor Dues.

12. Vessels plying between San Francisco and Sacramento and San Francisco and Stockton are liable to the payment of harbor dues to the city and county of San Francisco. (*San Francisco v. California S. Nav. Co.*, 10 Cal. 504.)

VII. Pilots.

Pilots. See Pilots and Pilotage.

13. When a vessel is properly in charge of a licensed pilot the owner is not responsible for damages which may ensue from the negligence or misconduct of the pilot. (*Griswold v. Sharpe*, 2 Cal. 17.)

Improper position in berth selected by pilot. See post, X.

VIII. Master, Powers, Contracts, and Liabilities of; Supplies; Liability of Owner or Charterer.

14. In order to authorize the captain of a vessel to pledge or sell the property of his owners for necessities certain facts must be established, the vessel must be in a foreign port; the voyage must be unfinished; the pledge or sale must be indispensable to enable the ship to complete her voyage. (*Marziou v. Pioche*, 8 Cal. 522.)

15. Where particular property was pledged to secure the first advance to ship captain the proceeds from a sale thereof must be applied to the payment of that advance. (*Marziou v. Pioche*, 8 Cal. 522.)

Draft drawn by captain as setoff in action for wages. See Setoff, 10, et seq.

16. The master of a vessel is presumed, even at a home port, to have authority to contract for such articles for the use of the vessel as come under the general appellation of ship's stores, and the owner of the vessel is liable for the value of the same, unless he shows that the master had not such power. (*Crawford v. Roberts*, 50 Cal. 235.)

17. If a vessel is chartered in the usual way, either for a particular voyage or for a period of time, the charterer having authority to appoint the master, and undertaking to victual, man, and navigate her at his own expense, he will be deemed the owner pro hac vice, and the general owner will not be personally liable on contracts of affreightment or for supplies. (*Oakland C. M. Co. v. Jennings*, 46 Cal. 175.)

18. If supplies for a vessel are purchased at a home port by the captain, with the knowledge and consent of the ship's husband, the owners are prima facie liable for the same. (*Crawford v. Roberts*, 50 Cal. 235.)

19. In such case the owners are liable, even if credit is given to the ship's husband, unless exclusive credit was given to him. (*Crawford v. Roberts*, 50 Cal. 235.)

20. If the owner charters the hold of his vessel, but appoints her master and sails her at his own expense, he will be liable on contracts of affreightment made by the master with shippers who have no notice of the charter party. (*Oakland etc. Co. v. Jennings*, 46 Cal. 175.)

21. If the registered owner of a vessel appoints her master, with an agreement that the master shall have the entire control of the vessel, and victual and man her, and make contracts of affreightment, and divide the gross earnings with the owner, the owner is liable on contracts of affreightment made by the master with shippers who have no notice of the arrangement between the master and the owner. (*Tomlinson v. Holt*, 49 Cal. 310; *Oakland etc. Co. v. Jennings*, 46 Cal. 175, cited 49 Cal. 312.)

Jurisdiction over action for supplies. See ante, III.

Lien for supplies, when attaches. See post, IX.

22. The owners of a steamboat engaged in carrying passengers, but who have not the possession, control, or management of it themselves, or by their agents, servants, or employees, cannot be held responsible for the negligence or mismanagement of others who have the exclusive possession, control, and management. (*Guizoni v. Tyler*, 64 Cal. 334.) Cited 89 Cal. 431.

23. Where the master of the vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. (*Bailey v. New World*, 2 Cal. 370.)

24. A purchased of the plaintiffs in New York certain merchandise, and gave his note payable in six months. The goods were shipped for San Francisco, and, by the bill of lading, as well as by the agreement, were de-

liverable to the order of the shippers; but they were insured for and on account of A. At the time of the purchase he received a bill of sale, gave his note for the purchase money, and took a receipt for its payment, and the acts of the plaintiffs in New York, and of their agent in San Francisco upon the arrival of the goods there, as well as the conduct of A, indicated that all parties considered the transaction as a sale, subject to the right of the plaintiffs to retain possession until payment of the note. Held, in an action by the plaintiffs against the master of the vessel to recover the market value on account of his having delivered them to A without orders, that the transaction between the plaintiffs and A was a sale, and transferred to the latter the property in the goods, subject to a lien thereon for the purchase money in favor of the plaintiffs, and that the master of the vessel was liable to the plaintiffs only for the value of the plaintiffs' property in the goods with interest. (*Perse v. Cole*, 1 Cal. 369.)

Master, right of purchaser of interest to remove. See post, XII.

Negligence of master in taking berth in port. See post, X.

IX. Liens on Vessels.

25. One part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements. (*Sterling v. Hanson*, 1 Cal. 478.)

26. The owner of a chartered vessel has no general lien upon the cargo for the charter price. (*Mayo v. Stansbury*, 3 Cal. 465.)

27. If a credit is given for supplies and materials furnished a vessel the lien of the person furnishing the same, for the price thereof, continues on the vessel for the period of one year from the time the demand falls due. (*Edgerly v. Schooner San Lorenzo*, 29 Cal. 418.)

28. In actions against boats and vessels, under the statute, the lien attaches only when service is had in the suit. (*Fisher v. White*, 8 Cal. 418.)

Cited 1 Wash. (Ter.) 53; *a. c. 1* Wash. (Ter.) N. S., 42.

29. It was not the intention of the legislature to make the lien attach when the liability was incurred. (*Fisher v. White*, 8 Cal. 418.)

Jurisdiction of suit to enforce lien for supplies. See ante, III.

X. Collisions; Positions in Berth.

Inevitable accident, driving of vessel against wharf. See Wharves, VI.

30. A vessel in the harbor of San Francisco, moored in the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. The want of such watch and light is to be deemed negligence per se, and the court should instruct the jury in such case to find a verdict in favor of the defendant.

Per Hastings, C. J. (*Innis v. Steamer Senator*, 1 Cal. 459.)

31. An action to recover damages for collision cannot be sustained where the injury of which the plaintiff complains has resulted from the negligence of both parties; so held where a brig lying in the harbor of San Francisco in the usual track of bay and river steamers, without having any light hung out, was run into and damaged by a river steamer when entering the harbor on her usual course and with diminished speed, it appearing that there was no intentional wrong on the part of the defendants; and held, further, that if ordinary prudence required the brig to show a light, the fact that it was a common practice in the harbor to neglect to do so was no excuse; it appearing that the brig lay in a more dangerous situation than most of the shipping in the harbor. (*Kelly v. Cunningham*, 1 Cal. 365.)

32. A plaintiff, suing for an injury from collision, must be faultless. But the neglect of the injured vessel to rig in her jib boom, as required by the port regulations, will not bar the action if it be shown that such neglect did not cause the collision, although it may have increased the injury; and it will be presumed the court below so considered it in appraising the damage. (*Griswold v. Sharpe*, 2 Cal. 17.)

33. In a case of collision, after the witness had testified concerning the position of the vessels and the character of the night, he was asked whether a vessel, on such a night and in such a place, could be seen at a considerable distance from a vessel approaching the shore, and, if so, how far. Held, that the question should have been allowed. (*Innis v. Steamboat Senator*, 4 Cal. 5.)

34. Responsibility of taking position or berth for vessel in port rests upon the master of the vessel or the harbor master; therefore, the owner is not exempt from liability for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port. (*Griswold v. Sharpe*, 2 Cal. 17.)

Negligence of pilot, owner is not liable for. See ante, VII.

XI. Seamen.

35. Justices of the peace alone have power to try and commit deserted seamen, under the act of Congress, and commissioners of the United States courts can only arrest and commit for trial. (*Ex parte Crandall*, 2 Cal. 144.)

36. Justices of the peace alone have power to try and commit deserted seamen under the acts of Congress. (*Ex parte Crandall*, 2 Cal. 144.)

Jurisdiction of state courts over action by seaman. See ante, III.

XII. Mortgage, Sale, Delivery, and Registration of Vessels; Sale Under Execution.

37. A, the owner of a seagoing vessel, executes to B a mortgage thereon, which is recorded in the custom-house of her home port, and B commences suit to foreclose the mort-

gage, and makes C a party defendant thereto, on the ground that he has purchased the vessel, subject to the lien of plaintiff's mortgage; C, in his defense, avers that the mortgage was void under our statute of frauds, and that he now held the vessel discharged from the same. Held, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C. (*Mitchell v. Steelman*, 8 Cal. 363.)

Cited 2 Wash. 439.

Mortgage of steamship, sale by receiver pendente lite. See *Mortgages*, 1022.

Conflict between state and federal law as to mortgage of. See *Constitutional Law*, 50.

38. Where a sale of a vessel is made, part cash, and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of the vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement. (*Fowler v. Fisk*, 12 Cal. 112.)

39. Sale of vessel of United States at sea forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival in a port of the United States. (*Davidson v. Gorham*, 6 Cal. 343.)

40. Where the new owner under a sale of a vessel at sea mortgaged the vessel while still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered, held, that the mortgage was good against attaching creditors of the new owner, who levied immediately on her arrival, neither party taking the requisite steps to obtain a new registry, as the vessel had lost her national character, and was therefore not subject to the provisions of the law requiring the registry of sales and mortgages. (*Davidson v. Gorham*, 6 Cal. 343.)

41. The registry of the bill of sale and mortgage at the expected port of arrival before her arrival, it seems, in no way affects the question of the national character of a vessel, which was sold and mortgaged by the new owner while at sea. (*Davidson v. Gorham*, 6 Cal. 343.)

42. The registration of vessels is not compulsory upon their owners, it being a privilege and advantage, of which they may or may not avail themselves, as they choose. (*Davidson v. Gorham*, 6 Cal. 343.)

43. Where the master of a vessel was one-third owner, and all his right, title, and interest in the vessel had been sold under execution against him, held, that the purchaser of his one-third interest was not entitled to supersede the master in the command of the vessel, nor deprive him of the possession thereof. (*Loring v. Illsley*, 1 Cal. 24.)

44. The transfer of a minority interest in a vessel by virtue of a sale under execution does not confer upon the purchaser any more extensive control than the execution debtor himself enjoyed; and, as a general rule, the majority of owners can control not only the employment and destination of a vessel, but also the appointment of a person to take

charge of her as master. It does not alter the case that the debtor was the master of the vessel, for his right to the possession and command is not the subject of sale on execution. (*Loring v. Illsley*, 1 Cal. 24.)

45. Judgment having been obtained against A, who was master and one-third owner of a certain bark for the sum of two thousand dollars in the court of first instance, and his interest having been sold and purchased by B, held, that a further judgment rendered in a subsequent proceeding, ordering that the possession of the bark should be delivered to B, was erroneous. (*Loring v. Illsley*, 1 Cal. 24.)

Cited 22 Cal. 222.

46. Where a contract stipulated for the delivery of a vessel, but designated no particular place for such delivery, held, that a notice of a readiness to deliver must be treated under the contract as an actual delivery. (*Albreton v. Hooker*, 5 Cal. 176.)

Power of master to sell vessel. See ante, VIII.

Liquidated damages in agreement to give good title to ship. See Damages, 31.

XIII. Freight, and Questions Relating to.

47. Delivery of goods by the master and payment of freight by the owner are concurrent acts, and neither party is bound to perform his part of the shipping contract, unless the other is ready to perform the correlative act. (*Frothingham v. Jenkins*, 1 Cal. 42.)

48. Where it appears clearly from a charter party that the intention of the owner of the ship and the charterer is that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel. (*Brown v. Howard*, 1 Cal. 423.)

49. Lien on cargo for freight attaches the moment the goods are received for the purpose of carriage. (*Hayes v. Campbell*, 55 Cal. 421.)

50. Lien of shipowner for freight is not affected by the fact that he had chartered the ship for the voyage where he still retains the possession, command, and navigation of the ship. (*Hayes v. Campbell*, 55 Cal. 421.)

51. If a shipowner rightfully obtains possession for the purpose of carriage he is entitled to retain possession until his duty in relation to it has been discharged, or if from any cause the carriage was dispensed with until his lien upon it had been extinguished by payment of the freight and charges, or its equivalent. (*Hayes v. Campbell*, 55 Cal. 421.)

52. Insolvency of the charterers of a vessel before the vessel was laden and had "broken ground," but after the wheat had been placed on board, does not extinguish the lien of the shipowner for freight, and he is not bound to reload and deliver the wheat to the owner without tender or payment of the freight. (*Hayes v. Campbell*, 55 Cal. 421.)

53. Master of ship has lien on cargo for freight, and is not bound to deliver to a consignee any part of the goods specified in a bill

of lading, until the whole freight is paid; and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master. (*Frothingham v. Jenkins*, 1 Cal. 42.)

54. Delivery of part of the goods mentioned in one bill of lading to the consignee does not defeat a lien on the remainder for the whole freight unpaid. (*Frothingham v. Jenkins*, 1 Cal. 42.)

55. A, a merchant in Boston, shipped by one bill of lading certain merchandise to San Francisco, consigned to B, who was the mere agent of A, the owner. On arrival part of the merchandise was delivered and part of the freight paid; but the agent, being unable to raise funds to pay the whole freight, offered to give good security for the payment thereof in case the master would make delivery, which offer the master refused to accept. Held, that the master had a lien on all the goods mentioned in the same bill of lading for the entire freight; that part delivery was no waiver of his lien on the remainder of the goods for the unpaid balance of freight, and that an offer to give good security for payment of the freight could not divest the master's lien. (*Frothingham v. Jenkins*, 1 Cal. 42.)

56. Where it was agreed in a charter party that a vessel should be chartered for fifteen months, at two thousand dollars per month, to be employed in the Pacific trade, and that the payments for the hire of the vessel should be made semi-annually in the city of New York, held, that the owner of the vessel had lost his right of lien on the cargo for the non-payment of the sum stipulated in the charter party. (*Brown v. Howard*, 1 Cal. 423.)

57. In an action for freight money, brought in the courts of this state, it is not a sufficient answer to set up that the vessel has been libeled, for the nondelivery of freight, in the district court of the United States. Both actions may proceed at the same time, without the fear or danger of any collision or clashing of jurisdiction. (*Russell v. Alvarez*, 5 Cal. 48.)

58. Contracts for carrying freight form no exception to the general rule of law, that where money is paid by one party in consideration of an act to be done by another, and the act is not done, the money so paid may be recovered back. (*Reina v. Cross*, 6 Cal. 29.)

Cited 6 Cal. 370.

59. If freight is paid in advance on a charter party, and the voyage is not accomplished by reason of the loss of the vessel at sea, the freight advanced may be recovered back. (*Keing v. Cross*, 6 Cal. 29.)

60. Advanced freight can be recovered back by the charterer, in case of the loss of the ship or nonperformance of the voyage, whether by the fault of the master or not. And this is the rule in England, as well as in this country. (*Lawson v. Worms*, 6 Cal. 365.)

61. If factor ships wheat in his own name he is, as to the shipowner, the owner of the wheat in the absence of any knowledge that it belonged to another party. (*Hayes v.*

Campbell, 55 Cal. 421, cited 55 Cal. 477; Green v. Campbell, 55 Cal. 477.)

62. In an action of claim and delivery, brought by the actual owner of the property claimed, against the master of a vessel, who had no knowledge or notice of any other owner of said property than the factor or merchant, who, having ostensible authority to make, did make the shipment thereof, in the usual course of business, as his own, the recovery will be subject to the terms of such shipment. (Green v. Campbell, 52 Cal. 586.) Cited 55 Cal. 424; 61 Cal. 420.

63. In such case the master of the vessel has a lien upon the property in his possession for proper charges and freights. (Green v. Campbell, 52 Cal. 586.)

Liability of master for delivery of freight without orders. See ante, VIII.

Freight. See Common Carriers, III, 4.

Breach of contract to furnish freight, damages for. See Damages, I, 1.

SHORE.

See Wharves.

Title to seashore. See Mexican Lands, 415. Belongs to state by virtue of sovereignty. See Public Lands, III, 1.

Boundary, shore as. See Boundaries, II, 6.

Inclosure of beach. See Swamp and Overflowed Lands, II.

Sale of. See Swamp and Overflowed Lands, 73, 74.

SHORTHAND REPORTERS.

Statutes relating to repealed by code. See Jury and Jurors, 380.

Official reporter, attendance before grand jury. See Jury and Jurors, XVII, 7.

1. The superior courts in the city and county of San Francisco have power to fix and order paid the compensation of phonographic reporters in criminal cases, and it is the duty of the treasurer of the city and county to pay the same upon the order of the court. (Ex parte Reis, 64 Cal. 233.) Cited 71 Cal. 634, 635; 83 Cal. 366; 91 Cal. 370, 371.

2. The superior court of San Francisco has power to fix and order paid phonographic reporters in criminal cases. (Ex parte Reis, 64 Cal. 233.) Cited 71 Cal. 634; 83 Cal. 366; 91 Cal. 370, 371.

3. The compensation of a shorthand reporter, who acts under appointment of a justice of the peace in taking down testimony given before him as a committing magistrate, may be fixed by the magistrate after the services are rendered, under the terms of subdivision 6 of section 869 of the Penal Code, not exceeding the compensation allowed such reporters in the superior courts under section 274 of the Code of Civil Procedure, as it stood before the unconstitutional amendment thereof of March 21, 1885. The action of such magistrate is judicial, and not legislative, and the board of supervisors is not required to allow or settle the claim, or supervise the action of the magistrate. It is the duty of the county auditor to draw his warrant on the treasurer for the

amount properly allowed by the magistrate on his certificate and order, and he may be compelled by mandamus to perform such duty. (McAllister v. Hamlin, 83 Cal. 361.)

4. Section 869 of the Penal Code, as amended March 3, 1881, provides that a committing magistrate may order the testimony and proceedings to be taken down in shorthand in all examinations of persons accused of crime, and for that purpose may appoint a shorthand reporter. And section 2 of the amending act provides that the reporter's fees shall be paid out of the treasury of the county, or the city and county, on the certificate of the committing magistrate; but there is no provision fixing the reporter's fees, or authorizing the magistrate to fix them. In a proceeding by a reporter employed by a magistrate under this provision to compel the county treasurer to pay the petitioner his fees as certified by the magistrate, held, that in the absence of any law prescribing the fees which the plaintiff was entitled to charge for his services, the certificate of the magistrate that services were rendered did not constitute a demand upon the county treasury which the treasurer was bound to pay. (Fox v. Lindley, 57 Cal. 650.)

5. Where a shorthand reporter has voluntarily taken shorthand notes in an action without demanding a deposit from the parties to the action, and the trial in which he took the notes has terminated and judgment has been entered, he stands in no more favorable relation than that of a creditor to the parties to the action for the amount of his fees; and the judge of the trial court has no power to refuse to settle a bill of exceptions in order to enforce the payment of the reporter's fee by the appellant, and, if he has so refused, will be compelled by mandamus to settle the bill. (James v. McCann, 93 Cal. 513.)

Staying proceedings until fees of are paid. See Jury and Jurors, 265.

Act providing that judge shall fix salary is void. See Constitutional Law, 177.

Fees of. See Costs, III, 4, c.

6. For the purpose of impeaching B., a witness for the prosecution, the witness D. was introduced by the defendant, who testified as to what the witness B. swore to on the former trial in reference to certain points; and the defendant, also for the same purpose, read in evidence the reporter's notes of a portion of the testimony of B. on a former trial, after the reporter had testified that it was a correct transcript of B's testimony. Afterward, for the purpose of contradicting the evidence of D., the prosecution were permitted to read in evidence, over the objection of the defendant, that the notes were not certified to as correct, the portion of the reporter's transcript of B's evidence that referred to the points in his evidence as to which D. had testified. Held, there was no error. (People v. Morine, 61 Cal. 367.)

Certified notes placed on same footing as deposition. See Criminal Law, 615.

Statute as to time of filing notes is directory. See Criminal Law, 616.

Failure to direct filing of notes, immaterial error. See Appeals, XF, 12, j.

Authentication or identification of notes of. See Appeals, VI, 6, d, E.

Notes of as statement on appeal. See Appeals, VI, 2.

Notes of as evidence. See Appeals, 875; Criminal Law, XVIII, 14, j; Evidence, IX, 10.

Transcript of evidence. See Evidence, 481, et seq.

Testimony of, when hearsay. See Evidence, 484.

SICK BENEFITS.

See Unincorporated Associations, VI.

SIDEWALKS.

See Streets, V.

SIERRA COUNTY.

Collection of poll taxes in. See Taxation, 852.

SIGNATURE.

1. Affixing of seal of the court is a sufficient adoption by the clerk of a printed signature. (*Ligare v. California Southern R. R. Co.*, 76 Cal. 610.)

Printed signature. See Pleading and Practice, VIII, 5; Streets, 214.

Signing by printed fac simile. See Bonds, 54.

Mark, signing by. See Bills and Notes, II, 3; Contracts, I, 2, b.

Signature affixed by third person. See Deeds, 7.

Signature to verification is a sufficient signing. See Mechanics' Liens, 309.

Affidavits, signature to. See Affidavits.

Bonds, signing of. See Bonds, I, 1.

Bond, conditional signing of. See Suretyship, I.

Bond, failure of cosurety or principal to sign. See Suretyship, I.

Contract of conveyance signed by vendor only. See Vendor and Vendee, I, 1.

Contract, signing of. See Contracts, I, 2, b.

Deed, signature to. See Deeds, II, 2.

Indictment or information, signature to. See Criminal Law, XIV, 5.

Patent, signature to. See Public Lands, XX, 1.

Petition in bankruptcy, signature to. See Bankruptcy and Insolvency, VI, 3, c.

Stipulations, who to sign. See Stipulations, I.

Trustee, signature of. See Trust and Trustees, II.

Wills, signature to. See Wills, IV.

Memorandum under statute of frauds, signing of. See Statute of Frauds, III.

Findings, signing of. See Findings, III.

Judgment, signing of. See Judgments, II, 6.

Special verdict, signature to. See Verdict, 62.

Tearing away signature from a will. See Wills, XII.

Official, judicial notice of. See Judicial Notice, 21, et seq.

Official, what sufficient as. See Mexican Lands, 449.

Verdict as to validity of, rarely interfered with. See Appeals, 2538.

Genuineness of. See Lost or Destroyed Instruments, 5.

SILK CULTURE.

1. The second section of the act of 1868, "for the encouragement of silk culture," shows that the act of 1866, on the same subject, was not repealed for all purposes; but so much of it was left in force as was for the benefit of those who had, at the time of the passage of the act of 1868, already planted mulberry trees under the encouragement of the act of 1866. (*Attorney General v. State Board of Judges*, 38 Cal. 291.)

2. By the act of 1866 it was the intention of the legislature to give for each farm or assemblage of mulberry trees, of the age of two years, amounting to five thousand or more, a premium of two hundred and fifty dollars. (*Attorney General v. State Board of Judges*, 38 Cal. 291.)

3. Under that act the state board of judges had no jurisdiction to allow a premium for a half of a plantation; or to subdivide a plantation, and denominate each subdivision a plantation, and award a premium therefor. (*Attorney General v. State Board of Judges*, 38 Cal. 291.)
Cited 41 Cal. 177.

SINDICO.

Attestation of will by. See Wills, 25.

SISTER STATES.

Judgments of. See Judgments, XXIII.

SLANDER.

I. What Words are Actionable.

II. Publication of.

III. Pleadings in Actions for.

IV. Construction of Words Used.

V. Evidence.

VI. Justification.

VII. Damages in.

VIII. Security for Costs.

IX. Slander of Title.

Libel. See Libel.

In legal proceedings. See Privileged Communications, 9, 10.

Arrest on charge of. See Malicious Prosecution, 3.

Instruction as to defense in slander. See Instructions, 96.

I. What Words are Actionable.

1. Slanderous words which impute to plaintiff a want of chastity are actionable per se. (*Hitchcock v. Caruthers*, 82 Cal. 523.)

2. To falsely speak of a married woman as the paramour of a man not her husband imports to her a want of chastity, and is slanderous per se. (*McKinney v. Roberts*, 68 Cal. 192.)

3. Where the words proved to have been spoken by the defendant clearly impute a want of chastity they are actionable per se; and evidence of a witness that he understood from such language that the defendant intended to impute to the plaintiff a want of

chastity, if error, is without injury. (Preston v. Frey, 91 Cal. 107.)

4. The action was brought to recover damages for an alleged slander. The complaint averred that the defendant said of and concerning the plaintiff that "she was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she had not lived with her husband for two years previous to his death, and that she was the cause of her husband's death; that she had driven him to drinking, and that her husband fell while drunk and was killed." It was further alleged that the words signified, and were understood by the hearer to mean, that the plaintiff had deserted her husband, and had, prior to his death, led an unchaste life, and had become enceinte while living apart from him, and that such bad conduct on her part drove him to drinking, and caused his death. Held, that the complaint stated a cause of action. (Kedrolivansky v. Niebaum, 70 Cal. 216.)

5. The words "You are a thief and whore," when spoken of a person, are actionable per se. (Pink v. Oatanich, 51 Cal. 420.)

6. The words "he is a thief," spoken by one person of another, impute a crime punishable by law, and are actionable per se. (Smullen v. Phillips, 92 Cal. 408.)

7. In an action for slander the complaint alleged that the defendant, in the presence and hearing of the plaintiff and other parties—naming them—spoke of and concerning the plaintiff, falsely and maliciously, the following words, viz: "You are a thief; you make your money by stealing." Held, that a cause of action was stated, as the words were actionable per se. (Rhodes v. Naglee, 66 Cal. 677.)

8. The words "you thief," "you swindler," "you scoundrel," "you want to swindle me out of my money," alleged in the complaint to have been slanderously spoken in the presence of others by defendant, of, to, and concerning plaintiff as the secretary of a corporation of which defendant was president, and for the purpose of injuring plaintiff in his said office, and to have been meant to be understood, and to have been actually understood by those who heard them, as charging plaintiff with having committed theft as such secretary, are actionable, and cannot upon demurrer be construed as merely imputing to plaintiff a desire to swindle. (Frolich v. McKiernan, 84 Cal. 177.)

9. In an action for slander where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which it is alleged was his profession, it is unnecessary to allege special damages. (Butler v. Howes, 7 Cal. 87.) Cited 84 Cal. 180.

II. Publication of.

10. A communication from a husband to his wife, not made in the presence of a third person, does not constitute a publication within the meaning of the law of slander. (Besler v. Montgomery, 78 Cal. 486.)

Proof of publication, variance. See post, 31.

III. Pleadings in Actions for.

11. A complaint which shows that plaintiff is an infant of seventeen years, who sues by a guardian ad litem, and averring that certain slanderous words imputing a want of chastity were spoken of her as a girl, and charged her with being kept by a man of different family name as his mistress, sufficiently shows that plaintiff is an unmarried woman, and not the wife of the man whose name is connected with her in the alleged slanders. (Hitchcock v. Caruthers, 82 Cal. 523.)

12. An allegation that the defamatory words spoken of the plaintiff "were false" implies malice on the part of the defendant, and it is not necessary to allege in the complaint, or to establish by proof in the first instance, that the words were spoken with malice. (Harris v. Zanone, 93 Cal. 59.)

13. A complaint in an action of slander, which alleges that the defendant, at a specified time and place, in the presence and hearing of divers persons, spoke the words "She is a damned thief," of and concerning the plaintiff, is sufficient, and need not allege that the words charged to have been spoken were understood by those who heard them to refer to the plaintiff. (Harris v. Zanone, 93 Cal. 59.)

14. Where words charged to have been spoken are libelous in themselves, and are uttered in the vernacular of those to whom they are addressed, it is not necessary, in an action of slander, to make any other averment than that they were spoken "of and concerning the plaintiff," nor to allege that they were understood by the hearers to apply to the plaintiff. (Harris v. Zanone, 93 Cal. 59.)

15. The common-law rules, as to the requirements of pleading in an action of slander as respects the inducement and colloquium, are dispensed with by section 460 of the Code of Civil Procedure, so far as they show that the defamatory words applied to the plaintiff, though the averments necessary in common-law pleading, to show the meaning of the words, must still be made. (Harris v. Zanone, 93 Cal. 59.)

16. The actionable words being in the vernacular of the place of publication, and unambiguous, an allegation that they were understood by the persons who heard them to have been applied to the plaintiff is unnecessary. (Rhodes v. Naglee, 66 Cal. 677.)

17. A complaint which alleges that "in a certain discourse which the defendant had in the presence of divers good and worthy persons the defendant falsely and maliciously spoke of and concerning the plaintiff" certain false and malicious words, specifically set out in the complaint, which imputed a want of chastity to her in the use of her first name, "meaning this plaintiff," sufficiently shows that the persons to whom the slanderous words are alleged to have been spoken knew that they were spoken of and concerning the plaintiff. (Hitchcock v. Caruthers, 82 Cal. 523.)

Averment of use, application, and understanding of words. See post, 27, 28.

18. If the words used are not libelous in themselves, or if they have some occult meaning or local signification, and require proof to determine their meaning or to show that they are libelous, or if they are words in a foreign language, it is necessary to make such allegation of their meaning as will show them to be actionable. (*Harris v. Zanone*, 93 Cal. 59.)

19. When the complaint in an action for slander contains allegations sufficiently showing that the words spoken of the plaintiff by the defendant are actionable it is not necessary to allege special damages. (*Frolich v. McKiernan*, 84 Cal. 177.)

Special damages need not be alleged where words spoken of one in his occupation. See ante, I.

20. In an action for slander the complaint alleged on information and belief that on a certain day the defendant spoke in the presence of certain named persons the slanderous words complained of. Held, that the allegation was sufficient. (*McKinney v. Roberts*, 68 Cal. 192.)

21. In an action of slander, where the complaint alleged that the defendant said of the plaintiff, "He is a thief," and the testimony at the trial showed that the defendant's words were, "That thieving son of a —, he stole two thousand five hundred dollars from me, and I can prove it," and the plaintiff amended his complaint by inserting the words proved, in lieu of those declared on, the amended complaint does not state a new cause of action. (*Smullen v. Phillips*, 92 Cal. 408.)

22. Refusal to strike from answer allegation of mitigating circumstances which came to the knowledge of the defendant after the speaking of the defamatory words, is not a prejudicial error if the court subsequently instruct the jury not to consider such circumstances in mitigation. (*Barkly v. Copeland*, 74 Cal. 1.)

23. The defendant may withdraw a charge made against the reputation of the plaintiff in his original answer, and by permission of the court file an amended answer leaving out the objectionable matter; and thereafter the plaintiff may be prohibited from showing that such a charge had been thus preferred and attempted to be established by evidence. (*Morris v. Lachman*, 68 Cal. 109.) Cited 77 Cal. 343, 344.

24. In an action for slander for speaking words actionable per se an allegation in the complaint, that, before the speaking of the alleged slanderous words, the plaintiff had sustained a good name and reputation among his neighbors is superfluous, and need not be denied; but if denied, and no attempt is made to prove the allegation untrue, it does not aggravate the slander or authorize the jury to add to the amount of damages. (*Pink v. Cat-anich*, 51 Cal. 420.)

Allegations in answer as aggravation of damages. See post, VII.

Repetition of words, necessity of pleading. See post, 35, 36.

Repetition of words, damages on. See post, VII.

Complaint shows cause of action when. See ante, I.

Admissions of falsity of charge in pleadings. See post, 30.

IV. Construction of Words Used.

25. In an action of slander, the words used being ambiguous, their meaning is for the jury to determine. (*Kedrolivansky v. Niebaum*, 70 Cal. 216.)

Allegations as to meaning of words. See ante, III.

V. Evidence.

26. In an action for slander, where the complaint shows that the words spoken were not actionable per se, and alleges extraneous facts showing their slanderous meaning, the plaintiff must prove such extraneous facts, and the defendant may give evidence to the contrary under a general denial. (*Nidever v. Hall*, 67 Cal. 79.)

27. In such a case the plaintiff must aver and prove that the words were actually used in their actionable sense, and were applied to him, and that the hearers so understood them. Upon this latter point the testimony of the hearers, as to how they understood the words, is admissible. (*Nidever v. Hall*, 67 Cal. 79.)

28. It is admissible, in actions of slander, to aver and prove that words which have a covert meaning were intended to defame, and were so understood by those who heard them. (*Chamberlin v. Vance*, 51 Cal. 75.) Cited 67 Cal. 83; 93 Cal. 69.

Evidence as to understanding of words actionable per se. See ante, 3.

29. The allegation that the libelous words were spoken "of and concerning the plaintiff" is an issuable fact, as was the colloquium under the common law, and, if denied, must be established at the trial by evidence of any extrinsic facts showing the application to the plaintiff of the defamatory matter. (*Harris v. Zanone*, 93 Cal. 59.)

30. Where the answer in an action for slander admits that the words spoken were false it is error to instruct the jury that the plaintiff must prove that they were false. (*Burke v. Mascarich*, 81 Cal. 302.)

31. An allegation that the defendant had spoken the defamatory words "in the presence and hearing of divers good and worthy persons" is but the formal averment of a publication, and proof of the publication in the presence of one person satisfies the averment, without a literal proof as alleged. (*Harris v. Zanone*, 93 Cal. 59.)

32. In actions for slander it is not necessary to show that the slanderous words were spoken on the precise day alleged in the complaint. (*Norris v. Elliot*, 39 Cal. 72.)

33. When the answer denies that the slanderous words were spoken at the time and place alleged, or at any other time or place, and the statute of limitations is not pleaded, it is not error to admit proof of the speaking of the words at any time before the commencement of the action. (*Norris v. Elliot*, 39 Cal. 72.)

34. Upon the trial of an action for slander

in charging plaintiff with being interested in the larceny of certain cattle entries of the plaintiff in his books, showing that he had put down therein the cattle he was charged to have stolen, as having been purchased by him, are not admissible in evidence in his favor, as a litigant is not permitted to strengthen his case by his own declarations, whether written or verbal. (*Barkly v. Copeland*, 86 Cal. 488.)

35. Proof of the repeating of the words after suit brought is admissible to show malice. (*Norris v. Elliot*, 39 Cal. 72.)

36. It is always competent, in an action for defamation, to prove a repetition of slanderous charges for the purpose of showing malice, and it is wholly unnecessary to plead the repetition of the words. (*Preston v. Frey*, 91 Cal. 107.)

37. In an action for slander evidence is inadmissible on behalf of the plaintiff of utterances by the defendant other than those alleged in the complaint; and the refusal to strike out such evidence upon the motion of the defendant is error. By *Sharpstein, J.*, *Paterson, J.*, and *McFarland, J.*, concurring. (*Stern v. Loewenthal*, 77 Cal. 340.)

38. It may be shown upon cross-examination of the defendant that similar statements to those charged were made by the defendant prior to the date of the alleged slander. (*Preston v. Frey*, 91 Cal. 107.)

39. In an action of slander words substantially the same as those declared on, spoken by the defendant after the commencement of the action, are admissible in evidence on the question of malice, but the plaintiff can recover no additional damages for such words. (*Chamberlin v. Vance*, 51 Cal. 75.)

40. Evidence for the plaintiff respecting the threats of the defendant to ruin the plaintiff's reputation is admissible for the purpose of establishing malice. (*Harris v. Zanone*, 93 Cal. 59.)

Malice, evidence of, necessity of. See ante, 12.

41. In an action for slander, it is competent, upon the question of damages, to prove the number and ages of the plaintiff's children; but not that they are dependent upon the plaintiff for support. (*Cahill v. Murphy*, 94 Cal. 29.)

42. In an action for damages for slander, where the complaint alleged, and the evidence showed, that the slanderous words consisted in charging the plaintiff, falsely and maliciously, with an attempt to commit the crime of arson, and the evidence showed that the plaintiff was a defenseless woman with four children, three of whom were minors, and the jury returned a verdict in favor of the plaintiff for twelve hundred dollars, although the prayer of the complaint was for ten thousand dollars, the error of the court in permitting the plaintiff to show how many of her children were dependent upon her for support cannot be said to be error prejudicial to the defendant, in view of the enormity of the charge, the situation of the parties, and the small amount of damages awarded. (*Cahill v. Murphy*, 94 Cal. 29.)

43. On the trial of the action the plaintiff may prove, in aggravation of damages, that he was a married man and had a family. (*Rhodes v. Naglee*, 66 Cal. 677.) Cited 69 Cal. 530; 94 Cal. 31.

44. In an action for slander evidence of the financial standing of the defendant is admissible on behalf of the plaintiff. (*Barkly v. Copeland*, 74 Cal. 1.)

45. The alleged slander consisted in calling the plaintiff a thief and scoundrel. At the trial the defendant testified that at the time he used the language he believed that his property had been stolen. Held, that the evidence was admissible as tending to show the good faith of the defendant and in mitigation of damages. (*Morris v. Lachman*, 63 Cal. 109.)

46. Testimony offered by the defendant for the purpose of showing the animus of the plaintiff in bringing the action, to the effect that the plaintiff had besought certain persons to endeavor to secure testimony in her behalf, is properly rejected by the court, as it would not affect her right of recovery. (*Harris v. Zanone*, 93 Cal. 59.)

47. Upon a trial for slander in uttering a false charge of theft evidence offered by the defendant to show that a third person had represented to the defendant that he had lost money from his pocket while the plaintiff was in the employ of the defendant, without any offer to show that such person had in fact lost any money, is hearsay, and inadmissible. (*Harris v. Zanone*, 93 Cal. 59.)

48. In an action for slander evidence that the slanderous statements made by the defendant were matter of common report is altogether inadmissible. Such report is not regarded in law as a mitigating circumstance. (*Preston v. Frey*, 91 Cal. 107.)

49. In an action of slander for words spoken accusing the plaintiff of a crime evidence on behalf of the defendant that, by common rumor, the plaintiff was suspected of having been guilty of the crime charged against him is not admissible. (*Chamberlin v. Vance*, 51 Cal. 75.)

50. In an action for slander for charging the plaintiff with being interested with an alleged confederate in stealing certain cattle, evidence of an attempt made by the plaintiff to get his confederate to steal other cattle in fulfillment of a general understanding between them for the theft of cattle, is admissible in support of the plea of justification, as tending to show the relations existing between them. (*Barkly v. Copeland*, 74 Cal. 1.)

51. In an action of slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply the plaintiff offered to prove on the trial, and the court refused to hear such proof, held, that such ruling of the court was error, as the reply might have qualified or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. (*Bradley v. Gardner*, 10 Cal. 371.)

52. In action of slander in charging plain-

tiff with being interested in the larceny of certain cattle, where the plaintiff testified that he paid a certain amount to the owner of the cattle stolen, evidence of a suit to recover such amount, brought against the thief after the cattle were stolen and the thief was arrested, is inadmissible, as the transaction was no part of the *res gestæ*. (*Barkly v. Copeland*, 86 Cal. 483.)

Plea of justification, evidence necessary to support. See post, VI.

53. When a witness for defendant has impeached plaintiff's general reputation for chastity, and, on cross-examination, testified without objection that he had seduced plaintiff, and had come from another county to testify against plaintiff, and on re-examination testifies further, without objection, to particular acts of illicit intercourse with plaintiff, it is competent and admissible for plaintiff, in rebuttal, to testify that she was not acquainted with the witness, and that he had never offered or suggested any improper liberties. The plaintiff had a right to show that the witness came from a place beyond the reach of a subpoena to voluntarily testify to his own undue intimacy with her, and to show, by express testimony if she could that his statement was absolutely false. (*Hitchcock v. Caruthers*, 82 Cal. 523.)

Variance, amendment of complaint. See ante, 21.

Evidence of conversation with confederate. See Conspiracy, 8.

Evidence of allegations in answer superseded by amendment. See ante, 23.

Impeachment of witness on immaterial matter. See Witnesses, 322.

VI. Justification.

54. If the defendant, in an action for slanderous words in which a crime is imputed to the plaintiff, justifies on the ground that they were true, he must prove the plaintiff guilty of the crime imputed to him, by testimony sufficient to convict him of the crime on a criminal trial. (*Merk v. Gelshaeuser*, 50 Cal. 631.)

Evidence of similar thefts in support of plea of. See ante, 50.

VII. Damages in.

55. If the defendant, in an action of slander, in his answer alleges matters, which, if true, would tend to show that the plaintiff was guilty of the crime charged in the slanderous words, and if he does not believe, and has no reason to believe, such alleged matters are true, the jury may consider such allegations as showing continuing and express malice, and as matter in aggravation of damages. (*Chamberlin v. Vance*, 51 Cal. 75.)

Allegations of answer do not aggravate damages, when. See ante, III.

56. Where the complaint charges but a single publication, the plaintiff is only entitled to recover damages therefor, and is not entitled to recover damages sustained by the utterance of similar words on other occasions, which may be proven merely to show malice; and it is not error for the trial court to refuse

to compel the plaintiff, at the close of the testimony, to elect which of the publications was the original and which the repetitions. (*Harris v. Zanone*, 93 Cal. 59.)

Repetition of slanderous words, damages for. See ante, 39.

57. Mental suffering entitles the plaintiff to compensation in an action for slander, and such suffering may be increased and the damages consequently enhanced by the fact that the members of the plaintiff's family would suffer by reason of the disgrace imposed upon the plaintiff by the slanderous charge. (*Cahill v. Murphy*, 94 Cal. 29.)

58. In an action for slander, where express malice is shown, the amount of damages to be awarded is within the just discretion of the jury, and their verdict will not be disturbed, unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. (*Harris v. Zanone*, 93 Cal. 59.)

59. A verdict of five thousand dollars, in an action for slander in uttering a false charge of theft against the plaintiff, will not be set aside upon appeal as excessive, where the record does not disclose any thing from which it could be said that the damages were awarded under the influence of prejudice or passion, though the amount may appear larger than the facts demanded. (*Harris v. Zanone*, 93 Cal. 59.)

60. A verdict for the plaintiff of three thousand dollars held excessive, where the slander consisted in a charge of theft, and where the evidence of the defendant, though it did not show justification, did show strong circumstances of mitigation. (*Rhodes v. Naglee*, 66 Cal. 677.)

Special damages need not be alleged where words actionable. See ante, III.

VIII. Security for Costs.

61. The failure of the plaintiff in an action for slander to file an undertaking for costs before the issuance of the summons, as provided in the act of March 23, 1872, does not deprive the court of jurisdiction. And a dismissal of the action on account of such failure is erroneous, when a proper undertaking is on file at the time the motion to dismiss is made. (*Stinson v. Carpenter*, 78 Cal. 571.) Cited 93 Cal. 425.

62. The act of March 23, 1872, concerning actions for libel and slander, requiring a written undertaking to be filed, on the part of the plaintiff, for the payment of costs, and providing that an action commenced without the filing of the undertaking shall be dismissed, requires that the sureties must be residents within the county where the action is brought, and an undertaking by sureties who reside in another county is defective, and, if no other undertaking is filed, or offered to be filed, a motion by the defendant to dismiss the action is properly granted. (*Smith v. McDermott*, 93 Cal. 421.)

63. The act of March 23, 1872, concerning actions for libel and slander, was not repealed by the Code of Civil Procedure, passed on

March 11, 1872. A subsequent act is not repealed by a prior one. (*Smith v. McDermott*, 93 Cal. 421.)

64. The act of March 23, 1872, concerning actions for libel and slander, is not a local or special law, within the meaning of subdivision 3 of section 25 of article IV, and section 1 of article XXII of the constitution, prohibiting the passage of local or special laws regulating the practice of courts of justice, and was not repealed by the adoption of the constitution. (*Smith v. McDermott*, 93 Cal. 421.)

IX. Slander of Title.

65. An action for slander of title is only maintainable by one who possesses an estate or interest in real or personal property, against one who maliciously comes forward and falsely denies or impugns his title thereto, if thereby damage follows to the plaintiff. (*Edwards v. Burris*, 60 Cal. 157.)

66. A caution published against purchasing certain land from the plaintiff on the ground that he had obtained the title to the land by fraud from the defendant has no mark of malice accompanying it. It was just such a notice as every freeman and freeholder would be justified in making, if the circumstances raised a strong presumption that a fraud had been attempted upon him to get possession of his estate. (*McDaniel v. Baca*, 2 Cal. 326.)

67. An action for slander of title will lie against one who falsely and maliciously disparages the title of another to property, real or personal, and thereby causes him some special pecuniary loss or damage, as the direct and natural result of the words spoken; and, in order to maintain the action, it is necessary to establish each of these facts. (*Burkett v. Griffith*, 90 Cal. 532.)

68. Words spoken disparagingly of property, however false or malicious, are not in themselves actionable, unless special pecuniary damage has resulted therefrom as the direct and natural result of the utterance of the words; and it is necessary, in an action for slander of title, to allege in the complaint, distinctly and particularly, the facts which show wherein the plaintiff has sustained such special damage. (*Burkett v. Griffith*, 90 Cal. 532.)

69. In an action for slander of title, as in all other cases dependent upon special damage, there must be both injury and damage as conditions of recovery. The slanderous words, false in fact and maliciously uttered, constitute the injury and give the right of action, and the pecuniary damage sustained is the measure of recovery. (*Burkett v. Griffith*, 90 Cal. 532.)

70. If the words were uttered after a sale was completed, or agreed upon and contracted for, so as to give the plaintiff a contract capable of being enforced, he does not suffer any actionable damage from their utterance, although the purchaser was thereby deterred from carrying out his agreement or induced to violate it. (*Burkett v. Griffith*, 90 Cal. 532.)

71. If the plaintiff has sustained any damage in consequence of the refusal of any persons

to perform their lawful contracts with him, it is damage which may be compensated in actions against those persons, and the law supposes that in such actions the plaintiff would receive a full indemnity; and he has no right of action against a defendant whose words, however false and malicious, have induced the other contracting party to violate such agreement. (*Burkett v. Griffith*, 90 Cal. 532.)

72. A complaint alleging as the only special damage to the plaintiff resulting from the words of the defendant that an intending purchaser was informed of his words, and withdrew his offer to purchase, and not alleging that the defendant ever made or authorized any statements to such purchaser or in his presence, fails to show that the special damage is the natural and direct result of the defendant's statements. The defendant is not liable for the subsequent repetition of the alleged slanderous words by another, without his direction or authority. (*Burkett v. Griffith*, 90 Cal. 532.)

73. If the plaintiff has released the purchaser from the obligations of his contract, or does not desire to enforce the same, whatever damage he has suffered is the result of his own voluntary act, and cannot be visited upon the defendant. (*Burkett v. Griffith*, 90 Cal. 532.)

74. If a complaint for slander of title fails to show affirmatively that the plaintiff had title or interest in the property at the time of the alleged tort a demurrer to it is properly sustained. (*Edwards v. Burris*, 60 Cal. 157, 161.)

75. A complaint alleging defamatory statements by the defendant, to the effect that the plaintiff had broken the covenants of leases attached to the complaint as exhibits, containing an option to purchase, and that plaintiff had forfeited all rights thereunder, and averring that he had a leasehold interest, with option and privilege of purchasing, but not directly alleging the nature or extent of his leasehold interest, or the terms of his option, or what were the covenants of his leases, or the nature of his rights thereunder, and showing these matters of substance only argumentatively, by inference from the contents of the exhibits, fails to show that the statements and declarations could have caused any damage or injury to the plaintiff. (*Burkett v. Griffith*, 90 Cal. 532.)

76. The allegation that the defendant had stated that he would not sell the lands described in leases from him, held by the plaintiff, which contained an option to purchase, cannot be regarded as a slander of title, especially if it is not alleged that an intending purchaser was informed of such statement. (*Burkett v. Griffith*, 90 Cal. 532.)

77. When the complaint avers an offer to purchase from a third person, and an acceptance of the offer by the plaintiff, and that through the words spoken by defendant such third person was intimidated, dissuaded, and deterred from carrying out his agreement with plaintiff, it will be construed against the pleader, as intended to aver a complete and executed contract of purchase and sale be-

tween the plaintiff and such third person. (*Burkett v. Griffith*, 90 Cal. 532.)

78. The action will only lie by reason of prejudice in a sale; and in order to show that the words uttered have caused injury, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for sale of the property, and that thereby some intending purchaser was prevented from bidding or competing. (*Burkett v. Griffith*, 90 Cal. 532.)

79. It is necessary for the plaintiff to set forth and describe in his complaint, in direct terms, the property respecting which the defamatory statements were made, as well as to aver title thereto, so that it may be shown wherein the defendant had done him any injury. (*Burkett v. Griffith*, 90 Cal. 532.)

80. In an action to recover damages for slander of title, the defendant is entitled to a nonsuit, if the evidence shows that the existence of the title alleged to have been slandered is in dispute in a prior action between the parties brought for the purpose of determining their rights. (*Thompson v. White*, 70 Cal. 135.)

81. It was error for the court to instruct the jury "that when a person injuriously slanders the title of another, malice is presumed." It was also error to instruct them that fraud could not be presumed, but may be established by circumstances, but not of a light character. The circumstances must be of a most conclusive nature. (*McDaniel v. Baca*, 2 Cal. 326.)

82. In an action for slander of title in publishing a notice warning persons against purchasing certain land from plaintiff on the ground that he had obtained it from the defendant through fraud, it is error in the court below to refuse to instruct the jury that if they believed the receipt specified in the deed, for three thousand dollars, was obtained by fraud, they were authorized to find for the defendant. No case in the history of jurisprudence will sustain that ruling. (*McDaniel v. Baca*, 2 Cal. 326.)

SLANDER OF TITLE.

See Slander, IX.

SLAUGHTER-HOUSES.

Ordinances prohibiting. See Ordinances, IV, 7, g.

Preventing access to. See Nuisances, 56.

Regulation of. See Constitutional Law, 438, 439.

SLAVERY.

Marriage between master and slave. See Marriage and Divorce, 40.

Nature of, effect of ceding territory. See International Law, 8.

1. The constitution of the United States recognizes a property in slaves, and the institution is a social and political one. (*Ex parte Perkins*, 2 Cal. 424.)

2. Is the whole power to legislate on the subject of fugitives from labor vested in Congress, query? (*Ex parte Perkins*, 2 Cal. 424.)

3. If the constitution of the state does abolish slavery, and affirm the Mexican law, and

if she have the power to control her own internal police as fully before as after her recognition by the other states, yet it does not follow that upon her admission into the Union she will have any authority to impair the obligation of rights subsisting under the federal constitution. (*Ex parte Perkins*, 2 Cal. 424.) Cited 9 Cal. 169.

4. If the slaveholder had authority to bring his slaves here under the constitution of the United States, the right could not be abridged or controlled until the admission of California as an independent state by Congress. (*Ex parte Perkins*, 2 Cal. 424.)

5. The act of April 15, 1852, concerning fugitives from labor, is not an *ex post facto* law. It impairs no right, nor does it constitute the refusal to return to servitude a crime; it simply provides for the departure of slaves brought here before a certain period. (*Ex parte Perkins*, 2 Cal. 424.)

6. Act of April 15, 1852, concerning fugitives from labor, does not impair the obligation of contracts. The state has entered into no contract with free negroes, fugitives, or slaves, by providing by her constitution that slavery or involuntary servitude shall not exist within her limits, which would prevent her, on proper occasion, from removing them. (*Ex parte Perkins*, 2 Cal. 424.)

7. Nor does the act of April 15, 1852, concerning fugitives from labor, impair the constitutional right of trial by jury. The rights of the slave are not determined by the arrest and commitment, nor by the examination on the writ of habeas corpus. The right to trial by jury is secured in all cases involving questions of liberty, property, or punishment. (*Ex parte Perkins*, 2 Cal. 424.)

8. State, in exercise of her police power, may expel from her limits slaves brought here voluntarily by their owners before the state was admitted into the Union. (*Ex parte Perkins*, 2 Cal. 424.)

9. By virtue of their police power, the states possess jurisdiction to arrest and restrain fugitive slaves, and to remove them from their borders, but not so as to obstruct the owner in reclaiming his slave under the constitution of the United States. (*Ex parte Perkins*, 2 Cal. 424.)

10. The exercise by the states of powers similar to the power exercised in aiding the reclamation of fugitive slaves has been acquiesced in for years, as in cases of "fugitives from justice," in the authentication of records, etc., in which the powers exercised by the United States and the states are concurrent. (*Ex parte Perkins*, 2 Cal. 424.)

11. In aiding the owner in the reclamation of his slave, the state acts in virtue of its territorial jurisdiction over the subject. (*Ex parte Perkins*, 2 Cal. 424.)

12. Marriage of master with his female slave amounts to relinquishment of his right to hold her as a slave and manumits her. (*Pearson v. Pearson*, 51 Cal. 120.)

13. Whether a slave becomes *ipso facto* free by his owner taking him voluntarily into a free state, and whether the master's control does not cease for the want of positive law author-

izing its exercise, query? (*Ex parte Perkins*, 2 Cal. 424.)

14. The owner of slaves in Mississippi brought them voluntarily into California before the adoption of the constitution by the state. The slaves asserted their freedom, and for some months were engaged in business for themselves. Afterward the act of April 15, 1852, was passed by the legislature, the fourth section of which in substance enacts that slaves who had been voluntarily introduced into the state before the adoption of the constitution, and who refused, upon the demand of their owner, to return to the state where they owed labor, etc., should be deemed to be fugitives from labor; and gave the owner the same remedies for their reclamation as are provided for the recovery of such fugitives. The owner, under the provisions of the above act, brought them before a justice of peace who allowed the claim of the owner, and ordered them into his custody. The slaves then petitioned for this writ of habeas corpus, which came before the supreme court; and, after hearing the case, the court ordered that the writ be dismissed, and the slaves remanded to their owner. (*Ex parte Perkins*, 2 Cal. 424.)

15. The intention of the fourth section of the act April 20, 1852, was simply to place the person to whom it relates in the category of fugitives from labor, extending the provisions of the law over them; but to change their actual status was a power alike beyond the power and intention of the legislature. (*Ex parte Perkins*, 2 Cal. 424.)

16. The visible acts of a party must be taken as the only test of his intentions, in deciding whether he is entitled to be considered a mere visitor, of which fact his declarations constitute no evidence. (*Matter of Archy*, 9 Cal. 147.)

17. The privileges extended to visitors cannot be extended to those who come for both business and pleasure. A mere visitor is one who comes only for pleasure or health, and who engages in no business while here, and remains only for a reasonable time. If the party engage in any business, or employ his slave in any business, except as a personal attendant upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom. (*Matter of Archy*, 9 Cal. 147.)

18. This rule admits of no exception upon the ground of necessity or misfortune, or it would introduce uncertainty and complexity, and lead the courts into profitless investigations. The pecuniary condition of the party is difficult of proof, and will not be inquired into; nor will the rule be relaxed to meet the hardships of a particular case. (*Matter of Archy*, 9 Cal. 147.)

19. Where the facts show that the delay of the visitor was unavoidable, the fact of his engaging in labor, in order to support himself during his necessary detention, does not divest his rights under the law of comity. (*Matter of Archy*, 9 Cal. 147.)

20. The character of immigrant or traveler, bringing with him a slave into this state, must last so long as it is necessary, by the

ordinary modes of travel, to accomplish a transit through the state. Nothing but accident or imperative necessity could excuse a greater delay. Something more than mere ease or convenience must intervene to save a forfeiture of property which he cannot hold as a citizen of the state through which he is passing. (*Matter of Archy*, 9 Cal. 147.)

21. But visitors for health or pleasure stand in a position different from travelers on business, and are protected by the law of comity. (*Matter of Archy*, 9 Cal. 147.)

SLICKENS.

See Mines and Mining, XI, 9.

SOCIETIES.

See Unincorporated Associations.

Religious. See Religious Societies.

SOLDIERS.

See Military Companies.

Residents are not citizens. See Aliens, 2.
Right of to vote. See Elections, VI, 3.

SOLDIER'S ADDITIONAL HOMESTEAD.

See Public Lands, XI.

Rights under. See Public Lands, 212.

SOLE CORPORATIONS.

See Corporations, I, 2.

SOLE TRADERS.

See Husband and Wife, VI.

SOLVENT CREDITS.

Taxation of. See Taxation, IV, 8.

SONOMA COUNTY.

Act to fund indebtedness of. See Counties, 66, et seq.

Statute authorizing supervisors to contract for map. See Statutes, 192.

Boundaries of. See Counties, 81.

SONORA.

Bonds of. See Statute of Limitations, 108.

SOVEREIGNTY.

See Eminent Domain; International Law.

State, sovereignty of. See Constitutional Law, I; State, 2.

1. Sovereignty is a term used to express the supreme political authority of an independent state or nation. Whatever rights are essential to the existence of this authority are rights of sovereignty—as the right to declare war, to make treaties of peace, to levy taxes, to take private property for public uses, termed the right of eminent domain. (*Moore v. Smaw*, *Fremont v. Flower*, 17 Cal. 199.)

2. In this country, this authority is vested in the people, and is exercised through the joint action of their federal and state governments. To the federal government is delegated the exercise of certain rights or powers

of sovereignty; and the exercise of all other rights of sovereignty, except as expressly prohibited, is reserved to the people of the respective states, or vested by them in their local governments. (*Moore v. Smaw*, *Fremon v. Flower*, 17 Cal. 199.)

3. Sovereignty can never be in abeyance, and until there was some local government organized, either by the people of the territory or some other competent authority, the United States, upon the doctrine of necessity, succeeded to, and represented the government of Mexico, so far as the same could be exercised within the purview of the constitution. (*People ex rel. Attorney General v. Folsom*, 5 Cal. 373.)

Lands belonging to the state by virtue of. See Public Lands, III, 1; Swamp and Overflowed Lands, 23.

Effect of statute trenching upon rights of. See Statutes, VI.

Change of, effect on laws. See Conflict of Laws, 9 et seq.

Effect of ceding territory. See International Law, 4.

SPANISH GRANTS.

See Mexican Lands.

SPANISH LAW.

See cross-references under Mexican Law.

Execution of will under. See Wills, IV.

SPECIAL ACTS.

See Constitutional Law, VIII, 14; Guardian and Ward, V, 6, a; Statutes, VIII, 18.

Creation of reclamation district by. See Swamp and Overflowed Lands, XVII, 3, c.

Authorizing change of venue. See Venue, II, 3.

SPECIAL ADMINISTRATORS.

See Executors and Administrators, XII.

SPECIAL CASES.

Definition of. See Definitions, 11.
Courts are always open to hear. See Courts, 39.

What are. See Jurisdiction, XII, 2.
Condemnation proceedings are. See Eminent Domain, 107.

Proceedings to determine conflicting land claims. See Public Lands, 300, 301.

Election contests are. See Elections, 135, 136.

Actions to enforce mechanics' liens. See Mechanics' Liens, 316.

Forcible entry and unlawful detainer cases. See Forcible Entry and Unlawful Detainer, 145.

Mandamus proceedings are not. See Mandamus, 219.

Insolvency proceedings, whether are. See Bankruptcy and Insolvency, IV.

Proceedings to determine heirship. See Estates of Deceased Persons, 480.

Proceedings in partition are. See Partition, 34.

Jurisdiction over. See Jurisdiction, XII, 2,
Appellate jurisdiction over. See Appeals, I, 3, g.

SPECIAL DAMAGES.

How averred. See Damages, VIII.

SPECIAL DEMURRER.

See Pleading and Practice, X, 4.

SPECIAL DENIAL.

See Pleading and Practice, IX, 18.

SPECIAL ELECTIONS.

See Elections, II.

SPECIAL ISSUES.

See Equity, IV, 4.

In probate courts. See Probate Courts, 22, et seq.

Trial of. See Pleading and Practice, XX, 13.

Submission of. See Verdict, X.

Recalling jury to submit. See Railroads, 91.

Suit for divorce, special issues in. See Marriage and Divorce, III, 4, 1.

SPECIAL PRIVILEGES.

Laws conferring. See Constitutional Law, VIII, 9.

SPECIAL VENIRE.

See Jury and Jurors, IV, 2.

Of grand jurors. See Jury and Jurors, XVII, 1.

SPECIAL VERDICT.

Conflict between and general verdict. See Verdict, X.

SPECIFICATIONS.

In building contracts and recording of. See Building Contracts, I, 1; I, 3, b; Mechanics' Liens, IV, 2.

Street contract, specifications. See Streets, XIV, 5.

SPECIFIC CONTRACT ACT.

See Payment, II, 3.

Validity of. See Constitutional Law, VIII, 18.

SPECIFIC DEVICES.

See Wills, XI, 8.

SPECIFIC LEGACIES.

See Wills, XI, 8.

SPECIFIC PERFORMANCE.

I. Right of Party to; Duty and Discretion of Court.

II. Adequacy of Legal Remedy, Effect of.
III. Nature of Contract to Entitle Party to Specific Performance.

1. Fairness and Reasonableness.

2. Mutuality.

3. Adequacy of Consideration.

4. Certainty and Completeness of Contract.

IV. Particular Contracts.

1. Contracts of Agents.

2. Contracts of Deceased Persons.

3. *Contracts of Married Women.*
4. *Joint Contract of Husband and Wife.*
5. *Contract Between Attorney and Client.*
6. *Illegal Contracts.*
7. *Exchange of Lands, Contracts for.*
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10. *Contracts Relating to Personality.*
11. *Contracts for Personal Services.*
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V. Suits to Enforce Contracts.

1. *Nature of.*
2. *Good Faith on Part of Plaintiff; Duty to Do Equity.*
3. *Within What Time to be Brought.*
4. *Performance by Plaintiff.*
 - a. *Necessity of.*
 - b. *Diligence Requisite; Effect of Delay in Performance.*
5. *Enforcement of Part of Contract.*
6. *Demand of Performance by Defendant; Waiver of Right; Rents and Profits.*
7. *Pleadings in; Enforcing on Cross-complaint.*
8. *Jurisdiction; Effect of Nonresidence.*
9. *In Whose Favor and Against Whom Lies; Parties.*
10. *Evidence.*
11. *Defect in Title as a Defense.*
12. *Fraud as a Defense.*
13. *Decrees in; Powers of Court.*
14. *Findings in.*
15. *Costs in.*
16. *Rights of Plaintiff Where Performance Refused.*

I. Right of Party to; Duty and Discretion of Court.

1. Contract should be enforced in every case where the object of it is susceptible of substantial enjoyment; provided, always, that the circumstances surrounding and connected with the contract bring it within the equitable rules which entitle it to the relief sought, and where the remedy at law is uncertain or insufficient. (*Johnson v. Rickett*, 5 Cal. 218.)

2. Equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy. (*Flickinger v. Shaw*, 87 Cal. 126.)

3. In applications for specific performance the party is not entitled to relief as a matter of course, but subjects himself to the equitable consideration of the chancellor, and must show a case free from doubt or suspicion. (*Brown v. Covillaud*, 6 Cal. 566.)

4. The specific performance of a contract is not a matter of course, but rests in the sound discretion of the court upon a view of all the circumstances, and before the court will act it must be satisfied that the contract is reasonable and equal in its operation. (*Cooper v. Pena*, 21 Cal. 403.)

5. A court of equity may refuse to specifically enforce a contract which is good at law, and which equity would refuse to cancel. (*Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557.)

6. Suit for specific performance of land is addressed to the sound discretion of the court; this discretion is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but is one to be exercised and controlled by the established doctrines of equity applied to the circumstances of the particular case. (*Sturgis v. Galindo*, 59 Cal. 28, 30.)

II. Adequacy of Legal Remedy, Effect of.

7. Whether equity will enforce contract depends, not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law. (*Duff v. Fisher*, 15 Cal. 375; cited 25 Cal. 571, 38 Cal. 453; *Senter v. Davis*, 38 Cal. 450.)

8. If nonperformance will embarrass the plaintiff in his business plans, or involve him in loss which a jury cannot estimate with any degree of certainty, specific performance should be decreed. (*Senter v. Davis*, 38 Cal. 450.)

9. If damages at law will be adequate compensation for the breach, specific performance will not be decreed. (*Senter v. Davis*, 38 Cal. 450.)

10. A bill quia timet, and to enforce the specific execution of an agreement, lies only where there is no adequate remedy at law. But where the damages, resulting from the breach of such agreement, are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances. (*White v. Fratt*, 13 Cal. 521.)

Cited 37 Cal. 228; 69 Cal. 593.

Inadequacy of legal remedy. See ante, I.

III. Nature of Contract to Entitle Party to Specific Performance.

1. Fairness and Reasonableness.

11. It must be shown that contract is fair and just, and that it would not be inequitable to enforce it. (*Agard v. Valencia*, 39 Cal. 292.)

Cited 70 Cal. 609.

12. In a suit for a specific performance of an agreement to convey lands, the agreement must be one which in all its features appeals to the judicial discretion as being fit to be enforced in specie, as having been obtained without any intermixture of unfairness. (*Bruck v. Tucker*, 42 Cal. 346.)

Cited 70 Cal. 609; 78 Cal. 599.

13. If agreement be deficient in either fairness, justice, or certainty, its specific execution will not be decreed. (*Sturgis v. Galindo*, 59 Cal. 28.)

Cited 82 Cal. 541.

Fairness and reasonableness of contract. See post, III, 3.

Contract must be free from doubt or suspicion. See ante, 3.

2. Mutuality.

14. Equity will not enforce the specific performance of a contract where the party ask-

ing its enforcement cannot, from the nature of the contract, be compelled to perform it specifically on his part. (*Cooper v. Pena*, 21 Cal. 403; *Smith v. Taylor*, 82 Cal. 533; *Banbury v. Arnold*, 91 Cal. 606.)

15. The agreement must be mutual; and when from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, it cannot be specifically enforced against the other. (*Sturgis v. Galindo*, 59 Cal. 28.) Cited 82 Cal. 541.

16. In order that a specific performance of a contract may be compelled, the remedy as well as the obligation must be mutual, and, as a general rule, the question of mutuality is to be determined by the contract itself, and is not affected by circumstances arising after the contract is made and the rights of the parties fixed. (*Cooper v. Pena*, 21 Cal. 403.) Cited 43 Cal. 465; 59 Cal. 31; 73 Cal. 418; 83 Cal. 55; disapproved 83 Cal. 466.

17. The cases in which a want of mutuality at the time the contract has been entered into has been held not to be sufficient reason for refusing to enforce it—as in contracts with infants, those between lessor and lessee, trustee and cestui que trust, voluntary settlements, and the like—are exceptional cases in which peculiar considerations have been allowed to override the principle of mutuality, and they do not contravene the general rule as above stated. (*Cooper v. Pena*, 21 Cal. 403.)

18. The general rule that contracts of sale must be mutual, or courts of equity will not enforce them, is subject to the exception that a contract for the sale of real estate at the option of the vendee only, upon election and notice, may be specifically enforced; and the refusal of the vendor to accept the purchase money will not destroy the mutuality, though the vendee could thereupon withdraw his election. (*Calanchini v. Branstetter*, 84 Cal. 249.)

19. Where the remedy is not mutual, specific performance will not be decreed, except where the party seeking to enforce the contract has performed every thing to which the other party is entitled under the same obligation, or nearly so, and full compensation for any want of entire performance is made. (*Lattin v. Hazard*, 91 Cal. 87.)

20. A court of equity will not, for the want of mutuality, refuse to enforce the specific performance of a contract between an attorney and client, by which the attorney undertakes to give his professional services in resisting a motion for a new trial made in the district court of the United States, in a case where a Mexican grant of land has been confirmed to the client, and to procure the dismissal of an appeal if one is taken, and the client agrees to convey to the attorney a portion of the land, if he succeeds in his undertaking. (*Ballard v. Carr*, 43 Cal. 74.) Cited 48 Cal. 489; 79 Cal. 510; 84 Cal. 254.

Contract must be mutual. See ante, 4; post, 131.

Want of mutuality in contract between attorney and client. See post, 64.

Want of mutuality in contract for personal services. See post, IV, 11.

3. Adequacy of Consideration.

21. Under the Civil Code of California, specific performance will not be decreed unless there was adequate consideration for the contract. (*Morrill v. Everson*, 77 Cal. 114.)

22. In actions for the specific performance of contracts for the sale of lands, it is necessary to allege and show to the court an adequate consideration for the performance of the contract sought to be enforced, and that the same is fair and reasonable in all its parts, and of such a character as may fairly call for the interpretation of a court of equity. (*Nicholson v. Tarpey*, 70 Cal. 608, 609.)

23. The question of adequacy of consideration relates to the time of the formation of the contract. And the highest possible price is not required, but only a consideration which is fair under all the circumstances. Instance of an inadequate consideration for a contract to convey real property. (*Morrill v. Everson*, 77 Cal. 114.)

24. A vendor, under a contract for the sale of land, by accepting the purchase price agreed to be paid therefor, and delivering a deed in which a portion of the land was fraudulently omitted, though supposed by the vendee to include the whole, waives his right to object to a specific performance of the contract on the ground of the inadequacy of the consideration. (*Nicholson v. Tarpey*, 70 Cal. 608.)

Contract must be just and fair in all parts. See Statute of Frauds, 86.

4. Certainty and Completeness of Contract.

25. Courts of equity will not attempt to enforce vague and shadowy claims. (*Doe v. Culverwell*, 35 Cal. 291.)

26. A court will not attempt to enforce the specific performance of a contract in writing relating to lands where the terms of the instrument are so vague and indefinite that it is impossible to ascertain what the contract really is. (*Minturn v. Baylis*, 33 Cal. 129.) Cited 39 Cal. 301; 5 Dak. 303.

27. If the contract is vague and uncertain, the court will not decree a specific performance, but will leave the party to his remedy at law. A pleading which seeks a specific performance is subject to a special demurrer as being indefinite, ambiguous, and uncertain, if it does not allege how or when conveyance of title was to be made, or how the deferred payments were to be evidenced or secured, or what were the precise terms of an agreement as to the assumption of mortgages. (*Smith v. Taylor*, 82 Cal. 533.)

28. In a suit for specific performance, the contract must be so free from ambiguity as to leave no reasonable doubt of the intentions of the parties. (*Agard v. Valencia*, 39 Cal. 292.) Cited 78 Cal. 599; 82 Cal. 541; 5 Dak. 303; 5 Mont. 497.

29. The specific performance of a contract cannot be had unless the thing agreed to be done is definite and certain in its terms and in itself, and the party claiming performance establishes by clear and satisfactory proof the existence of the contract as he alleges it. (*Magee v. McManus*, 70 Cal. 553.) Cited 78 Cal. 536; 82 Cal. 541.

30. A court of equity is always chary of its power to decree a specific performance, and will withhold the exercise of its jurisdiction in this respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity. (*Morrison v. Rossignol*, 5 Cal. 64.) Cited 33 Cal. 133; 39 Cal. 101; 70 Cal. 557; 2 Dak. 303; 5 Mont. 496.

31. A court of equity will not enforce any contract unless it be complete and certain as to parties, as well as to price, subject matter, etc. (*Los Angeles etc. Co. v. Phillips*, 56 Cal. 538.) Cited 70 Cal. 557; 78 Cal. 536.

32. When a contract of sale provides for payment of part of the purchase money on mortgage, without specifying the terms of the mortgage, and the terms thereof are not made certain by reference in the contract, or by averment in the complaint, the agreement is too indefinite and uncertain to support a judgment for specific performance, and a demurrer to the complaint is properly sustained. (*Burnett v. Kullak*, 76 Cal. 535.) Cited 78 Cal. 536.

33. A contract between the defendant in a foreclosure suit, and a proposed purchaser under the decree, that if such defendant would bear the necessary expenses of a conveyance and of erecting a division line, and would consent to the foreclosure of the mortgage in suit upon land of the defendant which had been released from the mortgage lien, he would convey the same to the defendant and would not disturb his possession, does not depend upon an uncertain or indefinite contingency, and will be specifically enforced when the contingency disappears by the completion of the purchase at the foreclosure sale. (*Nunez v. Morgan*, 77 Cal. 427.)

34. The subject matter of an agreement for the sale of land must all be included in the memorandum, and be described with sufficient exactness to render its identity certain upon the introduction of extrinsic evidence, disclosing the situation of the parties; but if, upon reading the contract in the light of the facts shown by such extrinsic evidence, it appears clear what land the vendor intended to convey and the vendee intended to purchase, the description will be deemed sufficiently certain, and the contract will be specifically enforced. (*Towle v. Carmelo Land etc. Co.*, 99 Cal. 397.)

35. The description in a contract for the sale of land, by which the grantors of the defendant agreed to convey to plaintiff all that portion of a rancho in his occupation and possession on a certain date, is sufficiently certain, and in an action for the specific performance of such agreement the plaintiff may allege and prove the specific boundaries of the land thus generally described, and that no part of it was within the description of lands excepted from the agreement. (*Towle v. Carmelo Land etc. Co.*, 99 Cal. 397.)

36. The action was brought to procure the specific performance of a parol contract. The complaint alleged that the plaintiff, having become liable as the accommodation surety for the defendant on two promissory notes,

bearing a given rate of interest, entered into a contract with her whereby she promised, in consideration of his joining with her in the execution of a new note for six hundred dollars, payable six months after date, at a different rate of interest, to secure him against liability on the three notes by giving him her individual note secured by a mortgage upon her homestead property, the note to be made payable to him at the same time as the six hundred dollar note, in a sum equal to the whole amount then due on the three notes, and to bear the same rate of interest, and the mortgage to be made in such an amount as would secure him against any liability by reason of his becoming her surety. The court found the contract as alleged in the complaint, except that it was made in consideration of the plaintiff becoming surety on a note payable one year after date. Held, that specific performance of the contract could not be had, (1) because the contract as alleged in the complaint and as found by the court differed in the consideration; and (2) because the contract was indefinite and uncertain both as to the time of payment of the note and mortgage, and as to the amount for which the mortgage was to be given, and the rate of interest on the note. (*Magee v. McManus*, 70 Cal. 553.)

37. The aid of court of equity cannot be had to specifically enforce that which is only the basis of an agreement, and not the agreement or contract itself. (*Los Angeles Assn. v. Phillips*, 56 Cal. 539.) Cited 70 Cal. 557; 78 Cal. 536.

38. A correspondence between a vendor and a proposed purchaser of a street railway, from which it appears that neither party intended to be bound until a formal written contract expressing all the terms of the agreement should be executed by both parties, does not, in the absence of such formal written contract, prove such a concluded agreement as may be specifically enforced by a court of equity. (*Pacific Rolling Mill Co. v. Riverside etc. Ry. Co.*, 90 Cal. 627.)

39. A memorandum of a contract for the sale of land, accurately describing it and the amount and time of payments therefor, is sufficiently certain to be specifically enforced, notwithstanding it is declared to be "subject to the conditions in a formal contract as to clearing streets, improvements, etc.," and provides that it shall be surrendered "on delivery of formal contract or deed." (*Karns v. Olney*, 80 Cal. 90.)

40. In an action upon the document set out in the opinion, the court found, in effect, that the same was executed by the plaintiff and defendant for the purpose and with the intent of making a full and complete settlement of all demands then existing between them; that the plaintiff had fully performed the terms of the agreement, and had executed, and the defendant had freely and voluntarily accepted, a deed, in pursuance of the agreement. Held, that the document referred to was not a contract, but a mere basis of a contract, to be framed after further negotiations; and could not be enforced in a court of equity, or an action for damages be maintained upon

it; and held, further, that the evidence (as stated in the opinion) was insufficient to justify the finding as to a delivery of the deed. (*Los Angeles Assn. v. Phillips*, 56 Cal. 539.)

41. The absence of a certificate of acknowledgment upon a copy of a contract for the conveyance of land, attached to a complaint for the specific enforcement thereof as an exhibit, is not sufficient to show that the contract was not executed and acknowledged according to law, and where the complaint alleges that the plaintiff entered into a contract with the defendant, whereby she agreed to sell to the defendant, and the defendant agreed to purchase, the land, such allegations will control, and imply the execution and acknowledgment of the contract according to law, for the purpose of supporting a judgment for specific enforcement of the contract. (*Banbury v. Arnold*, 91 Cal. 606.)

Contract must be certain. See ante, III, 1; Statute of Frauds, 86.

Parol contract must be clearly shown. See post, 109.

Parol contract for lease, what sufficiently certain. See post, 91.

Contract of decedent must be certain. See post, IV, 2.

Indefinite contract. See post, V, 6.

Enforcing agreement in which there is a mistake. See Reformation of Contracts, 31.

IV. Particular Contracts.

1. Contracts of Agents.

42. If, in case where both vendor and vendee act through agents in the sale and purchase of real estate, a written memorandum of sale is made by the agent of the vendor and delivered to the broker of the vendee, and the circumstances show that the broker of the vendee was authorized by him to make the purchase, and that the vendee accepted of the delivery of the written memorandum to his broker as a delivery to him and knew what its contents were, the contract will be enforced against the vendee. (*Rutenberg v. Main*, 47 Cal. 213.)
Cited 77 Cal. 282.

43. A letter from the owner of real estate to his agent, saying: "As you stated you could get thirty thousand dollars for the place you occupy on Market street, and if you can, we will sell at that price any time before the first day of September, 1887, and allow you two and one-half per cent on said price, and if no sale is made, no expenses to us," simply authorizes the agent to find a purchaser who would pay the price stated, and binds the principal to pay the commission agreed upon for finding such purchaser; but it does not authorize the agent to execute a contract to sell and convey the property so as to bind the principal, nor can the purchaser specifically enforce against the principal such a contract, signed by the agent, by virtue of the authority contained in such letter. (*Grant v. Ede*, 85 Cal. 418.)

44. Such letter does not constitute an agreement of the principal which such purchaser can enforce, as it merely fixes a price, and does not specify any form of deed or time of

payment, or of delivery of possession, or authorize the agent to make such specifications. (*Grant v. Ede*, 85 Cal. 418.)

45. Specific performance of an agent's contract for the sale of his principal's land will not be decreed where the documentary evidence of the transaction shows that the agent did not act within the scope of his authority; that he was employed to sell for a specific sum, and was not employed to pay taxes upon the land nor to contract for their payment, and where the agreement to sell for a sum less than that nominated in his authority and to pay taxes was therefore of no binding force upon his principal. (*Holbrook v. McCarthy*, 61 Cal. 216.)

Cited 83 Cal. 438; 20 Or. 479.

Parol contract of agent. See post, 88.

Contract of agent, enforcement against estate of decedent. See post, IV, 2.

2. Contracts of Deceased Persons.

46. A proceeding under sections 1597 et seq. of the Code of Civil Procedure, to compel a conveyance of real estate, is one for the specific performance of a contract in the probate court. (*Estate of Corwin*, 61 Cal. 160.)

47. Section 1597 of the Code of Civil Procedure does not empower the probate court to direct an administrator to perform specifically a contract for the conveyance of land made by his intestate, unless the contract of the intestate was in writing. (*Cory v. Hyde*, 49 Cal. 469.)

Cited 65 Cal. 343.

48. The words "and in all cases where such decedent, if living, might be compelled to make such conveyance," inserted in section 1597 of the Code of Civil Procedure, by way of amendment to section 206 of the Old Probate Act, do not extend the jurisdiction of the probate court to cases where there was no contract in writing. (*Cory v. Hyde*, 49 Cal. 469.)

49. A written contract for the sale of real estate executed by an agent of the owner, upon the express condition that it was subject to his approval, cannot after his death be specifically enforced against his personal representative, if he did not approve the contract before his death. (*Estate of Dick*, 74 Cal. 284.)

50. An administrator will not be compelled to perform specifically a contract of the intestate to convey land, unless it is found as a fact that the intestate had contracted to convey the particular land described in the complaint. An agreement of the intestate to convey a parcel of his land, when he owned several parcels, without describing any particular tract, will not be enforced. (*Ferris v. Irving*, 28 Cal. 645.)
Cited 78 Cal. 208.

51. A sale of land of the estate of a deceased person, which is absolutely void, will not be specifically enforced at the instance of the administrator. (*Kertchem v. George*, 78 Cal. 597.)

52. An action to compel the specific performance of an agreement to convey real estate may be brought within two years

after the time the cause of action accrues, and the time is not shortened by the facts that the person bound to convey dies, and executors of his will are appointed more than one year before the action is commenced. (*Lowell v. Kier*, 50 Cal. 646.) Cited 18 Nev. 224.

53. At any time within six months after the dismissal, without prejudice, of a petition to a probate court to compel an administrator to convey lands in accordance with the terms of a bond executed by the decedent, the obligee may sue in the superior court for a specific performance of the contract. It will be presumed that the petition was dismissed upon the ground that the petitioner's right to relief was considered doubtful by the probate court. (*Hall v. Rice*, 64 Cal. 443.)

54. If the statute authorizes the probate court to compel an administrator to execute a conveyance of real estate, in a case where the intestate had contracted in writing to convey it, the petition asking for a decree compelling the administrator to convey must state that the contract was in writing, in order to give the probate court jurisdiction. - (*Cory v. Hyde*, 49 Cal. 469.) Cited 75 Cal. 255.

55. It was not the intention of the statute to vest in the probate court more extensive power than was administered by a court of equity; and therefore where it appears in a proceeding under section 1597 of the Code of Civil Procedure to compel a conveyance of realty that there are third parties interested in the controversy, and who, were the proceeding in equity, would be necessary parties, the petition should be dismissed. So held in a case where the petition showed that the administrator had conveyed the premises to a third person under an order of court before the petition was filed. (*Estate of Corwin*, 61 Cal. 160.)

Contract of deceased wife, omission in findings. See post, V, 14.

Compelling performance on sale of decedent's realty. See *Estates of Deceased Persons*, VII, 4, m.

Acts of decedent, how far binding. See *Executors and Administrators*, VI, 3, d.

3. Contracts of Married Women.

56. A court of equity will compel a married woman or her grantees with notice to execute a contract to convey her separate real estate, acquired by her before the cession of California, if the facts are such as to warrant a court of equity to give relief. (*Bodley v. Ferguson*, 30 Cal. 511.) Cited 32 Cal. 384, 385; 40 Cal. 562; distinguished 83 Cal. 537.

57. Specific performance cannot be compelled of an unacknowledged executory contract of a married woman to convey her separate property. Such contract, if not within the precise letter of section 1093 of the Civil Code, is within its meaning, and also within the policy of the law requiring acknowledgments by married women. (*Jackson v. Torrence*, 83 Cal. 521.) Cited 91 Cal. 607.

58. An unacknowledged executory contract of a married woman for the sale of her separate real estate is not enforceable against her, and cannot be specifically enforced by her against the vendee. Her acknowledgment of such a contract is an essential part of its execution. And the consideration which actuated the vendee, consisting of her promise to convey the land, having failed through her nonexecution of the contract, it is absolutely void, and not voidable at plaintiff's option, and is a nudum pactum for all purposes. (*Banbury v. Arnold*, 91 Cal. 606.)

59. When a married woman has, prior to her marriage, entered into a contract which is binding upon her, a specific performance may be decreed notwithstanding her subsequent marriage. (*Love v. Watkins*, 40 Cal. 547.)

Cited 47 Cal. 37; 65 Cal. 509; 80 Cal. 435; 83 Cal. 537; 86 Cal. 529.

Joint contract of husband and wife. See post, IV, 4.

Contract of deceased wife, omission in findings. See post, V, 14.

Unacknowledged contract of married woman. See ante, 41.

4. Joint Contract of Husband and Wife.

60. Executory contract for sale of wife's separate property, executed by the husband and wife in the mode prescribed by the statute defining the rights of husband and wife, is valid and binding on the wife, and may be enforced by a decree of specific performance. (*Love v. Watkins*, 40 Cal. 547.)

61. Where husband and wife own separate undivided interests in a house and lot where they live and carry on a hotel business, and have jointly agreed to sell the whole property together for a fixed sum, the husband cannot be held to have intended to sell his undivided interest apart from that of the wife, and if she fails or refuses to acknowledge the contract, or to convey her interest in the property, equity will not compel a conveyance by the husband of his separate undivided interest in the property. (*Jackson v. Torrence*, 83 Cal. 521.) Cited 91 Cal. 507-09.

5. Contract Between Attorney and Client.

62. Although, when an attorney contracts to perform legal services for a client in consideration of receiving a portion of the property about which the litigation is to be carried on, he cannot maintain an action for a specific performance while the contract remains unperformed on his part; yet, if he can show a substantial performance on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money. (*Howard v. Throckmorton*, 48 Cal. 482.) Cited 79 Cal. 510.

63. If a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services to be rendered, the facts that the property afterward enhances in value, and that such enhancement is, in a material degree, the result of the labor and money of the client, are no

valid objection to a decree for a specific performance of the contract. (*Howard v. Throckmorton*, 48 Cal. 482.)

64. A contract by a client to convey land to his attorney, as compensation for services in litigation involving the title, may be specifically enforced against the client and his vendees with notice if it has been fully performed on the part of the attorney, without regard to whether the client had title to the land or not; but, if not fully or substantially performed by the attorney, and if performance has not been waived, such contract cannot be specifically enforced for want of mutuality of remedy, the contract being for personal services confidential in their nature, which the client could not enforce. (*King v. Gildersleeve*, 79 Cal. 504.)

65. If an attorney asks the specific performance of a contract to convey to him land for his professional services, and the client, after making the contract, employed other counsel to assist, in the absence of the attorney, equity will allow the client compensation for the services of the counsel, and the amount of the compensation is the value of the services rendered. (*Ballard v. Carr*, 48 Cal. 74.)

Contract between attorney and client, enforcement of. See ante, 20.

6. *Illegal Contracts.*

66. No court will lend its aid to give effect to a contract which is illegal, whether it violate the common or statute law, either expressly or by implication. It is not necessary that any statute should expressly declare the contract void; but if, upon review of all the state legislation upon the subject, the contract appears to contravene the design and policy of the laws, a court of equity will not enforce it. (*Kreamer v. Earl*, 91 Cal. 112.)

67. It may be stated, as a general proposition, that an act which the law prohibits to be done is in so far infirm that a court of equity will not lend its aid to enforce its performance. To grant any relief, the court must first decide that the transaction on which it is claimed was lawful and valid. (*Martin v. Zellerbach*, 38 Cal. 300.)

68. An agreement, the purpose of which is to secure from the state large tracts of land through the applications of other persons in a manner unauthorized by law, and which contravenes the spirit and policy of the land laws of the state in force at the time of its execution, is illegal and void, and will not be specifically enforced. The parties being in pari delicto, the court will leave them where it finds them. (*Kreamer v. Earl*, 91 Cal. 112.) Cited 94 Cal. 72.

69. A court of equity will not enforce an agreement to obtain the title to land from the United States by pre-emption and then convey the same to the plaintiff, for such an agreement is in contravention of the pre-emption laws of the United States. (*Hudson v. Johnson*, 45 Cal. 21.) Cited 70 Cal. 604.

Illegal contract not enforced. See *Swamp and Overflowed Lands*, 90.

Fraudulent contract not enforced. See *Fraud*, 86.

7. *Exchange of Lands, Contracts for.*

70. Contract for the exchange of lands is a contract of sale which may be enforced in a court of equity by a decree for specific performance. (*Gilbert v. Sleeper*, 71 Cal. 290, 293.)

Parol contract of exchange, part performance of. See post, 108.

Contract of exchange. See *Exchange*, 6.

8. *Award or Agreement to Appoint Referees, Enforcement of.*

71. When an agreement in writing is entered into under the three hundred and eightieth section of the Practice Act, to submit questions of difference relative to the partition of lands to the award of arbitrators, and the arbitrators meet and make their award, a court of equity will decree a specific performance of the award. (*Whitney v. Stone*, 23 Cal. 275.) Cited 11 Mont. 62.

72. The fact that such agreement contains a clause by which each party binds himself to the other in a sum certain, as a penalty, in case he refuse to abide by and perform the award, does not deprive a court of equity of its power to decree a specific performance, even though the party refusing to perform should offer to pay the penalty agreed upon. (*Whitney v. Stone*, 23 Cal. 275.)

73. Question whether an agreement for selection of referees to fix the value of the property be an agreement capable of specific performance, not decided. (*Weber v. Marshall*, 19 Cal. 447.)

9. *Optional Contracts.*

74. Contract for conveyance of land, by the terms of which the purchaser may pay the purchase money either in labor or money, at his option, may be enforced in equity if the purchaser elects to pay in money, and makes a tender of the amount due. (*Owen v. Frink*, 24 Cal. 171.)

75. Equity will decree specific performance of a covenant in a lease, which provides that the lessee shall have the privilege of purchasing the premises for a fixed sum of money, on or before the expiration of the term. (*Hall v. Center*, 40 Cal. 63.) Cited 48 Cal. 80; 77 Cal. 115; 84 Cal. 254, 289; 91 Cal. 330; 10 Nev. 366.

Specific enforcement of optional contract. See ante, 18; post, 86.

Options in lease to purchase. See post, 132.

Enforcement of alternative contract. See *Contracts*, 234, et seq.

10. *Contracts Relating to Personality.*

76. Sometimes in equity chattel interests or personal property are made subjects of specific performance. (*Johnson v. Rickett*, 5 Cal. 218.)

77. General rule is, that specific performance of contracts for the sale of personal property will not be decreed; yet if the thing bargained for is of unusual distinction or curiosity, or is so related to the business of the plaintiff that nonperformance will em-

barrass or impede him in his business, threatening a loss of profits which a jury cannot correctly estimate, or the like, specific performance will be granted. (*Senter v. Davis*, 38 Cal. 450.)

78. As a general rule, courts of equity do not enforce the specific performance of contracts for the sale of personal property. When such contracts are enforced by courts of equity, it is not upon the ground of the insolvency of the defendant, but because the character of the property is so peculiar in itself, or its connection with the complainants' business is such that no adequate damages could be given at law. (*McLaughlin v. Piatti*, 27 Cal. 451.)
Cited 38 Cal. 454.

79. Bill will not lie to enforce contract for sale of cattle not possessing any especial value, except as merchandise. (*McLaughlin v. Piatti*, 27 Cal. 451.)

80. The general rule that a court of equity would not enforce a specific performance of an agreement for the transfer of stock applied particularly to public stocks, such as are commonly bought and sold in the market, and where exact compensation in damages could be awarded by a court of law. (*Treasurer v. Commercial Min. Co.*, 23 Cal. 390.)
Cited 38 Cal. 453; 6 Col. 322.

81. Where stock is of a peculiar and uncertain value, and where compensation in damages will not afford a party a full and adequate remedy, a court of equity will decree a specific performance. (*Treasurer v. Commercial Min. Co.*, 23 Cal. 390.)

82. In this state courts of equity will decree a specific performance of contracts for the transfer of mining stocks, owing to their fluctuating and uncertain value in market, and the difficulty of substantiating by competent evidence what would be a proper measure of damages. (*Treasurer v. Commercial Min. Co.*, 23 Cal. 390.)

83. A party seeking specific performance of contracts for the sale of personal property must state, in his complaint, the peculiar facts upon which he relies as taking his case out of the general rule that specific performance will not be decreed in relation to such contracts. (*Senter v. Davis*, 38 Cal. 450.)

84. D. being the owner of the right or privilege to deliver a newspaper to subscribers within a certain district, sold to S., at a price agreed upon, to be thereafter paid, and, when paid, D. was to give a bill of sale. S. took possession, and paid part of the purchase money, when D. turned him out. S. then sued for specific performance; but no further facts being stated showing why damages would not be full compensation, specific performance was denied. (*Senter v. Davis*, 38 Cal. 450.)

11. Contracts for Personal Services.

85. Equity will not enforce specifically a contract for personal services, especially where they are confidential in their nature, and involve in their performance the exercise of discretionary authority, but will leave the

party to his remedy at law. (*Cooper v. Pena*, 21 Cal. 403.)

Cited 24 Cal. 178; 40 Cal. 68; 79 Cal. 509, 510; 91 Cal. 608; 93 Cal. 194.

86. P. agreed to convey certain land to B. and J. on or before a date specified, provided the latter complied with the covenants contained in the contract, and the covenants of the latter were, that they would pay for the land a certain sum per acre, and also that they would prospect the land for coal, and should they find sufficient in their opinion to warrant them, they would organize a corporation and cause to be issued to P. a certain amount of unassessable stock; but that if before the expiration of the specified time they should become satisfied that it was useless to further prospect said lands agreed to be conveyed for coal, then, upon giving thirty days' notice to P. in writing of their intention to abandon said contract, the agreement should be void. Held, in an action for specific performance by the assignees of B. and J., that the contract called for the exercise of personal skill on the part of B. and J.; that it could not be specifically enforced against them, because, besides the difficulty of enforcing the contract for personal services, the contract gave them the option to abandon it, and that therefore it could not be specifically enforced against P. (*Sturgis v. Galindo*, 59 Cal. 28.)

Contracts for personal services cannot be enforced. See post, 131; *Deeds*, 31.

12. Parol Agreements.

87. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been part performance of a verbal contract by the vendee. (*Hoen v. Simmons*, 1 Cal. 119.)

Cited 1 Cal. 210.

88. A, the owner of a lot of land in San Francisco, requested B to sell the same, and delivered to him the title deeds in order to enable him to effect a sale. B agreed verbally with the plaintiff to sell the land to him, but A refused to comply with the verbal agreement which B, his agent, had made with the plaintiff. Held, in an action by the plaintiff against A to compel the execution of a deed, or the payment of damages, that the agreement was void, and could not be enforced, and that the defendant A was not liable in damages. (*Harris v. Brown*, 1 Cal. 98.)

89. A verbal contract between adjoining owners of land, providing that if a division line temporarily agreed upon should be found incorrect by subsequent survey, the owner who should occupy and clear the land of the other up to the agreed line should have the option to purchase the same at its value when uncleared, or to claim payment of the cost of clearing, as he may elect, may be specifically enforced by the assignee of the owner having the option if the land was possessed, cleared, and improved by his assignor, and the assignee has tendered payment and demanded a conveyance of the land. (*Calanchini v. Branstetter*, 84 Cal. 249.)

90. A court of equity will, in a proper case,

enforce the specific performance of a parol contract to execute a written lease of land. (*McCarger v. Rood*, 47 Cal. 138.)

91. If the owner of land makes a verbal agreement with another to lease him the same for one year, with the privilege of two years more, at an annual rent of six hundred dollars, and a lease is to be executed containing the usual covenants, and the lessee takes possession and pays the rent for the first year, the agreement is sufficiently certain to support a decree against the lessor for a specific performance. (*Clark v. Clark*, 49 Cal. 586.)

Cited 16 Cal. 422.

92. If the lessee and lessor enter into a parol agreement with regard to a new lease of the premises the lessee is occupying, and the amount of rent to be paid by the lessee, and improvements made by him and to be made on the premises, and afterward the lessee executes a lease in writing relating to the same subject matter, containing terms varying from the parol agreement, a court of equity will not rescind the written lease and enforce the parol contract, nor, unless upon some equitable ground, as mistake or fraud, will it reform the written lease to make it correspond with the parol contract. (*Ewald v. Lyons*, 29 Cal. 550.)

93. A court of equity will not enforce a parol contract if, after the same is made, the parties voluntarily enter into a written contract differing in terms from the parol agreement, nor will it substitute the parol contract for the written one. (*Ewald v. Lyons*, 29 Cal. 550.)

94. A party who seeks a specific performance of a verbal contract for the conveyance of real estate should show that he has fully complied with the substance of the contract on his part. (*Hoen v. Simmons*, 1 Cal. 119.)

95. In an action for the specific performance of a parol agreement to convey land, evidence of a statement by the defendant that he had given the land to the plaintiff, although not made in the hearing of the latter, is admissible as an admission of the gift. (*Burlingame v. Rowland*, 77 Cal. 315.)

96. Courts of equity in this state possess the power to enforce the specific performance of verbal contracts for the sale of land in cases of part performance of such contracts. (*Arguello v. Edinger*, 10 Cal. 150.) Cited 13 Cal. 132.

97. Equitable fraud is basis of action to enforce parol contract for the sale of land on the ground of part performance; that is, fraud as a necessary consequence, if the vendor were allowed to set up the statute of frauds as a defense, so as to secure for himself the benefit of the purchaser's acts of part performance. (*Foster v. Maginnis*, 89 Cal. 284.)

98. Where there has been such a part performance of a verbal contract of sale by the plaintiff, as to put him into a situation which would operate as a fraud upon him unless the verbal agreement should be enforced, a specific performance of the contract will be decreed. (*Tohler v. Folsom*, 1 Cal. 207.) Distinguished 4 Cal. 93.

99. Where there has been such a part performance of an oral agreement for an easement upon land that it would be a sanction of fraud to refuse its specific performance, the statute of frauds does not prevent an enforcement of the agreement. (*Flickinger v. Shaw*, 87 Cal. 126.)

100. To entitle a vendee to a parol contract for the conveyance of land to a specific performance, on the ground of part performance, the acts of part performance must have been done by the vendee, with the consent and knowledge of the vendor and in pursuance of the contract, and with a design of carrying the same into execution. (*Foster v. Maginnis*, 89 Cal. 284.)

101. The payment of the purchase money is not sufficient part performance to authorize the specific enforcement of an oral agreement to convey land. (*Forrester v. Flores*, 64 Cal. 24, cited 94 Cal. 549, 99 Cal. 590; *Salfield v. Sutter County etc. Co.*, 94 Cal. 546.)

102. Possession of a lot of land under a parol contract for the sale thereof, the expenditure of money in its improvement, and partial payments of the purchase price, constitute part performance of the contract which takes it out of the statute of frauds, and entitles the vendee to a specific performance of the contract. (*Day v. Cohn*, 65 Cal. 508.)

103. The fact that the vendee moved some fence posts and lumber upon the land is not such a part performance of the contract as will entitle him to its specific enforcement. (*Foster v. Maginnis*, 89 Cal. 284.)

104. A parol gift of land, followed by possession and improvement of the land by the donee, is so far executed as to entitle the donee to a specific performance; but held, in an action of ejectment by the grantee of the donor, that the defense must be specially pleaded. (*Manly v. Howlett*, 55 Cal. 94.) Cited 77 Cal. 317.

105. Equity will compel the specific performance of a parol agreement, made by a father with his daughter, to convey certain land to her if she would take possession thereof and live upon it, when the agreement has been acted upon and partly performed by her; and it is a sufficient part performance if she moves upon the land and erects valuable improvements thereon. (*Burlingame v. Rowland*, 77 Cal. 315.) Cited 81 Cal. 208.

106. In a suit for specific performance of a parol contract for the sale of land, the acts which constitute the part performance must be distinctly and clearly stated in the complaint, and an allegation that the vendee entered upon the premises and made valuable improvements is insufficient. (*Fowler v. Sutherland*, 68 Cal. 414.)

107. If a surveyor and another enter into a parol contract, by which the surveyor is to search for and survey swamp lands, and the other is to pay the first installment of twenty per cent purchase money and procure a certificate of purchase, and then deed one-half to the surveyor, the services performed by the surveyor are not such part performance of the contract as to bring the case within the

tenth section of the statute of frauds, and enable the court to decree a specific performance. (*Edwards v. Estell*, 48 Cal. 194.) Cited 73 Cal. 418.

108. If one party to an oral agreement for the exchange of lands conveys his own land to the other party, in accordance with the terms of the agreement, it is a sufficient part performance by him to take the agreement out of the statute of frauds and entitle him to its specific performance by the other party. (*Swain v. Burnette*, 89 Cal. 564.)

109. A vendee claiming the right to a conveyance of land under a parol contract, upon the ground of part performance, must make out by clear and satisfactory proof the existence of the contract alleged by him; and it is not enough that the acts of part performance proved are evidence of some agreement, but they must be unequivocal and satisfactory evidence of the particular agreement charged in the complaint. (*Foster v. Maginnis*, 89 Cal. 284.)

Personal services, offer to perform. See post, V, 4, a.

Oral contract for sale of land not enforced. See Statute of Frauds, 55.

Indemnity, parol contract of, when too uncertain. See ante, III, 4.

Parol contract of insurance. See Insurance, 3.

Oral agreement for use of water, specific performance of. See Watercourses, 507.

Part performance, allegations as to. See post, 141.

Parol modification of contract. See Contracts, 357.

13. Miscellaneous Agreements.

Corporators, agreement between before incorporation, specific performance of. See Corporations, II, 10.

Resulting trust cannot be enforced. See Trusts and Trustees, 73.

Executory contract to create trust. See Trusts and Trustees, 19.

Action for specific performance of agreement to reconvey. See Mortgages, 132.

Not decreed in suit to quiet title. See Quieting Title, 166.

V. Suits to Enforce Contracts.

1. Nature of.

110. An action by a grantee for the specific performance of a written contract for the conveyance of real estate, alleged to have been retained by the grantor of the land when he executed a deed for a portion of the premises described in the contract, which he had induced the plaintiff to accept as conveying the whole land contracted for, is, in effect, an action to reform the deed. (*Nicholson v. Tarpey*, 89 Cal. 617.)

Nature of proceeding to compel enforcement of decedent's contract. See ante, IV, 2.

2. Good Faith on Part of Plaintiff; Duty to do Equity.

111. A party seeking to enforce specific performance of a contract must show that he has acted in good faith. (*Conrad v. Lindley*, 2 Cal. 173.)

112. A party entering upon land, under an agreement to purchase, and afterward abandoning the purchase, disclaiming the title of the vendor, forfeits the benefit of the agreement, and cannot, on subsequently tendering the purchase money, claim a specific performance. (*Conrad v. Lindley*, 2 Cal. 173.)

Cited 24 Cal. 176; 64 Cal. 20; 92 Cal. 526.

113. If a party appeals to a court of equity for the specific performance of a contract, he must himself do equity, and submit to such terms as a court of equity will impose. (*Balard v. Carr*, 48 Cal. 74.)

Cited 87 Cal. 60.

3. Within What Time to be Brought.

114. Specific performance is a relief which the court will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit. (*Henderson v. Hicks*, 58 Cal. 364.)

115. There is no absolute bar to action for specific performance of a contract for sale of land short of the statute of limitations. Shorter delays may sometimes be fatal, but each case depends upon its own circumstances. The circumstances of this case held to show no ground of objection to the action by reason of plaintiff's delay in bringing the action. (*Karns v. Olney*, 80 Cal. 90.)

116. In an action for specific performance, the plaintiff, after a decree in his favor which does not designate the time for performance, may demand its enforcement at any time, until the statute of limitations becomes available to his adversary. (*Redington v. Chase*, 34 Cal. 666.)

117. It seems that lapse of over four years from the maturity of the note, where plaintiff gave a note payable four months after date, in consideration of a contract to convey, before action commenced for a specific performance, bars the action by limitation, and goes far to make out an abandonment of the purchase by the plaintiff. (*Pearis v. Covillaud*, 6 Cal. 617.)

Cited 18 Cal. 487; 23 Cal. 34.

118. The plaintiff and defendant entered into an agreement for the sale of the land in controversy, and, after obtaining possession, the defendant objected to the title. The plaintiff subsequently gave notice that he repudiated the contract, for the reason that the sale was for cash. More than three years thereafter the plaintiff began this action to recover possession, and the defendant filed a cross-complaint for a specific performance. Held, that the laches of the defendant precluded his right to have the agreement executed. (*O'Donnell v. Jackson*, 69 Cal. 622.)

119. The specific performance of a parol agreement for the sale of land refused on account of the nonpayment of the purchase price, and of the great delay in the commencement of the action. (*Molaskey v. Peery*, 76 Cal. 84.)

Limitation of actions to compel conveyance. See Statute of Limitations, VI, 2, b.

4. Performance by Plaintiff.

a. Necessity of.

120. To entitle a party to a specific performance, he must have performed, on his part, every essential of the agreement. (*Goodale v. West*, 5 Cal. 339.)
Cited 10 Nev. 367; 12 Nev. 399.

121. A party seeking the legal enforcement of the stipulation of a concurrent obligation of the other party must first show a compliance with his own. (*Green v. Covilland*, 10 Cal. 317.)
Cited 14 Cal. 143.

122. If, in a contract for the sale and conveyance of land, it is provided that the purchaser shall pay certain sums at specified times, and that, if he fails to do so, the seller shall be released from all his obligations in law or equity to convey the premises, and the purchaser shall perfect his right to a conveyance, and the purchaser makes default in his payments, without excuse, a court of equity will not enforce the contract against the seller. (*Grey v. Tubbs*, 43 Cal. 359.)
Cited 84 Cal. 321; 87 Cal. 450; 90 Cal. 494, 526.

Compliance with terms of oral contract is essential. See ante, IV, 12.

123. An agreement to convey lands and give the right of way for a street railroad in consideration that the road shall be well and substantially built, and operated by steam-dummy motive power for a period of not less than ten years, and shall have a carrying capacity and speed equal to all the requirements of the section and the business thereof, and that rates of fare specified shall not be increased for ten years, and providing that deeds shall be made and placed in escrow until the completion and operation of the railroad, cannot be specifically enforced while the covenants for the continued operation of the road are unperformed. (*Lattin v. Hazard*, 91 Cal. 87.)

124. Specific performance of such agreement cannot be granted upon the ground that the covenants for the deeds and for the continued operation of the road are independent, the latter covenants being an important part of the consideration for the former, and being a substantial and important part of the obligation, which has not been performed, and of which specific performance cannot be enforced by a decree. (*Lattin v. Hazard*, 91 Cal. 87.)

125. In action for specific performance against vendor who refuses to make title, tender of the unpaid purchase money must be proved, as it is of the essence of the contract. (*Goodale v. West*, 5 Cal. 339.)

126. Where A contracted verbally to convey to B a certain lot of land for five thousand dollars, of which sum one thousand dollars was to be paid down, and the balance in two months, with interest at the rate of two per cent per month, and the time for the payment of the four thousand dollars had elapsed long before the commencement of the suit, held, the plaintiff not having paid or tendered the four thousand dollars with interest, that a specific performance ought not to be decreed. (*Hoen v. Simmons*, 1 Cal. 119.)

127. If, in a contract for the sale of land, the vendee agrees to make certain payments at stipulated times, and the vendor agrees to execute a conveyance of the land when the payments are all made, the vendee cannot maintain an action in equity for a specific performance if he has failed without any cause to make the first payment, and the last installment is not due. (*Troy v. Clarke*, 30 Cal. 419.)

Duty to tender payment where contract partly enforced. See post, V, 5.

Nonpayment as bar to suit. See ante, 119.

128. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for his execution. (*Goodale v. West*, 5 Cal. 339.)
Cited 17 Cal. 276; 25 Cal. 279.

129. A cross-complaint for specific performance which fails to show that the defendant had tendered a deed conveying the title he had agreed to convey, or that he could convey such title, and which shows affirmatively that the abstract of title which he had agreed to furnish did not show good title, or that he had made or could make it good, is bad on general demurrer. (*Smith v. Taylor*, 82 Cal. 533.)

130. For the purpose of enforcing specific performance of stipulations, the consideration for which was an agreement by the plaintiff to perform personal services, an offer to perform these services is not equivalent to an actual performance. The rejection of the offer by the defendant excuses the performance as a condition precedent, but does not release the plaintiff from his obligation to perform so long as he insists upon the agreement. (*Cooper v. Pena*, 21 Cal. 403.)

131. When a contract for the sale of real estate which might have been specifically enforced is modified by a supplemental contract so as to make a large portion of the purchase money payable in personal services at an agreed price, such contract will not be specifically enforced unless the purchaser has without default fully performed on his part. Specific performance will not be enforced against either party if it cannot be enforced against the other, and cannot be enforced for personal services. (*Wakeham v. Barker*, 82 Cal. 46.)

132. Under a lease from C. to D., the latter had the election to purchase the leased premises for the sum of six thousand dollars, payable at any time during the term, with interest from the date of the lease at the rate of one per cent a month, previous payments of rent to be credited on the interest, the lessee also to pay the taxes on the land imposed during the term. D., during the term, notified C. of his election to purchase, and tendered him the sum of six thousand dollars, and also offered to pay the taxes, but did not tender or offer to pay the interest then due; C. declined the tender, and denied the right of D. to purchase. In an action by D. for a specific performance, the denial by the defendant of the plaintiff's right to purchase was a waiver of the necessity of a tender, and the plaintiff is entitled to a specific perform-

ance upon the terms of paying to the defendant, besides the taxes, the sum of six thousand dollars, agreed upon, with interest from the date of the lease at the rate of one per cent a month, after deducting the amounts paid for rent. (*Dowd v. Clarke*, 54 Cal. 48.) Cited 63 Cal. 226; 91 Cal. 330; 96 Cal. 221.

133. Where the owner of land entered into a contract with an intending purchaser for its sale, by the terms of which part of the purchase money was to be and was paid down by the vendee, and the balance was to be paid, upon approval of the title, "on delivery of the deed," and the vendee entered into possession and made improvements, the commencement of an action to quiet title, by the vendor against the vendee, without an offer to convey, is a repudiation of the contract, and entitles the vendee to the right to file a cross-complaint for specific performance of the contract without a previous tender of the balance of the purchase money. (*Sheplar v. Green*, 96 Cal. 218.)

134. In such case the withdrawal by the vendee of a sum of money deposited in the hands of a third party to cover the balance of the purchase money, which was "to be paid on delivery of deed," if a violation of the contract of purchase, was not such as to release the vendor from performing or offering to perform on his part, nor such as to prevent the vendee from obtaining specific performance of the contract, notwithstanding a demand upon the depository for the whole sum deposited, unaccompanied by an offer to convey, where it appears that the vendee was ready at all times to complete the purchase, and upon the trial tendered the balance due on the contract, which was much less than the sum deposited, and, upon a refusal by the vendor to accept it, deposited it with the clerk of the court for the vendor. (*Sheplar v. Green*, 96 Cal. 218.)

135. Where there has been a compliance with a reasonable understanding of the contract, and no injury done by the want of an exact compliance, a specific performance will be decreed. (*Farley v. Vaughn*, 11 Cal. 227.)

136. Where any lack of exact compliance with the contract on the part of the purchaser can be sufficiently compensated by allowing costs to the vendor, while a refusal to allow a specific performance would cause irreparable loss to the purchaser, a specific performance may properly be decreed in favor of the purchaser upon payment of costs. (*Sheplar v. Green*, 96 Cal. 218.)

137. In suit by a vendee for specific performance of a contract of sale, the averment of tender of payment was in general terms, as that the tender had been repeatedly made, and that the plaintiff has been at all times, and still is, ready and willing to pay. Held, that the tender should have been stated with greater particularity as to time, but that the objection, in this respect, cannot be taken for the first time in the supreme court. (*Duff v. Fisher*, 15 Cal. 375.)

138. Where a contract to convey land provided that a deed to the land should be placed in escrow until the performance of certain conditions on the part of the grantee, and

should be thereupon delivered to the grantee, a complaint by an assignee of the grantee for a specific performance of the contract, which alleges that the grantee fully performed the contract on his part, and, after having become entitled to a conveyance from the defendant, conveyed all his right, title, and interest in the land to the plaintiff, and that plaintiff has demanded a conveyance from the defendant of the same, which defendant refused to make, but which does not allege a refusal by defendant to place a properly executed deed in escrow according to the terms of the contract, does not state a cause of action, and is subject to a general demurrer. (*Lattin v. Hazard*, 85 Cal. 58.)

139. In accordance with the presumption that private transactions have been fair and regular, it must be presumed that such deed was placed in escrow pursuant to the terms of the contract, in the absence of an allegation to the contrary; and it follows that the grantor was not in default at the time of the demand upon him for a deed, and properly refused to make a second conveyance of the land, the allegations of such demand and refusal not being inconsistent with the presumption that the contract was complied with. (*Lattin v. Hazard*, 85 Cal. 58.)

140. It is essential, in order to entitle the assignees of the vendee to enforce the contract, that the complaint should allege performance of the agreement respecting insurance on the part of the vendee, which was the sole consideration of the offer to sell by the vendor, or an offer to perform or an excuse for nonperformance, on the part of the vendee, within a reasonable time after the making of the offer to sell. (*Chadbourne v. Stockton Savings and Loan Society*, 88 Cal. 636.)

141. In an action by a vendee for the specific performance of a contract to convey land, the court found a parol contract and gave judgment for the plaintiff. Held, that the complaint was insufficient in not alleging a readiness and willingness on the part of the plaintiff to pay the balance of the purchase price, and that it was also defective in the averments respecting part performance. (*Frixen v. Castro*, 58 Cal. 442.) Cited 90 Cal. 287.

142. The complaint in specific performance did not allege a formal tender, but there was an allegation of part payment, and an offer to pay the balance. Held, to be sufficient under the circumstances of the case. (*Barsolou v. Newton*, 63 Cal. 223.) Cited 96 Cal. 221.

Pleading, what insufficient. See ante, 129.

143. In an action to compel the specific performance of a verbal contract to convey land, a decree enforcing specific performance will not be reversed because the court fails to find that the party seeking performance was ready and desirous to perform on his part, provided the findings show such facts as, taken in connection with an offer to pay the price of the land into court, evince a readiness and willingness to perform. (*Owen v. Frink*, 24 Cal. 171.)

Vendee enforcing contract after forfeiture. See Vendor and Vendee, 169.

b. Diligence Requisite; Effect of Delay in Performance.

144. The party insisting on specific performance must show himself "eager, prompt, ready, and desirous to perform the contract on his part." He must show that he has "used due diligence; or, if not, that his negligence arose from some just cause, or has been acquiesced in. It is not necessary for the party resisting performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the other party." (*Weber v. Marshall*, 19 Cal. 447.)

Cited 68 Cal. 418; 69 Cal. 271; 84 Cal. 255.

145. Nor does possession by the party seeking performance make the rule different. (*Weber v. Marshall*, 19 Cal. 447.)

146. While time is not of the essence of the contract for the sale of land, ordinarily, yet in every case it will devolve upon the party seeking the relief to account for his delay, and if there are circumstances showing culpable negligence on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raise the presumption of an abandonment of the contract, or if the property has greatly enhanced in value in the mean time, and the purchaser has laid by apparently for the purpose of taking advantage of this circumstance, he will not be entitled to a decree in his favor. (*Green v. Covillaud*, 10 Cal. 317.) Cited 13 Cal. 316; 23 Cal. 34; 40 Cal. 11; distinguished 11 Cal. 237; 19 Cal. 237.

147. This rule is especially applicable to such contracts in this state. (*Green v. Covillaud*, 10 Cal. 317.)

148. Where a party seeks to enforce a contract to convey land to him, if there are circumstances showing culpable negligence on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raise a presumption of an abandonment of the contract, or if the property has greatly enhanced in value, and he has apparently laid by for the purpose of taking advantage of this circumstance, he will not be entitled to a decision in his favor. (*Brown v. Covillaud*, 8 Cal. 566.)

Cited 64 Cal. 20; 69 Cal. 624; 76 Cal. 593.

149. A court of equity will not enforce a specific performance of the agreement to convey lands, when the plaintiff shows no compliance, or offer of compliance, on his part with the agreement, nor any excuse therefor, for the period of twenty-one or twenty-two months from the time he bound himself to perform. (*Green v. Covillaud*, 10 Cal. 317.) Cited 19 Cal. 458-60; 64 Cal. 20; 69 Cal. 271, 624; 76 Cal. 593; 92 Cal. 525.

150. Equity will not decree specific performance of a contract for the sale of land in favor of a party who, by his own negligence or default, has prevented or unreasonably delayed the full execution of the contract. (*Hicks v. Lovell*, 64 Cal. 14.) Cited 82 Cal. 126; 86 Cal. 364.

151. Under an agreement for the sale of land binding the vendor to make a conveyance "on or before" a specified date, provided the vendee should "on or before that day" have paid to the vendor the price named therein, the purchaser is entitled to a conveyance upon his payment or tender of the agreed price to the vendor at any time within the time stated, and may enforce a specific performance of the agreement as soon as such payment or tender is made. (*Warner v. Darrow*, 91 Cal. 309.)

152. On a verbal contract between adjoining owners, providing that, if a division line be found incorrect, the owner occupying and clearing the land of the other should have the option to purchase at the uncl. ared price or recover for the clearing, no such laches is imputable to the party seeking specific performance as will bar his right thereto by reason of a delay of more than three years before any attempt to ascertain the true line, and of more than four years before suit for specific performance, if no time was fixed by the contract for making the proposed survey, and the burden of making it was not cast upon either of the contracting parties and both of them acquiesced in the delay as to the ascertainment of the true line. (*Calanchini v. Branstetter*, 84 Cal. 249.)

153. The following verbal agreement for the sale and purchase of land was made between W., claiming the land under a Mexican grant, and M., who was in possession. W. was to choose one referee and M. another, the two to choose a third, they to appraise the value of the land, which M. was to pay W. upon the confirmation of the grant by the United States land commissioners. The grant was confirmed in 1855, and no offer was made by M. until 1861, when W. brought ejectment for the land, to comply with the terms of the agreement. Held, that under the agreement it was the duty of M. within a reasonable time after the confirmation of the grant by the United States land commissioners to notify W. that he was ready to execute the agreement and to appoint the referees; and that his failure to do this for five or six years was fatal to his claim for specific performance. (*Weber v. Marshall*, 19 Cal. 447.)

154. It was not the duty of W. to notify M. of the confirmation in such case; that the board of United States land commissioners being a public tribunal, whose proceedings were open and notorious, and affecting whole communities, and M. being personally interested in the decision upon this grant, the fact of confirmation was not peculiarly within the knowledge of W., and that hence the case is not within the rule requiring notice from the party having peculiar information. (*Weber v. Marshall*, 19 Cal. 447.)

155. In such case the fact that payment for the land was to be made according to the value at the time of the appraisement, and that therefore the delay in executing the agreement was not injurious to W., is insufficient to take the case out of the rule refusing specific performance where there has been unreasonable delay. (*Weber v. Marshall*, 19 Cal. 447.)

156. A complaint by assignees of a vendee for the specific performance of a contract for the conveyance of land, which is in terms a mere offer to sell to the vendee upon specified terms within two years, expressly making time of the essence of the contract, providing that the rent in the lease to third parties was paid as specified in the lease, and by the terms of which the vendee, in consideration of the offer to sell, agreed to keep the buildings on the land insured for a specified sum, and to assign the policies of insurance to the vendor, which does not allege that the vendee, or any one claiming under him, did any thing in pursuance of the contract prior to an offer of performance by the plaintiffs, two days before the expiration of the time limited by the offer, and more than twelve months after the interest of the vendee had been sold under execution, does not state a cause of action, and a general demurrer thereto should be sustained. (*Chadbourn v. Stockton Savings and Loan Society*, 88 Cal. 636.)

157. Relief of specific performance denied in a case where the vendee had failed to pay any part of the purchase money, except a portion of the interest thereon, for a period of over six years from the execution of the contract. (*Henderson v. Hicks*, 68 Cal. 384.)

158. Specific performance of a contract for the sale of land, at the instance of the vendee, will be refused when there has been an unexplained delay by him of upwards of three years in performing the conditions of the contract with respect to the payment of the purchase price. (*Requa v. Snow*, 76 Cal. 590.)

159. In an action by a purchaser to enforce specific performance of a contract for the sale and conveyance of land, where time is of the essence of the contract, and the purchaser has failed to pay an installment of purchase money within the time limited therefor, the defendant need not prove performance of the contract, or an offer to perform, on his part, in order to defeat the action; nor need he tender a deed to the purchaser in order to put him in default. (*Bennett v. Hyde*, 92 Cal. 131.)

160. In an action against the vendors to enforce specific performance of a contract for the sale and conveyance of real estate, where a considerable delay had occurred in the payment of a portion of the purchase money, it was claimed that the vendee had been guilty of such laches as rendered it inequitable to enforce the contract. On a review of the facts, held, that the charge of laches was unfounded, it appearing that the vendee had taken possession with the consent of the vendors, and made valuable improvements upon the land, and that the vendors assented to the delay in the first instance, and subsequently acquiesced therein without giving notice that payment was required. (*Barsolou v. Newton*, 63 Cal. 223.)

161. The action was brought by a vendee under a verbal contract for the sale of several distinct tracts of land, to procure the specific enforcement of the contract, on the ground of part performance. The contract provided that the vendee should pay for the land within a reasonable time. The complaint

showed that the plaintiff did not offer to pay for the land until two years and three months after the date of the contract, and failed to allege any excuse for the delay or facts showing an acquiescence by the vendor. Held, on a demurrer to the complaint, that the court would not presume that the offer to pay was made within a reasonable time. (*Fowler v. Sutherland*, 68 Cal. 414.)
Cited 76 Cal. 303; 84 Cal. 255.

162. Where a contract for the sale and conveyance of land provided that, if the purchaser failed to comply with any one of the agreements therein specified and at the time specified, the contract should immediately become void, and the vendor should be released from all obligations at law or in equity to convey the land, and a voluntary extension of time to a fixed date, and not longer, was granted the purchaser in which to make a payment due under the contract, upon the express condition that "time must be the special and essential ingredient in the extension, as it was intended to be of the original contract," the intention to make time of the essence of the contract is sufficiently expressed; and after a default in payment by the purchaser within the extended time the contract will not be specifically enforced against the vendor. (*Bennett v. Hyde*, 92 Cal. 131.)

163. In suit by a vendee for specific performance, where it appeared that the defendants were desirous to raise money to make certain improvements, for which reason they were anxious to dispose of some of their land, and that the plaintiffs never offered to pay their note until three years after its maturity, during which time the property of one of the defendants had been sold under execution, and the other defendants had been obliged to raise money at a high rate of interest, to meet their obligations respecting this and other property, and had paid all the taxes on the land, while the plaintiffs refused to have the property assessed to them or to pay taxes thereon; that they had been ever since the making of the contract in receipt for the rents and profits of the land, which had greatly enhanced in value since the maturity of their note; and further, that since the maturity of their note, they, with others, had made a written request to the defendants to be allowed to purchase the land occupied by them and the others; all these facts go to show conclusively that the plaintiffs never intended to consummate the purchase unless they found it to their interest to do so. (*Brown v. Covillaud*, 6 Cal. 566.)

164. This conclusion is strengthened when the complaint sets up as a reason for the non-payment of the note that the defendants hitherto had been unable to make "a good and sufficient deed," as they had covenanted to do, for the reason that the title to the land in the defendants had only recently been confirmed by the United States land commission. (*Brown v. Covillaud*, 6 Cal. 566.)

165. Under a contract for the sale of land, making time of the essence of the contract for payments on the part of the purchaser, and releasing the vendor from all obligation upon

his default, the failure of the purchaser to make the payments provided for does not render the contract void as to the vendor, or prevent its enforcement by him; and the fact that the vendor did not tender a deed and demand the purchase price until some months subsequent to the date fixed by the contract for final payment, does not prevent the vendor from claiming a specific performance of the contract. (*Banbury v. Arnold*, 91 Cal. 606.)

5. Enforcement of Part of Contract.

166. If vendor is unable to perform entire agreement, and can convey only an undivided half of the land, he may be compelled to convey that interest. (*Marshall v. Caldwell*, 41 Cal. 611.)

167. To entitle the vendee to a decree compelling the vendor to convey his undivided half of the land, held, that it was necessary for him to tender as the purchase money only one-half of the contract price. (*Marshall v. Caldwell*, 41 Cal. 611.)
Cited 64 Cal. 20.

168. In proceedings to specifically enforce the contract in such case it is not incumbent on the defendant to restore, or offer to restore, the possession to the plaintiff; nor is the plaintiff entitled to any portion of the rents and profits accruing since the contract was made. (*Marshall v. Caldwell*, 41 Cal. 611.)

169. If defendant refuses to carry out his contract for partition of detached tracts of land, and for an exchange and conveyance of certain portions of land, the plaintiff has his remedy by an action for specific performance of the whole contract, and not by partition of part only of the lands. (*Bank of Healdsburg v. Hitchcock*, 76 Cal. 489.)

Joint contract, specific enforcement of part. See ante, IV, 4.

Specific performance in part. See Watercourses, 507.

6. Demand of Performance by Defendant; Waiver of Right; Rents and Profits.

170. In an action for the specific performance of a trust by the execution of a deed, a demand therefor before suit is only material as affecting costs. Without such demand the action may be maintained, but the plaintiff will not be entitled to costs. (*Jones v. City of Petaluma*, 36 Cal. 230.)

171. Before the vendee can maintain an action to recover damages for the breach of a covenant to convey land, he must demand his deed from the vendor; otherwise, where he brings an action for specific performance, in which case a demand is important only in respect to costs, and does not affect the merits of the case or the rights of the parties. (*Gray v. Dougherty*, 25 Cal. 266.)
Cited 47 Cal. 73; 4 Nev. 460; 20 Nev. 388.

172. If, however, the vendor, by any act of his, prevents the vendee from performing his part of the agreement, or makes it known that he does not intend to perform his covenant, except upon compulsion, the vendee is not required to demand a deed from the vendor, or perform his part of the agreement, before commencing suit; and in such case a court of equity will award a decree, compel-

ling specific performance within a certain time, provided the vendee shall have before that time performed on his part. (*Gray v. Dougherty*, 25 Cal. 266.)
Cited 56 Cal. 247.

173. The commencement of the action is a sufficient demand for a conveyance, and from that time the plaintiff is entitled to rents and profits. (*Heinlen v. Martin*, 53 Cal. 321.)

174. On the facts found, the court below would have been justified in decreeing to the plaintiff the rental value of the land from the commencement of the action. (*Heinlen v. Martin*, 53 Cal. 321.)
Cited 76 Cal. 48, 303.

Right to rents and profits. See ante, 168.

175. If plaintiff has executed his side of agreement to exchange lands by a conveyance, he is entitled, in an action to enforce the agreement, to an account of rents and profits, and an averment relating thereto should not be stricken out. (*Swain v. Burnette*, 76 Cal. 299.)

176. Plaintiff joined with the defendant in the execution of a note as surety on consideration of defendant giving a mortgage on his homestead as security; the plaintiff performed his part of the contract, but there was no subsequent ascertainment or agreement as to the amount and terms of the mortgage; nor did he make any demand on the defendant for a performance on her part until after the debt for which he was surety became due, at which time the contract in its original shape could not be performed. Held, that the plaintiff had waived his right to a specific performance of the contract. (*Magee v. McManus*, 70 Cal. 553.)

177. Where, by the terms of a contract for the conveyance of land, the vendor agreed to convey, and the vendee agreed to purchase the land if the vendor was the owner thereof, and his title could be proven by the records, and the vendee agreed to accept such conveyance when tendered to him within a reasonable time after it should be ascertained that the vendor was the owner of the land, and where, in an action by the vendee for a specific performance of the contract, it appeared that the vendor, on a subsequent date, was the owner of the land, and able to convey it to the vendee, free of encumbrances, and offered on that date so to do, and tendered a deed thereof, but the vendee then refused to take the land and pay for it, for reasons other than a defect in the title, the vendor had a right to consider the contract as terminated, and to convey the land to another, and a subsequent offer by the vendee, made after the land had been conveyed to another, to take the land and pay for it, could not give the vendee the right to a conveyance under the contract. (*Eshleman v. Henrietta Vineyard Co.*, 97 Cal. 670.)

7. Pleadings in; Enforcing on Cross-complaint.

178. In the absence of a special demurrer on the ground of ambiguity, if it appear from the general framework of the complaint that the action is for specific performance, it will be so considered, though the complaint be ob-

noxious to criticism for want of perspicuity. (Heinlen v. Martin, 53 Cal. 321.) Cited 88 Cal. 202.

179. A complaint for the specific performance of a contract for the purchase of real estate, which shows that the purchase money was by supplemental agreement made payable in part in personal services, and that said services were performed according to agreement to a certain date, and that defendant at that date refused to furnish any further work to be performed, asserting non-compliance of plaintiff with the agreement, and avers readiness and willingness and ability to perform the remainder, but does not aver how much service was rendered, or what amount was paid on the contract or remained unpaid, or lay any foundation for an accounting, but simply alleges a demand for a deed, and an offer to pay a certain sum of money as balance due upon the agreement, which defendant refused to accept, is subject both to a general demurrer for failure to state a cause of action, and to a special demurrer for ambiguity. (Wakeham v. Barker, 82 Cal. 46.)

180. In an action to compel the conveyance of land in pursuance of an agreement, the complaint did not clearly set forth whether the title which the defendant agreed to obtain, and did obtain, was a title to the land as lieu land, or a title under the pre-emption laws of the United States. Held, that the complaint was ambiguous and uncertain. (Hudson v. Johnson, 45 Cal. 21.)

181. In an action to compel defendant to execute a deed of real estate held by him, the complaint alleged that the property was purchased by plaintiff of one O., and by agreement with defendant was conveyed directly to him as security for a debt, he to make a deed to plaintiff upon its payment, and that the debt was subsequently paid and the deed demanded; but the complaint failed to aver that defendant, upon the demand, refused, or at any other time has refused, to execute the deed. Held, that the failure to aver refusal is fatal to the action, and may be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action. (Dodge v. Clark, 17 Cal. 586.)

182. In an action by J., a vendor, against H., his vendee, to compel (1) a specific performance, and (2) if performance should be impossible, then to recover the purchase money, etc., the complaint showed that at the date of the contract the plaintiff was the owner in fee, and that the parties entered into the following agreement: "I have this day purchased of J. his brick building and lot . . . for the sum of ten thousand dollars, to be paid in the following, viz., to give two promissory notes of S. and G. for two thousand dollars each, dated the 13th of July, 1867; . . . also, one note for two thousand seven hundred and seventy-five dollars dated July 13, 1867; . . . and my note for three thousand dollars, payable at ten years from date. . . . I also agree to release J. from paying the taxes on the property herein described, due for the years 1867 and 1868. Abstract of title must be satisfactory. Signed,

H. and J," and dated. The complaint further alleged that upon due performance by the defendant the plaintiff was ready to convey the premises; that the defendant, upon demand, refused to perform. The court below sustained a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. Held, that while said agreement in writing is valid under the statute of frauds, it is nevertheless insufficient as a pleading of the contract of sale sought to be enforced, and that the demurrer was properly sustained. (Joseph v. Holt, 37 Cal. 250.)

Complaint is indefinite, ambiguous, and uncertain when. See ante, 27.

183. If an agreement for specific performance is executed on one side by a conveyance, and it turns out that for some reason the agreement cannot be enforced, the party conveying is entitled to a reconveyance, and therefore an averment relating to the conveyance tends to state a cause of action and should not be stricken out. (Swain v. Burnette, 76 Cal. 299.)

184. In an action to compel the specific performance of a covenant in a contract for the sale of land, whereby the vendors agreed to also sell "a full and abundant water right" for the land, the complaint must allege the purpose for which the water right was to be "full and abundant." If it does not, a demurrer on the ground of ambiguity should be sustained. (Durkee v. Cota, 74 Cal. 313.)

Acts of part performance must be distinctly alleged. See ante, 106.

Performance or offer to perform, pleading of. See ante, V, 4, a.

Alleging performance of conditions. See ante, 156.

Petition against executor must show contract to be written. See ante, IV, 2.

Complaint in suit to enforce contract for sale of personality. See ante, IV, 10.

Pleading, failure to allege tender. See Quieting Title, 121.

Enforcing on cross-complaint. See Vendor and Vendee, 169.

Specific performance of contract to convey by cross-complaint. See ante, 133; Cross-complaint, 19.

Cross-complaint, what insufficient. See ante, 129.

8. Jurisdiction; Effect of Nonresidence.

185. Fact that vendor is absent from state at time the vendee becomes, by the terms of the sale, entitled to a deed, does not prevent him from giving a deed voluntarily, nor the courts of this state from compelling him to do so, in person, or by a commissioner appointed by the court to act for him. (Rourke v. McLaughlin, 38 Cal. 196.) Cited 85 Cal. 32.

186. Specific performance will be decreed whenever the parties or the subject matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court. (Rourke v. McLaughlin, 38 Cal. 196.)

Power of probate court to decree. See Probate Courts, 13.

9. In Whose Favor and Against Whom Lies; Parties.

187. If A enters into a contract with B for the conveyance of a tract of land, whereby B acquires a right to a conveyance of the entire tract, and B afterward assigns to two or more persons, giving to each a separate conveyance of his equitable title to distinct and separate parcels of the land, the assignees of B may maintain a joint action against A for a specific performance of the contract. (*Owen v. Frink*, 24 Cal. 171.)
Cited 26 Cal. 360.

188. If A, being in the possession of land, contracts in writing with B to sell and convey the land to B, and to deliver him possession at any time within five years, upon the payment of the price agreed on, and C, with notice of this contract, obtains from A a deed of the land before B has paid the agreed price, B may pay the agreed price to C, and equity will compel C to convey the land to B, and to deliver him possession of the same. (*Hildreth v. Shelton*, 46 Cal. 382.)

189. The fact that such land is public land, held by A under the Possessory Act of this state, is no defense. (*Hildreth v. Shelton*, 46 Cal. 382.)

190. Where there is but one contract and one cause of action under it, there can be but one action, in which the rights of all the parties can be adjusted. (*Agard v. Valencia*, 39 Cal. 292.)

191. In an action for specific performance of a contract to convey an undivided interest of a specified quantity of land in a larger tract, all persons subject to the plaintiff's equity, and holding adversely to him, must be made parties to the proceeding. (*Agard v. Valencia*, 39 Cal. 292.)

192. In an action to compel an individual to perform an agreement made by him for the transfer of shares of stock in a corporation, and to account for dividends received thereon, and to restrain the negotiation of the stock, the corporation is not a necessary party defendant, and its joinder will not prevent a change of the place of trial to the residence of the individual defendant. (*Sayward v. Houghton*, 82 Cal. 628.)

193. Where the contract which is the basis of an action for specific performance shows upon its face that it was, as between defendant's grantors and each of the other persons signing it, a separate and distinct contract, entitling each person to purchase that part of a rancho of which he was in possession at a specified date, it is not necessary for one in possession of a specific part to join the possessors of other parts as parties defendant in an action to enforce specific performance of the distinct contract with the plaintiff, or to join any other parties to the contract who do not appear to have an interest in the specific tract claimed by the plaintiff, and a demurrer for the nonjoinder of such parties should be overruled. (*Towle v. Carmelo Land and Coal Co.*, 99 Cal. 397.)

Dismissal for want of proper parties. See ante, 55.

Suit by purchaser under foreclosure to en-

force agreement for water right. See Water-courses, 179.

Donee of realty may maintain. See Gifts, 30.

10. Evidence.

194. In an action for the specific performance of a parol agreement to convey land, questions asked the defendant as to whether he had ever said any thing to lead the plaintiff to believe that she was going to obtain title or a deed of the land, or whether he intended to give her more than a life estate, are properly excluded, because asking for a conclusion of the witness. (*Burlingame v. Rowland*, 77 Cal. 315.)

195. The action was brought to specifically enforce a written contract to convey real estate. At the trial the defendant was allowed to show that by a subsequent parol agreement he was to retain the title until certain money loaned by him to the plaintiff, and not named in the original contract, should be repaid. Held, that the evidence was competent. (*Hewlett v. Miller*, 63 Cal. 185.)
Cited 63 Cal. 226.

196. In an action to enforce the specific performance of a contract for the conveyance of land, where the plaintiff alleged that by the terms of the contract she traded her land for a band of horses and a tract of land of the defendant, and the answer of the defendant admitted plaintiff's ownership of her land, and only raised an issue as to whether the defendant, at the time the contract was entered into, agreed to give his own land as part consideration for the plaintiff's land, evidence on the part of the defendant tending to show that the land of the plaintiff is not hers in fact or in equity, as against her father's creditors, is irrelevant and immaterial, and is properly excluded. (*Moulton v. Harris*, 94 Cal. 420.)

197. In an action to enforce a parol agreement to execute a lease of land, where plaintiff has entered into possession and farmed the land under the parol agreement, evidence on behalf of defendant that plaintiff has not properly farmed the land is not admissible, because it does not tend to prove that there had not been such part performance as takes the contract out of the statute of frauds. (*McCarger v. Rood*, 47 Cal. 138.)

11. Defect in Title as a Defense.

198. Though it might be a defense to an action brought by the vendor to enforce a contract for conveyance that he had no title, the rule cannot be invoked in an action brought by the vendee, who has broken his contract, against a vendor who only agreed to convey the interest he had in the land. (*Brown v. Covillaud*, 6 Cal. 566.)

199. Vendor cannot object to the enforcement of the contract that there are encumbrances upon the land or defects in the title. (*Grant v. Beronio*, 97 Cal. 496.)

200. In an action involving the specific performance of a contract for the sale of land, which is resisted by the purchaser on account of the alleged dedication of streets upon the land, where it appears that the alleged streets

never vested in the public, and that the property had been conveyed in a body, including such alleged streets, and fenced and occupied for more than five years before the agreement to convey the property, the right of prior purchasers bounding on the streets to use the same, if it ever existed, is barred by the statute of limitations, and it is incumbent upon the purchaser to prove the existence of any circumstances which would have prevented the running of the statute of limitations, as against these purchasers, in order to avoid a specific performance of his contract to purchase the land; and, in the absence of such proof, the facts show such title in the vendor that the purchaser is bound to accept a conveyance, and pay the purchase money. (*Phillips v. Day*, 82 Cal. 24.)

201. To avoid a specific performance of a contract to purchase land on the ground of defective title, where the vendor has a clear paper title to the property, the burden of proving a defect in the title because of an alleged dedication of part of the land as public streets is on the purchaser. (*Phillips v. Day*, 82 Cal. 24.)

Defective title. See ante, 129.

Abatement of price for defect in title. See post, V, 13.

12. Fraud as a Defense.

202. Fraudulent misrepresentations by which the defendant was induced to enter into the contract, and by which third persons would be injured, constitute a defense to a suit for specific performance. (*Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557.)

203. Fraudulent misrepresentations, by which the defendant was induced to enter into the contract, constitute a defense to a suit for specific performance, although neither the defendant nor third persons would be injured by the enforcement of the contract. (*Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557.)

Fraud as defense, receipt of payment does not waive, when. See Fraud, 69.

Costs where performance refused because of fraud. See post, V, 15.

13. Decree in; Powers of Court.

204. A broader equity is frequently administered in cases of specific performance, where courts sometimes proceed upon grounds independent of the validity of the contract. (*Ward v. Packard*, 18 Cal. 391.)

205. In an action to compel the conveyance by defendant to plaintiff of certain lands, it was admitted by the pleadings that defendant held the title to the property described as security only for the payment of a debt contracted to be paid by plaintiff to defendant; and the only material issue made was whether the debt had been paid or not, the complaint alleging such payment and praying that defendant be required to convey the property to plaintiff, while the answer traversed said allegation, and for affirmative relief prayed judgment that said debt be declared a lien on said property, and that plaintiff's bill be denied until such payment be made. On the trial the court found said issue as to payment

for the defendant, and adjudged the defendant to hold a lien on said property to secure the payment of said debt; and, by its judgment, directed a sale of the property and a satisfaction of the debt, the costs of sale and defendant's costs of suit, from the proceeds of said sale. Held, that this judgment was beyond and foreign to the relief demanded in said answer, and erroneous; further, that the proper judgment in such case would be that plaintiff be adjudged, within a reasonable time specified, to pay said debt, and that on said payment or tender thereof made the defendant to convey said land to plaintiff, and that on failure of plaintiff to make said payment or tender, his bill to be dismissed with costs. (*Meyer v. Mowry*, 34 Cal. 514.)

206. An objection to the form of the judgment overruled. (*Barsolou v. Newton*, 63 Cal. 223.)

207. When the contract of sale provides for the use in common of an extension of a roadway on the east line of the lots sold through to a certain drive north of the lot, and the findings show that said roadway was opened through the said drive by the vendor, it is not error in the decree enforcing the contract to omit specific mention of said extension, when the decree requires the conveyance of a right of way in such roadway described as "extending northerly along the east side" of the lot sold, and refers to all of the roadways as located upon a recorded map, which shows the roadways as opened by the vendor. (*Brandt v. Clark*, 81 Cal. 634.)

208. When the cross-complaint of a defendant, seeking the specific performance of a contract of sale, refers to a map of a tract which includes the premises sold, and which was recorded after the date of the contract, it is not error for the decree enforcing a specific performance to refer to such map instead of describing the premises by metes and bounds, as set forth in the contract, although the roadways and drives mentioned in the contract of sale, as located on said map, cut the premises in two, and though the decree does not award to the purchaser the fee of the land over which such roadways pass, but merely requires a conveyance to the purchaser of the right of way over the same in common with the vendor. (*Brandt v. Clark*, 81 Cal. 634.)

209. When the amount of abatement allowed to the purchaser who seeks the specific performance of a contract for the sale of land, on account of want of title in the vendor to part of the premises sold, is fixed by the court below in view of conflicting evidence, the decision of the court below will not be disturbed upon appeal. (*Brandt v. Clark*, 81 Cal. 634.)

210. If a contract for the sale of land provides that the conveyance shall transfer the title free of encumbrances, the court, in an action for specific performance brought by the purchaser, can direct the application of the purchase money to the satisfaction of those encumbrances, and for that purpose can cause the money to be brought into court and disbursed under its direction. If the holders of the encumbrances are before the court they will be bound by the direction of the court, and their claims will be satisfied by a satisfac-

tion of the judgment; and even if they are not before the court, where the amount of the encumbrances is ascertained, and the court finds that the liens can be discharged by mere payment, it can direct that the payment be made directly to the holders of the encumbrances, instead of to the vendor, who cannot object so long as he incurs no liability, and is freed from any personal claim for the amount of the encumbrances. (*Grant v. Beronio*, 97 Cal. 496.)

211. The defendant agreed to convey to the plaintiff a perfect title to a tract of land upon which there was at the time a mortgage which defendant refused to satisfy. Held, in an action for specific performance by the vendee, that he was entitled to the relief prayed in his complaint, viz., "that the defendant cause the said tracts or lots of land to be released from said mortgage, or, in default thereof, that he secure plaintiff for the payment of the same, and execute to plaintiff a sufficient conveyance of the said land with a perfect title thereto." (*Reese v. Hoeckel*, 58 Cal. 281.)

212. Can one who files a bill in equity for a specific performance of a contract to convey land, and also to recover damages for personal property converted to his use by the vendor, who has taken possession after the execution of the contract, recover judgment for the damages if he fails in obtaining a specific performance, or are the damages cognizable in a court of law only, query? (*Troy v. Clarke*, 80 Cal. 419.)

213. In an action by a purchaser to enforce a specific performance of a contract to convey land, a judgment decreeing that the land shall be conveyed by the vendor to the purchaser upon the payment by the purchaser, on or before a specified date, of the purchase money, is a judicial determination of the existence and validity of the contract, and is, in substance and effect, a judgment for the specific performance of the contract, which can be enforced as such by proper proceedings, either by the vendor or purchaser, and does not merely give the purchaser the option to purchase the land on or before the date mentioned, and he does not forfeit the right to enforce the judgment by a mere failure to tender the purchase money within the time specified. (*Seventy-six Land and Water Co. v. Superior Court*, 93 Cal. 139.)

214. In such action the court may, if the vendor asks it, make a decree, as in the case of a strict foreclosure, that if the purchaser does not pay the purchase money within such time as may be limited by the court for that purpose, he shall be barred of his right to insist upon a specific performance afterward; but in the absence of an explicit direction to that effect in the judgment, it cannot be construed as giving to the vendor any such relief, and the rule that where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, is as applicable to such a judgment as to the con-

tract upon which it is based. (*Seventy-six Land and Water Co. v. Superior Court*, 93 Cal. 139.)

215. The mere fact that the judgment fixes the date when, according to the contract to be enforced, the plaintiff was to make such payment does not make his right to the enforcement of the judgment depend upon payment by the day named. (*Seventy-six Land and Water Co. v. Superior Court*, 93 Cal. 139.)

Rents and profits. See ante, V, 6.

Right of plaintiff to reconveyance where contract cannot be enforced. See ante, V, 7.

Judgment must follow complaint in description. See Judgments, 474, et seq.

Judgment for defendant for want of demand is no bar. See Judgments, 361.

Judgment denying is bar to action for breach of contract of sale. See Judgments, 356.

Ejectment, judgment in when not a bar to. See Judgments, 334.

Verdict in is merely advisory. See Cross-complaint, 42.

Compelling execution of deed by trustee. See Trusts and Trustees, 127.

14. Findings in.

216. In actions for specific performance of contracts of sale, it is to the interest of the parties, at least the losing party, to have a written finding of the facts filed. (*Morrison v. Lods*, 39 Cal. 381.)
Cited 74 Cal. 563.

217. In an action for specific performance of a contract of sale by a deceased wife, where her surviving husband and her father, to whom the land was conveyed by her in trust, are joined as defendants, and are contesting the right to receive the purchase money as between themselves, and it appears by the terms of the contract that the wife agreed to convey with the land forty shares of water stock appurtenant thereto, at a specified price, and the surviving husband declares in his answer that he is the owner of the water stock, and that it is distinct and separate from the land, a failure of the court to find who owns the stock, and what proportion of the money due from the plaintiffs is due for the stock, is error for which the judgment must be reversed upon appeal. (*Garnsey v. Gothard*, 90 Cal. 603.)

Findings as to performance. See ante, 143.

15. Costs in.

218. Where specific performance is refused because of fraudulent misrepresentations of the plaintiff, and the defendant is free from blame, costs should not be awarded to the plaintiff, but should be awarded to the defendant. (*Kelly v. Central Pac. R. R. Co.*, 74 Cal. 565.)

Where no demand for performance. See ante, V, 6.

On inexact compliance with contract. See ante, 136.

16. Rights of Plaintiff Where Performance Refused.

219. If the plaintiff cannot have the contract enforced, he cannot concern himself

with what the defendant does with the property. (*Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557.)

SPEED.

Trains, liability for. See Railroads, VIII, 1.

SPEEDY TRIAL.

Right to. See Criminal Law, XVIII, 2.

SPIRITUALISM.

Courts will not hold the belief in spiritualism to be superstitious or contrary to public policy when not followed by acts which are recognized as hurtful to society. (*Newman v. Smith*, 77 Cal. 22.)

Insanity from. See Fraud, 34.

Insanity, mere belief in spiritualism does not show. See Wills, 59.

Influence of medium. See Fraud, 33, et seq.

Contract with medium. See Fraud, 35.

SPLITTING CAUSES.

See Joinder and Severance of Actions, II.

SPRINGS.

See Watercourses, VIII.

SPRING VALLEY WATER WORKS.

Questions relating to. See Water Companies.

SQUARES.

Public parks. See Public Parks.

San Francisco, public squares in. See San Francisco, IX.

STABLE-KEEPERS.

See Livery Stable-keepers.

STAGE COMPANIES.

Licenses of. See Licenses, II, 7, b.

Injuries while riding in coach. See Negligence, III, 3.

Burden of proof in action for negligence. See Common Carriers, 123.

Breaking of wheel is presumptive of negligence. See Common Carriers, 127.

Degree of care required of. See Common Carriers, 68, 69.

Instructions in actions against. See Common Carriers, 136.

STAKEHOLDERS.

Obligations of. See Gaming, III.

STALLION.

License of to keep. See Licenses, II, 7, h.

STAMPS.

Internal revenue stamp. See Bills and Notes, II, 1; Internal Revenue.

Will, stamp on probate of will. See Wills, 128.

STANISLAUS COUNTY.

Boundaries of. See Counties, 32.

STARE DECISIS.

See Statutes, VIII, 11.

1. While the argument ad inconvenienti should have its proper weight in ascertaining what the law is, there is no public policy which can empower the courts to disregard the law, or, because of an asserted benefit to many persons, in itself doubtful, overthrow the settled law. (*Lux v. Haggin*, 69 Cal. 255.)

Cited 86 Cal. 85.

2. In cases where a writ of error will lie to the supreme court of the United States, the decisions of that court will be followed in preference to former decisions of this court. (*San Benito County v. Southern Pac. R. R. Co.*, 77 Cal. 518.)

3. When the question upon which the judgment of this court depends is such as may be re-examined on writ of error by the supreme court of the United States, we will follow the rule of law with respect to such question laid down by the supreme court of the United States. (*Belcher v. Chambers*, 53 Cal. 635.) Cited 77 Cal. 520; 79 Cal. 136; 85 Cal. 477.

Following decisions of supreme court of United States. See Mexican Lands, 131.

4. The government of the United States is one of delegated powers; the right to decide ultimately upon the extent of powers granted has not been delegated to the United States, nor prohibited to the states, and is reserved to the states by the provisions of the tenth amendment to the constitution; and therefore the decision of the supreme court of the United States on such questions is not binding in the state courts. Per Terry, C. J. (*Ferris v. Coover*, 11 Cal. 176.)

5. The construction given by the supreme court of the United States to its decree confirming a Mexican grant of land in California, is of binding authority in the state courts. (*Schmitt v. Giovanari*, 43 Cal. 617.)

6. The decision of the majority of the court in bank is controlling authority when the same question comes before a department. Per Works, J., and Fox, J. (*Arnold v. City of San Jose*, 81 Cal. 618.)

7. Nisi prius courts are not at liberty to set aside or disregard the decisions of the supreme court because it may seem to them that the decisions are unsound. (*People v. McGuire*, 45 Cal. 56.)

8. A previous ruling of the appellate court upon a point distinctly made is only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made, it is a final adjudication, and constitutes upon a new trial or a second appeal the law of the case. (*Leese v. Clark*, 20 Cal. 387.) Cited 71 Cal. 452; 73 Cal. 338; 79 Cal. 687.

9. The conservative doctrine of stare decisis was never designed to protect manifest innovations upon the well-settled principles of law. (*Aud v. Magruder*, 10 Cal. 282.)

10. There is no principle which compels the observance of the doctrine of stare decisis when a rule, well settled and universally acquiesced in, has been violated. (*Cohas v. Raisin*, 3 Cal. 443.)

11. No well-considered decision of this

court ought to be overruled unless it clearly violates some established rule of law, and great evils are likely to flow from suffering it to stand as a rule of property. It is an additional reason for standing by a decision that it was based upon the construction of a statute and affects titles to real estate. (*Pioche v. Paul*, 22 Cal. 105.)

12. A decision of the supreme court which has been in force for over twelve years, and has been accepted and acted upon as correct ever since, and which is not shown to violate any principle of law, or work injustice, will not be reversed, even if its correctness is doubted. (*Estate of Dorris*, 93 Cal. 611.)

13. If, upon a fuller consideration, the court is satisfied that a former judgment upon a constitutional question is wrong, it is not precluded from asserting the correct rule if vested interests of great moment are not disturbed thereby. (*People v. Lynch*, 51 Cal. 15, 39.)

14. Considerations of public policy and justice, as well as regard for individual rights acquired under the law, as announced by the highest judicial tribunal, imperatively demand a strict adherence to the doctrines of the case of *Cohas v. Raisin*, 3 Cal. 443. Per *Terry, J.* (*Welch v. Sullivan*, 8 Cal. 165.)

Duty to follow incorrect decision. See Constitutional Law, 100.

15. Stare decisis, doctrine of, how far binding, discussed. (*Houghton v. Austin*, 47 Cal. 646, 667.)
Cited 60 Cal. 204.

16. Doctrines of the law regarding, stated. (*Hart v. Burnett*, 15 Cal. 530.)
Cited 47 Cal. 668; 51 Cal. 39; 84 Cal. 149-51.

17. Expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and cannot be safely applied in their largest and most universal sense to dissimilar cases. (*Pasadena v. Stimson*, 91 Cal. 238.)

18. It is a maxim, not to be disregarded, that general expressions in every judicial opinion are to be taken in connection with the case in which those opinions are used. (*Uhlfelder v. Levy*, 9 Cal. 607.)

19. The language of a decision must be considered in the light of the circumstances involved in the case before the court. (*Coburn v. Brooks*, 78 Cal. 443.)

20. A mere obiter dictum is not authority. (*Haight v. Joyce*, 2 Cal. 64.)

Opinion, when is obiter dictum. See Probation, 15.

Dictum. See cross-references under Dictum.

21. In construing judicial decisions, that only is held to be authoritatively decided which was necessarily involved in the decision of the cause. (*Banks v. Moreno*, 39 Cal. 233.)

22. The case of *Touchard v. Touchard*, 5 Cal. 307, has not been overruled as an authority; and the case of *Hart v. Burnett*, 15 Cal. 599, so far as declaring it to have been overruled, is obiter dictum, and cannot be affirmed upon the principle of stare decisis. A decision

is not even authority, except upon the point actually passed upon by the court and directly involved in the case. (*Norris v. Moody*, 84 Cal. 143.)

23. The rule of stare decisis does not apply to the decision in the case of *People v. San Francisco*, 75 Cal. 389, so far as it determines the conclusiveness of the patent to the city of San Francisco, that question being unnecessary to the decision of that case, and its determination being erroneous and in conflict with the decisions of the supreme court of the United States. *McFarland, J.*, *Beatty, C. J.*, and *Works, J.*, dissenting. (*United Land Assn. v. Knight*, 85 Cal. 448.)

23. When counsel in argument assume certain principles advanced by them as correct law, and the court decides the case upon the assumption thus made by counsel, without discussing the correctness of this assumption, the opinion is not authority that such assumption is correct law. (*Donner v. Palmer*, 31 Cal. 500.)

25. In the exposition of constitutions, as of inferior laws, the solemn, deliberate, and long-settled precedents of courts, and the practice and acquiescence of governments and people, should possess controlling weight. (*Ferris v. Coover*, 11 Cal. 175.)

26. The settled construction of a constitutional provision, made before its adoption into the constitution of this state, should be held as the just interpretation thereof. (*People v. Webb*, 38 Cal. 467.)
Cited 69 Cal. 384.

27. The exposition of the constitution by the highest court in existence under it, with regard to laws passed while it was in force, should be accepted by the present court without regard to its own views as to the correctness or incorrectness of the doctrine. (*Staudt v. Election Commrs.*, 61 Cal. 313.)

28. Where the supreme court of the state, prior to the adoption of the new constitution, passed upon the constitutionality of an act of the legislature, the construction will be accepted and followed by the present supreme court, without regard to its own views as to the correctness of that construction. (*Emery v. Reed*, 65 Cal. 351.)
Cited 76 Cal. 116.

29. Though, on questions of practice, previous decisions are entitled to very great weight, still a single decision, made without notice of a statute, and in fact setting aside the statute, cannot be invoked as authority on the principle of stare decisis. (*Duff v. Fisher*, 15 Cal. 375.)

30. In matters of practice involving no principle, it is safer to acquiesce in a rule which has been established for several years in the inferior courts of this state, the abrogation of which might introduce confusion and operate hardly on litigants. (*Ellissen v. Halleck*, 6 Cal. 386.)
Cited 10 Cal. 30; 25 Cal. 92.

31. Where important rights of property had grown up under a decision of the supreme court, and many years have elapsed since the same was rendered, and its correctness has been tacitly admitted in other cases, the

question will not be reopened. (*Vassault v. Austin*, 36 Cal. 691.)

32. When a rule, by which the title to real property is to be determined, has become established by positive law or by deliberate judicial decision, its inherent correctness or incorrectness, its justice or injustice, in the abstract, are of far less importance than that it should itself be constant and invariable. (*Smith v. McDonald*, 42 Cal. 487.)

33. Even if property rights have grown up under an erroneous decision with regard to the construction of a clause in the constitution, it is better that inconvenience should be submitted to, rather than such decision should stand, and a valuable provision in the fundamental law be obliterated. (*San Francisco v. Spring Valley Water Works*, 48 Cal. 493.)

Decision affecting titles to real estate. See ante, 11.

34. Where decision was made several years ago, affirming validity of deed conveying a large amount of real estate, under which decision important rights may have been acquired, the court will not re-examine the grounds of the decision, but on the principle of stare decisis will allow it to stand. (*Hihn v. Courtis*, 31 Cal. 398.)

35. Opinion is not authority where rehearing has been granted, and the opinion first delivered is not adhered to after the reargument. (*Argenti v. San Francisco*, 16 Cal. 255.) Cited 30 Cal. 461.

36. The decisions of the supreme court of this state do not make or change the law, but simply declare what the law is, and overruled decisions declaring that a conveyance absolute in form but intended merely as security did not pass the legal title to the grantee, not having stated the law correctly as declared in later cases, cannot be considered as forming part of a conveyance executed after the making of the earlier decisions, and before they were overruled, and do not furnish the true rule of interpretation thereof. (*Allen v. Allen*, 95 Cal. 184.)

Law of the case. See Law of the Case.

Jurisdiction of district assumed on principle of stare decisis. See Jurisdiction, 76.

Duty of courts to follow construction of land laws. See Public Lands, XVIII, 4.

Effect of precedents on construction of will. See Wills, XI, 3.

Doctrine applied to jurisdiction. See Jurisdiction, 105.

Constitutionality of legal tender acts. See Constitutional Law, 55.

Doctrine applied to construction of statute. See Courts, 23.

Affirming doctrine on principle of. See Registration, 7.

Power to grant rehearing affirmed on principle of. See Appeals, 3217.

STATE.

See Escheat.

Congress, power of over. See Constitutional Law, III, 1.

Political divisions of. See Constitutional Law, VIII, 8, a.

Wharfage and tolls are property of state. See Wharves, 34.

Right of in streets of city. See Streets, 19.
Cannot take private property without providing compensation. See Eminent Domain, 166.

State lands. See Public Lands.

Control of over grants of pueblo lands. See Mexican Lands, II, 4, a.

Riparian owner, state as. See Watercourses, XIV, 1, a.

Right of in beach and water lots granted to San Francisco. See San Francisco, XIV, 10, b.

Grant of swamp and overflowed lands to state. See Swamp and Overflowed Lands, III.

Curative act curing defective conveyance of beach and water lot. See San Francisco, 298.

Patent, conclusiveness of against. See Public Lands, XX, 11, c.

Land contest, state as party to. See Public Lands, XVII, 6.

"Third person," state is not. See Public Lands, XX, 11, c.

Proceedings in condemnation by. See Eminent Domain, IX, 1.

Power of over elective franchise. See Elections, VI, 1.

Contracts, effect of. See Prisons.

Contracts of, law impairing obligation of. See Constitutional Law, VIII, 8, b.

Law of private contracts not applicable where state a party. See Counties, 41.

State bonds. See Bonds, II.

Aid to railroad. See Railroads, II.

Forfeiture of lease from state, how asserted. See Forcible Entry and Unlawful Detainer, VI, 9.

1. After admission into the union, no act of Congress was necessary to define the rights of the inhabitants who were recognized as members of the community organized into a state. (*People ex rel. Kimberly v. De La Guerra*, 40 Cal. 311.)

2. To say that a state of the union is sovereign only means that she possesses supreme political authority, except as to those matters over which such authority is delegated to the federal government, or prohibited to the states; in other words, that she possesses all the rights and powers essential to the existence of an independent political organization, except as they are withdrawn by the provisions of the constitution of the United States. (*Moore v. Smaw, Fremont v. Flower*, 17 Cal. 199.)

Sovereignty of. See Constitutional Law, I; Sovereignty.

3. The state cannot be sued directly or indirectly, as by setting up a counterclaim or setoff, nor can any judgment be entered against the state, except when the same is permitted by statute. (*People v. Miles*, 56 Cal. 401.)

4. The state and its political subdivisions cannot be sued except as specially authorized by statute; and general language creating new remedies or prescribing procedure does not authorize such an action. (*Whittaker v. County of Tuolumne*, 96 Cal. 100.)

5. Neither the state in its own person, nor as represented in its local subordinate governments, can be summoned to answer before its courts except by its own consent, nor can its property, in actions in rem, be so summoned. All suits and judgments brought and recovered in the state courts against itself or its subordinate governments, without such consent given, are void. (*People v. Doe G.*, 36 Cal. 220.)

6. In the absence of any statute to that effect, the state cannot be sued, and a judgment against her is erroneous. (*People v. Talmage*, 6 Cal. 256.)

7. Services performed for the state by an attorney under a contract with the governor or attorney general might be the subject of relief at the hands of the legislature, but are not a legal cause of action. (*People v. Talmage*, 6 Cal. 256.)

8. Remote and consequential damages occasioned to the property of a private individual, as an indirect result of the construction by the state of a public work, do not constitute a taking of such property, within the meaning of a constitutional provision prohibiting the taking of private property for public purposes without compensation. For such damages the state is not responsible, in the absence of any statutory or constitutional provision imposing the liability. (*Green v. State of California*, 73 Cal. 29.) Cited 73 Cal. 133, 135.

9. When state authorizes itself to be sued, and there is no statutory or constitutional provision fixing a different liability, its measure of responsibility is to be determined by the same rule as that which determines the liability of ordinary private litigants. (*Green v. State of California*, 73 Cal. 29.)

10. The act of March 12, 1885, authorizing the plaintiffs to institute an action against the state for damages alleged to have been caused to their property by reason of the canal which had been constructed by the levee commissioners of the city of Sacramento, under the act of April 9, 1862, for the purpose of diverting the waters of the American river into the Sacramento river, was not an admission by the state of its liability for the alleged damages, nor a waiver of any legal defense it might have to the action, except its immunity from suit. (*Green v. State of California*, 73 Cal. 29.)

Liability for injury to employees. See *Offices and Officers*, VIII.

Payment for injuries to servant of. See *Constitutional Law*, 407.

Liability of, where officer sued. See *Offices and Officers*, VII, 10.

Estoppel of by acts of officers. See *San Francisco*, 266.

Limitations in actions by. See *Statute of Limitations*, VI, 1.

Limitation against. See *Wills*, 146.

No prescription against state. See *Watercourses*, XIV, 2, g, A.

Taxes, action to recover, state is not necessary party. See *Taxation*, 568.

Authorization to use name of. See *Attorney General*, 3.

Service out of state without publication. See *Summons*, IV, 3.

Liability for costs of publishing summons in suit to cancel certificate. See *Public Lands*, XIV, 15.

Right of appeal. See *Appeals*, 385.

Undertaking on appeal by. See *Appeals*, V, 6, j.

11. The state has no right to repudiate her debts. She cannot be sued, and hence, demands against her must await the action of the legislature in the appropriation of moneys for their payment. In that sense the legislature possesses the power to postpone her general creditors indefinitely; in that sense only can the state repudiate; but the right and the power are not synonymous terms. (*People ex rel. McCauley v. Brooks*, 16 Cal. 11.)

Cited 16 Cal. 194; 34 Cal. 290; 39 Cal. 274; 10 Mont. 487.

Claims against, what are not. See *State Library*, 7.

Claims against, appropriation for, construction of. See *Statutes*, 64.

Statute requiring claims against to be audited. See *Constitutional Law*, 337, et seq.

City cannot set up right of state to defeat claim against her. See *San Francisco*, 72.

Effect of statute on state. See *Statutes*, VI.

STATE CAPITAL.

1. City of Sacramento declared to be the capital of the state. (*People ex rel. Vermule v. Bigler*, 5 Cal. 23.)

2. The act of February 4, 1851, removing the seat of government to Vallejo, declared to be constitutional. (*People ex rel. Vermule v. Bigler*, 5 Cal. 23.)

3. The act of February 4, 1851, removing the seat of government to Vallejo, operates as an absolute removal, and cannot be defeated by the breach of subsequent conditions. (*People ex rel. Vermule v. Bigler*, 5 Cal. 23.)

4. After the first removal of the seat of government a majority of the legislature might at any time remove the capital. (*People ex rel. Vermule v. Bigler*, 5 Cal. 23.)

5. The act of April 18, 1856, providing for the erection of a state capitol, at a cost not to exceed three hundred thousand dollars, is unconstitutional and void. (*Nougues v. Douglass*, 7 Cal. 65.)

6. The act of March 29, 1860, providing for the construction of a state capitol in the city of Sacramento, is not unconstitutional, as creating an indebtedness or liability on the part of the state exceeding the limit of three hundred thousand dollars prescribed in the eighth article of the constitution. The act authorizes the commissioners therein named to contract only to the extent of one hundred thousand dollars. (*Koppikus v. State Capitol Comm'rs*, 16 Cal. 248.)

Cited 19 Cal. 596; 24 Cal. 454; 27 Cal. 207, 208, 219; 9 Cal. 411; 6 Mont. 540; 5 Nev. 26; 5 Or. 32, 33.

7. No analogy exists between this case and *Nougues v. Douglass*, 7 Cal. 65, because there the act of 1856 authorized a contract in a sum not exceeding three hundred thousand dol-

lars, payable in state bonds, and at the time of its passage the state was indebted to the amount limited by the constitution without a vote of the people. (*Koppikus v. State Capitol Comm'rs*, 16 Cal. 248.)

8. The act of 1860 is not unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provisions of the constitution that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action at law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. (*Koppikus v. State Capitol Comm'rs*, 16 Cal. 248.)

9. In this case, the district judge did not err in refusing the application to set aside the award of the commissioners, and for a new trial. The proceedings before the commissioners were regular, and "appear to have been done in good faith," within the act. (*Koppikus v. State Capitol Comm'rs*, 16 Cal. 248.)
Cited 42 Cal. 68.

STATE DEBT.

See Public Debt State, 11.

Controller cannot draw warrant without appropriation. See Supreme Court Reports.

STATE ENGINEER.

The appropriation of six thousand dollars for the office of state engineer, made by the general appropriation act of March 21, 1889 (*Stats.* 1889, p. 438), appropriating money for the objects therein expressed, and "for the support of the government of the state of California for the forty-first and forty-second fiscal years," is for payment of the entire salary of the state engineer appointed by the act of March 19, 1889, which took effect sixty days after its date, and created the office of state engineer, "to remain in existence for a period of two years only," and provided that the state engineer should receive a salary of three thousand dollars a year, and the fact that the period of the two-year term included that portion of the fortieth fiscal year extending from May 19, 1889, to July 1, 1889, does not preclude the right of the state engineer to receive the entire sum of six thousand dollars appropriated for his office, though the fortieth fiscal year is not named in the appropriation act. (*Irean v. Colgan*, 96 Cal. 413.)

STATE LANDS.

See Public Lands.

STATE LAND COMMISSIONERS.

Salary, from what time dates. See Offices and Officers, 140.

STATE LIBRARY.

Librarian holds until election and qualification of successor. See Offices and Officers, 182, 183.

1. The provision of section 2292 of the Political Code, placing the state library under the control of a board of trustees elected by the legislature in joint convention assembled, is constitutional. (*People ex rel. Watterman v. Freeman*, 80 Cal. 233.)

2. An act creating a board of five trustees to govern the state library, and making the chief justice of the supreme court one of the five, is, as to the chief justice, and as to the place to be filled by him, void, and there is no vacancy which the governor can fill by appointment. (*People ex rel. Simmons v. Sanderson*, 30 Cal. 160.)

3. The duties of trustee of the state library cannot be performed by any person holding an office in the legislative or judicial departments of the state. (*People ex rel. Simmons v. Sanderson*, 30 Cal. 160.)
Disapproved 34 Cal. 529, 532, 539.

4. The chief justice of the supreme court is prohibited by the third article of the constitution from exercising the functions and duties of trustee of the state library. (*People ex rel. Simmons v. Sanderson*, 30 Cal. 160.)

5. Duties of trustee of state library properly fall within the sphere of the executive department of the government. (*People ex rel. Simmons v. Sanderson*, 30 Cal. 160.)

6. The board of trustees of the state library are authorized to draw from the state treasury, at any time, all the moneys therein belonging to the library fund. (*Board of Trustees of State Library v. Kenfield*, 55 Cal. 488.)

7. Bills for books purchased for state library are not claims within the meaning of section 660 of the Political Code, and need not be presented to the board of examiners. (*Board of Trustees of State Library v. Kenfield*, 55 Cal. 488.)

STATEMENTS.

See Taxation, V, 3.

Proceedings before board of equalization. See Taxation, 448.

Sworn, publication of. See Banks and Banking, XI.

Agreed. See Pleading and Practice, XX, 11.

Opening. See Pleading and Practice, XX, 5.

Declaratory statements. See Public Lands, IX, 3.

Motion for new trial, statement on. See New Trial, V, 7.

New trial, statement on motion for is necessary. See New Trial, V, 4.

Appeal, statements on. See Appeals, VI.

Appeal, authentication and identification of statements on. See Appeals, VI, 6, d, E.

STATE PRINTER.

1. An appointment to fill a vacancy in the office of state printer made by the governor

during the session of the legislature is irregular and void. (People ex rel. Casserly v. Fitch, 1 Cal. 519.)

2. The legislature having elected a state printer, and the state printer previously appointed by the governor having resigned after the adjournment and during the recess, whereupon the governor appointed a person to fill the vacancy supposed to exist, held, that this second appointment, as well as the former one, was irregular and void. (People ex rel. Casserly v. Fitch, 1 Cal. 519.)

3. The act of May 1, 1854, which creates the office of state printer, and requires the controller to draw his warrants on the treasurer for such sums as may be due the state printer, is not a specific appropriation. (Redding v. Bell, 4 Cal. 333.)
Cited 45 Cal. 171.

Power of controller over accounts. See Controller, 13.

STATE PRISON.

See Prisons.

Contract, mandamus to compel issuance of warrants. See Mandamus, 128.

Governor taking possession guilty of forcible entry, when. See Forcible Entry and Unlawful Detainer, 42.

Law forbidding sale of liquor near. See Constitutional Law, 443.

STATE REFORM SCHOOL.

Conflict between act creating and penal code. See Statutes, VIII, 16.

STATE SENATORS.

Election of. See Legislature, 3.

STATE TREASURER.

See Treasurer.

Mandamus against. See Mandamus, II, 12, e.

STATE UNIVERSITY.

1. All moneys in the state treasury, subject to the use of the board of regents of the university of California, may be drawn therefrom upon the order of the board indorsed by the governor, and no appropriation or warrant from the controller is necessary for that purpose. (Regents of University of California v. January, 66 Cal. 507.)

Appraisal for water supply, approval of governor, mandamus. See Mandamus, 127.

2. Under the acts of the 23d and 28th of March, 1868, and of the 4th of April, 1870, the land agent of the university had no power to sell its agricultural lands, even after their selection and location, to an applicant who was not a qualified purchaser, or whose application was not made according to the instructions issued to him by the board of regents. (White v. Douglass, 71 Cal. 115.)

Applicant for university land must be an actual settler. See Public Lands, 360.

Affidavit on application to purchase university land. See Public Lands, 397.

Rights under void location of land under the five hundred thousand acre grant. See Public Lands, 766.

Patent for land, conclusiveness of. See Public Lands, 761.

Contest of right to purchase, judgment on the pleadings. See Public Lands, 553.

Exemption of property from taxation. See Injunctions, 233.

Law forbidding sale of liquor near. See Constitutional Law, 443.

Deduction of mortgage due to. See Taxation, 353.

STATIONS.

See Common Carriers, IV, 3, f.

STATUTE OF ENROLLMENTS.

The statute of enrollments (27 Henry VIII, c. 16) has never been in force in this state. (Chandler v. Chandler, 55 Cal. 267.)

STATUTE OF FRAUDS.

I. Contracts or Proceedings Affected by.

1. *Contracts of Corporations.*
2. *Contracts Between Brokers or Agents.*
3. *Contracts for Services on Commission.*
4. *Contract to Furnish Materials for Building.*
5. *Agreement to Purchase at Execution for Debtor; Order Drawn on Trustee.*
6. *Contracts for Sale of Personality.*
7. *Contracts not to be Performed Within a Year.*
8. *Contracts to Answer for Debt, Default, or Miscarriage of Another, of Guaranty or Indemnity.*
9. *Judicial Sales; Miscellaneous Contracts.*
10. *Contracts Relating to Real Property.*
 - a. Construction of Statute.
 - b. Oral Contracts for Sale or Reconveyance; Effect of Under Mexican or Spanish Law.
 - c. Agreement to Convey Interest in or Locate Mine.
 - d. Contract for Exchange of Real Estate.
 - e. Gifts of Land.
 - f. Contracts of Leasing.
 - g. Boundaries or Improvements, Contracts Concerning; Releases of Equitable Interests.
 - h. Agreements Concerning Ditches, or Use of Water.
 - i. Growing Crops, Agreements for Sale of.
 - j. Agreement to Purchase for Another, or Advance Money for Another's Purchase.
 - k. Agreement Regarding Proceeds on Resale by Vendee.
 - l. Oral Modification of Written Contract; Miscellaneous Agreements Concerning Realty.

II. Part Performance; Effect of Statute on Executed Agreements.

III. Memorandum.

IV. Who Cannot Invoke; Effect of in Cases of Fraud and Trust.

V. Contracts Partly Void.**VI. Remedies on Contract Void Under.****VII. Pleading and Waiver of; Presumption as to Contract Being Written.****VIII. Findings.**

Oral evidence, objection to. See Appeals, 2367.

I. Contracts or Proceedings Affected by.**1. Contracts of Corporations.**

1. A conveyance that would come within the statute of frauds if made by an individual, if made by a corporation would be liable to the same construction, and, if void in the former case, would be void in the latter. (Smith v. Morse, 2 Cal. 524.)

2. Contracts Between Brokers or Agents.

2. A contract between brokers to co-operate in buying and selling real estate for a share of the commission is not within the statute of frauds and need not be in writing. (Gorham v. Heiman, 90 Cal. 346.)

3. A contract between brokers, whereby one agrees to purchase and sell stocks for the account of the other, to advance money for the purpose, and pay assessments on the stocks purchased, is not obnoxious to section 26, article IV, of the constitution, and is not required by the statute of frauds to be in writing. (Kutz v. Fleisher, 67 Cal. 93.)

Ratification, writing, necessity of. See Agency, III, 7, c.

Authority of custodian of deed in escrow need not be written. See Deeds, 104.

3. Contracts for Services on Commission.

4. A contract by which the defendants agreed to pay plaintiffs a certain sum per acre for all the land which plaintiffs should examine and advise defendants to purchase, and which should be afterward purchased by defendants, is not such a contract as is required by the statute of frauds to be in writing. (Wilson v. Morton, 85 Cal. 598.) Cited 100 Cal. 29.

5. A contract by which P. agrees that if H. will, within a fixed time, find a purchaser of P's land at two hundred dollars per acre, P. will sell and convey the land to the purchaser, and that H. may have for his services all that can be obtained from the purchaser over two hundred dollars per acre, is not a contract for the sale of any land or interest in land, within the meaning of the eighth section of the statute of frauds. (Heyn v. Philips, 37 Cal. 529.)

6. If R. orally agrees with F. to give him a certain portion of the purchase money, and also a certain parcel of land, for his services in effecting the sale of R's land, there being no note or memorandum in writing of the promise, the whole contract, as well for the money as for the land, is void, and no action will lie either for the money or the land. (Fuller v. Reed, 38 Cal. 99.)

7. A contract whereby it is agreed that one of the parties shall use his knowledge and influence on behalf of and render his services to the other party to enable the latter to sell or exchange lands, for which the former is to be

paid an agreed sum of money as soon as the sale or exchange is effected, is "an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission" within the meaning of section 1624 of the Civil Code, requiring all such contracts to be in writing in order to be valid, and the admission in evidence of such oral contract, against proper objection thereto, in an action to recover for the services, is an error of law justifying an order granting a new trial, though granted upon other grounds not tenable. (Shanklin v. Hall, 100 Cal. 28.)

Auctions, effect of statute on. See Auctions, II.

4. Contract to Furnish Materials for Building.

8. A contract to cut, furnish, and deliver the stone work of a building according to the plans and specifications of the architects, is not a contract within the statute of frauds, where it appears that if the stone had been cut according to the specifications, and had not been used in the construction of the building, it would not have been available for other purposes, or have been salable in the general market. (Flynn v. Dougherty, 91 Cal. 669.)

9. Where the seller is to furnish materials and fashion them according to specifications furnished by the purchaser, or according to some model selected, and when, without the special contract entered into by the parties, the thing furnished would never have been put in the particular shape or condition in which it was furnished, the contract is essentially one for labor, and is not within the statute of frauds. (Flynn v. Dougherty, 91 Cal. 669.)

5. Agreement to Purchase at Execution for Debtor; Order Drawn on Trustee.

10. A verbal agreement was made by J. and B., who were two of several judgment creditors, with Bartram, an execution debtor, who owned a large amount of real and personal property, then under execution levy but still in Bartram's possession, the value of which exceeded the amount due on the executions by over one-half, to take into their immediate possession, in their own names, and to purchase all of said property at the sheriff's sale for the benefit of Bartram, and to advance their own money, and, when they should have repaid themselves out of the rents of the property and the sales, to reconvey the portions unsold. Held, that so far as the agreement contemplated the payment by J. and B. to be made from the proceeds, there was raised a resulting trust in favor of Bartram, and it was therefore not within the statute, and so far as the agreement contemplated the payment by J. and B. to be made from money to be advanced by J. and B., it was equivalent to a loan of money and the taking of the title as a security under such circumstances as would amount to a fraud upon Bartram if J. and B. should afterward be allowed to repudiate the agreement, and was, therefore, not within the statute. (Sandfoss v. Jones, 35 Cal. 481.)

Cited 38 Cal. 460; 75 Cal. 170; 77 Cal. 12, 93, 337; 80 Cal. 435; 87 Cal. 555; 88 Cal. 565, 566; 2 Mont. 592; 1 N. Dak. 84; 5 Utah, 253.

11. To allow J. and B., under such circumstances, to evade their promise, would be to enable them to practice a fraud upon Bartram, and convert a statute designed to prevent fraud into a shield for their protection. (*Sandfoes v. Jones*, 35 Cal. 481.)
Cited 74 Cal. 439; 75 Cal. 527.

12. If in such case J. and B. acted from the outset in bad faith, and entered into said agreement with the intent and for the purpose of defrauding Bartram, by betraying him into a false confidence, and thus to get possession of his property, such fraud on their part would, of itself, take the case out of the operation of the statute of frauds. (*Sandfoes v. Jones*, 35 Cal. 481.)

13. Where complaint charged that A was indebted to plaintiff, and had conveyed his property to B, to be disposed of for his benefit, and drew an order on B who had accepted it, the order of A on B is not void by the statute of frauds. The conveyance by the former to the latter was a sufficient consideration to support their promise. (*Lucas v. Payne*, 7 Cal. 92.)

6. Contracts for Sale of Personality.

14. A contract to sell and deliver at a future day one hundred shares of mining stock for the sum of thirteen hundred and fifty dollars is void, under the statute of frauds, if no part of the stock is delivered, and no portion of the purchase money is paid, and no note or memorandum of the sale or transaction is made or signed by the parties. (*Mayer v. Child*, 47 Cal. 142.)

15. An oral contract for the sale of wool, no part of the price being paid, and it appearing from the evidence that the buyer had not accepted any part of the wool, held, invalid under section 1739 of the Civil Code. (*Jamison v. Simon*, 68 Cal. 17.)

16. A contract for the sale of goods, for the price of two hundred dollars or over, is void; unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged therewith; or, unless the buyer shall accept or receive part of such goods; or, unless the buyer shall at the time pay some part of the purchase money. (*Bunting v. Beidman*, 1 Cal. 181.)

17. When the buyer accepts and receives the goods, a writing is not necessary. (*McMenomy v. Talbot*, 84 Cal. 279.)

7. Contracts not to be Performed Within a Year.

18. The statute does not declare void a contract which may not be performed within a year, or which is not likely to be performed within that period. It includes only agreements which, fairly and reasonably interpreted, do not admit of a valid execution within the year. (*Dougherty v. Rosenberg*, 62 Cal. 32.)
Cited 72 Cal. 309.

19. Agreement which may be performed within a year is not within the statute of frauds. The complaint alleged that the plain-

tiff, being about to commence separate suits against R. (defendant's testator), B. and H., for the enforcement of certain assessment liens against each of their several lots of land owned by them respectively, R. verbally promised plaintiff that, in consideration that the plaintiff would not bring the suit to enforce the lien against the lot owned by him, but would "altogether forbear" to bring such suit, and would commence and prosecute suits against B. and H. for the enforcement of the assessments against their lots respectively, and succeed in recovering final judgments in such suits against B. and H., he, the said R., would, upon such final recovery, pay to the plaintiff the amount of the assessment against the lot owned by him. Held, such agreement is not void under the provision of the statute of frauds requiring a writing for agreements that by their terms are not to be performed within one year from the making thereof. (*Dougherty v. Rosenberg*, 62 Cal. 32.)
Cited 72 Cal. 309.

20. The agreement of the plaintiff was "altogether," not "always," to forbear, and an agreement to refrain altogether for an indefinite time is not within the operation of the statute. (*Dougherty v. Rosenberg*, 62 Cal. 32.)

21. The promise of the plaintiff was "altogether" to forbear to bring suit to foreclose the lien against the lot of R. until he should recover final judgments against B. and H., events which might occur within the year. (*Dougherty v. Rosenberg*, 62 Cal. 32.)

22. Hoare and Hindley were partners in a band of cattle which were pastured on a public range. In June, 1889, they dissolved the partnership and corralled and divided all the cattle they could find, and agreed that Hindley should retain the partnership brand, and Hoare the partnership earmark, and that any cattle which had the partnership brand and earmark after the expiration of one year should belong to Hoare, and that, in the mean time, they should make divisions and alter the earmark of cattle coming to Hindley, and the brand of those coming to Hoare. Held, that all that was to be done under the contract was to be performed within one year, and that it was not, therefore, in violation of the statute of frauds. (*Hoare v. Hindley*, 49 Cal. 275.)

23. Agreement on dissolution of copartnership between attorneys that one will wind up the business and pay the other his share of the fees is not within the statute of frauds, although at the time it was made the partner did not expect that all the business would be wound up within a year. (*Osment v. McElrath*, 68 Cal. 466.)

24. A verbal contract, by which the plaintiff agrees to cut and deliver to the defendant, at the defendant's mill, saw-logs sufficient to keep the defendant's mill running to its full capacity for two years from its date, is not to be performed within one year, and is therefore void under the statute of frauds. (*Patten v. Hicks*, 43 Cal. 509.)
Cited 79 Cal. 535.

25. A verbal contract between the lender and borrower that money loaned is to be re-

paid when nut-bearing trees about to be planted on the borrower's farm yield an income sufficient to pay the same, over and above paying the expenses of the farm and of the borrower's family, is void under the statute of frauds, because the parties must have contemplated that more than one year would elapse before the time of payment would arrive. (*Swift v. Swift*, 46 Cal. 266.) Cited 93 Cal. 193.

26. Verbal contract between the plaintiff and the defendant, by which plaintiff was to pay installments of the price on defendant's contract of purchase from a railroad company and to take the contract in his own name as security, the defendant to repay the amount within a year, is not void under the statute of frauds, as it was originally to have been performed within one year, and where its subsequent extension for six months took place before the expiration of the year, and after that time was not of the essence of the contract. (*Ward v. Matthews*, 73 Cal. 13.)

Contract of leasing for indefinite period. See post, I, 10, f.

Contract to answer for debt of another to be performed in a year. See post, 28.

**8. Contracts to Answer for Debt, Default, or Mis-
carriage of Another, of Guaranty or Indemnity.**

27. A parol contract to answer for the debt of another is void. (*Luce v. Zeile*, 53 Cal. 54.)

28. By the statute of frauds, a promise to pay the debt of a third person must be in writing, though to be performed within one year. (*Gordon v. Ross*, 2 Cal. 156.)

29. A promise to pay a draft that may be drawn on the promisor by another person for a debt due by the drawer to the person to whom the promise was made, is void, unless in writing, and signed by the person making the promise. (*Wakefield v. Greenhood*, 29 Cal. 597.)

30. It is essential to the validity of contract to answer for the debt, default, or miscarriage of another that it, or some note or memorandum thereof, be in writing; that it express the consideration, and that it be subscribed by the party to be charged thereby. (*Ellison v. Jackson Water Co.*, 12 Cal. 542.)

31. A contract in writing agreeing to pay to the party of the second part such sums as he may afterward advance to a foreman of a toll-road company is not a promise to pay the debt of another, and not within the statute of frauds. (*Gradwohl v. Harris*, 29 Cal. 150.)

32. An agreement to pay a physician for his past attendance on a third person, rendered at the request of the latter, and also for his services to be rendered such person in the future, is a promise to answer for the debt of another, so far as the past services are concerned, and must be in writing. (*Flournoy v. Van Campen*, 71 Cal. 14.)

33. Defendant, upon the purchase of certain land from B, agreed with him in writing, as part of the consideration, to pay to plaintiff a debt then due the latter from B. Plaintiff afterward assented to the arrangement, and

verbally agreed with defendant to look to him for his debt and release B. Held, that this agreement was not within the statute of frauds, and gave plaintiff a right of action against defendant for the debt. (*McLaren v. Hutchinson*, 22 Cal. 187.) Cited 77 Cal. 44.

34. Where a defendant entered into a contract with a builder for the construction of a brick house, and the builder applied to the plaintiffs, who were proprietors of a brickyard, for the sale of the necessary brick, and the defendant said to the proprietors, to induce the sale, that he would become responsible for all the brick furnished his building, and whatever contract or agreement was made with the builder he would see carried out, or would pay for the brick if the builder did not, held, that the promise of the defendant was within the statute of frauds. (*Clay v. Walton*, 9 Cal. 328.) Cited 12 Cal. 553.

35. Such a promise is conditional, and dependent upon the default of another. If there is any doubt as to its import, the court will look to all the circumstances of the case to ascertain the intention of the parties. (*Clay v. Walton*, 9 Cal. 328.)

36. Wherever the leading object of the promisor is not to become surety or guarantor of another, but to subserve some interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another. (*Clay v. Walton*, 9 Cal. 328.)

37. The mere fact that the debt guaranteed was for brick to be used in the building of the guarantor does not show such an object in the promise of the guarantor. (*Clay v. Walton*, 9 Cal. 328.)

38. The interest which a promisor has in the performance of a contract by another, or the benefit which he may derive thereby, cannot determine his liability. That liability arises from the character of the promise; and the interest in the principal contract, and the benefit to be derived from it, become matters of consideration only as they may serve to determine that character. (*Clay v. Walton*, 9 Cal. 328.)

39. E. contracted with J. W. to construct an extension to a ditch, and, after the ditch was completed, was to be paid out of the sales of water. At the time of the execution of the contract B. held a mortgage upon the ditch. After E. had partly completed his work, B's mortgage fell due, and he brought an action to foreclose it, and had a receiver appointed to receive the water rents of the ditch. E. refused to go on and complete the work. B. agreed with E. that if he would go on and complete the work, he should be paid out of the receipts from the sale of water by the receiver. Under this promise E. completed the work. Held, that this is an undertaking to answer for the debt, default, or miscarriage of another, and is therefore within the statute of frauds. (*Ellison v. Jackson Water Co.* 12 Cal. 542.) Cited 75 Cal. 489.

40. The provision of the statute of frauds

which requires the promise to pay the debt of another to be in writing, expressing the consideration, does not apply to the promise of A to pay money he owes by contract with B, to C. This is paying A's own debt, and creating his own obligation, not assuming another's. (*Barringer v. Warden*, 12 Cal. 311.)

41. Guaranty not under seal nor expressing consideration made contemporaneously with the contract guaranteed is a part of that contract, and the expression of the consideration in the contract takes the guaranty out of the statute of frauds. (*Jones v. Post*, 6 Cal. 102.)

Cited 7 Cal. 34; 16 Cal. 153; 27 Cal. 83; 34 Cal. 675; 38 Cal. 135.

42. Contract of guaranty on note is not within the statute of frauds for want of a consideration in writing. (*Biggs v. Waldo*, 2 Cal. 435.)

43. The promise of a guarantor, when made before the delivery of the note, is not within the statute of frauds. (*Ford v. Hendricks*, 34 Cal. 673.)

Cited 50 Cal. 257.

44. It is well settled in this state that the promise of a guarantor of a note is not within the statute of frauds if made before the delivery of the note. (*Howland v. Aitch*, 38 Cal. 133.)

Cited 50 Cal. 257; 4 Utah, 352, 353.

45. But that fact is not the test as to whether the guaranty is an original contract or not. The true test is, Were the promises of the principal debtor and of the guarantor parts of one and the same original transaction? Thus, where, three days after the execution and delivery of a promissory note from A. to H., T. indorsed thereon, in pursuance of a previous agreement, "I guarantee the payment of the within note," upon the faith of which previous agreement H. had sold and delivered to A. certain horses, held, that said indorsement was not within the statute of frauds. (*Howland v. Aitch*, 38 Cal. 133.)

46. A executed a lease to B, and at the time of the execution C wrote underneath it, "I hereby agree to pay the rent stipulated above, when it shall become due, provided the said B does not pay the same." Held, that the agreement of C being added as an agreement running with the lease, and executed at the same time, it must be considered as a part of the lease itself, and not within the statute of frauds. (*Evoy v. Tewksbury*, 5 Cal. 285.)

Cited 7 Cal. 34; 27 Cal. 83; 34 Cal. 675; 38 Cal. 135.

47. The statute requires the written agreement to answer for the debt of another to express the consideration upon which it is made; but where the agreement is executed at the same time as the lease, and forms the consideration for the execution, it is not a promise to answer for the debt of another, but must be considered as an original undertaking, and as a promise made, upon the strength of which another was enabled at the time to obtain possession of property and enjoy its use. (*Evoy v. Tewksbury*, 5 Cal. 285.)

48. Where one wrote a guaranty on a lease

at the time of its execution, such a transaction is not embraced within the statute of frauds, as the credit given by the written guaranty of the third party is the consideration upon which the transaction is closed. (*Evoy v. Tewksbury*, 5 Cal. 285.)

49. An indorsement made by a third person on a contract entered into between two parties, and made simultaneously with the contract, by which the indorser, without expressing any consideration received, agrees that the undertaking of one of the contracting parties shall be fulfilled, is an original and not a collateral promise of the indorser to answer for the debt of another, and not within the statute of frauds. (*Otis v. Haseltine*, 27 Cal. 80.)

Cited 34 Cal. 675; 38 Cal. 135, 136.

50. By such act the indorser makes the contract his own, and the consideration therein expressed becomes the consideration of his promise. (*Otis v. Haseltine*, 27 Cal. 80.)

51. The defendants were sureties on an undertaking to stay execution on an appeal from a judgment of a justice's court. The appeal having been dismissed, they requested the plaintiff, a constable, to levy execution upon and sell certain personal property which they represented belonged to the judgment debtor, and verbally promised to indemnify him for any damage he might sustain by reason of the levy and sale, should they prove to be wrongful. The plaintiff, in consideration of such promise, levied upon and sold the property and thereby satisfied the judgment. Held, that the promise was founded upon a sufficient consideration, and was not within the statute of frauds. (*Lerch v. Gallup*, 67 Cal. 595.)

Cited 70 Cal. 557.

52. Where a sheriff seized and sold a wagon on execution in favor of R., who pointed out the wagon, requested the sheriff to seize it, and verbally agreed to hold him harmless, etc., held, in suit by the sheriff against R. for damages recovered against the sheriff for the seizure, that the agreement to indemnify is valid; that it was not a "special promise to answer for the debt, default, or miscarriage of another," within the statute of frauds, because the sheriff was acting not for himself, but as agent of R., and the promise was to be responsible for his acts as such agent. (*Stark v. Raney*, 18 Cal. 622.)

Contract to assume indebtedness need not be written, when. See *Husband and Wife*, 404.

Defense that guaranty should be written, pleading. See *Guaranty*, 26.

Agreement to pay another's debt within statute of frauds. See *Contracts*, 20.

Debtor need not sign agreement not to sue. See *Statute of Limitations*, 260.

9. Judicial Sales; Miscellaneous Contracts.

53. A sale of property, under an order of the probate court, is a judicial act, and therefore not within the statute of frauds. (*Hal-leck v. Guy*, 9 Cal. 181.)

Necessity of writing in contract for interest. See *Interest*, V.

Married woman's contract, necessity of writing. See *Husband and Wife*, III, 8.

Necessity of writing on contract of novation. See Novation, 2.

Verbal agreement of partnership. See Partnership, III.

Parol contract of insurance. See Insurance, I, 2.

Oral contract to make will. See Wills, III.

Assignment of insurance policy, necessity of writing. See Insurance, 71.

Statute does not apply to assignment when. See Assignments of Contracts, 16.

Contract for extension of time and extra work need not be written. See Building Contracts, 28.

Mortgage of vessel, validity of, under. See Shipping, 37.

Parol contract for sidewalk. See Streets, 42.

Verbal contracts of railroad company. See Railroads, 103.

Verbal agreement between husband and wife as to earnings. See Husband and Wife, 176.

Parol promise to pay discharged debt. See Bankruptcy and Insolvency, 362.

Ratification of pledge by one not owner on consideration of forbearance is not within. See Pledges, 23.

10. Contracts Relating to Real Property.

a. Construction of Statute.

54. The provisions of the sixth section of chapter 1 of the statute of frauds relate exclusively to contracts in respect to real estate. (*Sandfoss v. Jones*, 35 Cal. 481.)

b. Oral Contracts for Sale or Reconveyance, Effect of Under Mexican or Spanish Law.

55. Unwritten contract for sale of land is void by express declaration of the statute of frauds, and a court of equity has no power to enforce a specific performance of it. (*Abell v. Calderwood*, 4 Cal. 90.)
Cited 8 Cal. 433; 9 Cal. 196; 10 Cal. 158.

56. A verbal contract for the sale of real property or for an interest herein is invalid. (*Hall v. Wallace*, 88 Cal. 434.)

57. In case of a sale of land, a verbal agreement made by the vendee when he receives the conveyance, to reconvey the land to the vendor if he does not pay the purchase money when demanded by the vendor, is void under the statute of frauds. (*Gallagher v. Mars*, 50 Cal. 23.)
Cited 76 Cal. 471.

58. An agreement for the conveyance of land, resting solely in parol, is void by the Mexican law. (*Hoen v. Simmons*, 1 Cal. 119.)
Cited 1 Cal. 211; 7 Cal. 158, 490; 14 Cal. 608.

59. Contracts for the sale of land were, under the Mexican law, and by the custom of California, required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain the names of the parties, the thing sold, the date of the transfer, and the price paid. (*Stafford v. Lick*, 10 Cal. 12.)
Cited 26 Cal. 469.

60. A mere parol agreement for the conveyance of land made before the adoption of the common law and the re-enactment of the statute of frauds in this state, is void, there being neither delivery of possession nor of title deeds, and no part payment of the purchase money. (*Harris v. Brown*, 1 Cal. 98.)
Cited 1 Cal. 121.

61. Verbal contract, of itself alone, was insufficient under Mexican law to transfer the title to real estate; but where there was a verbal contract of sale in presenti, and the title deeds were delivered by the vendor to the vendee, and permission given to the vendee to enter upon and take possession of the land, and the vendee did, accordingly, take possession and make valuable improvements on the premises, held, that a specific performance of the verbal contract should be decreed. (*Tohler v. Folsom*, 1 Cal. 207.)
Cited 7 Cal. 490.

62. A parol sale of real estate, made in California while the laws of Mexico were in force here, if fully executed, was valid, and passed the title to the vendee. (*Hall v. Yoell*, 45 Cal. 584; *Cook v. Frink*, 44 Cal. 331, cited 45 Cal. 587.)

63. Under the Spanish law, contracts for the sale of real estate rest upon the same footing with those relating to personal estate, and may be by parol or otherwise, at the option of the parties. (*Long v. Dollarhide*, 24 Cal. 215.)
Cited 44 Cal. 332; 45 Cal. 587.

64. As a general proposition it may be stated that under the Spanish law a sale of real estate by parol would not be void per se, and that the distinction between parol contracts and specialties, known to the common law, does not exist under the civil law, or the Mexican system of jurisprudence heretofore in force here. (*Hayes v. Bona*, 7 Cal. 153.)
Cited 10 Cal. 17; 12 Cal. 166; 26 Cal. 469.

c. Agreement to Convey Interest in or Locate Mine.

65. A gold mine is real estate, and an interest therein, other than an estate at will or for a term not exceeding one year, can be transferred only by an instrument in writing. A verbal sale is not good. (*Melton v. Lam-bard*, 51 Cal. 258.)
Cited 73 Cal. 544; 3 Mont. 19.

66. An agreement to locate and develop a mining claim for the joint benefit of the parties need not be in writing; and if, in pursuance of the agreement, one of the parties locates the claim in his own name he holds the legal title to the interest of the other in trust for him. (*Moritz v. Lavelle*, 77 Cal. 10.)

Verbal authority to locate claims is sufficient. See Mines and Mining, 109.

d. Contract for Exchange of Real Estate.

67. Agreement in writing for mutual conveyance of land in exchange is not void under the statute of frauds. (*Brennan v. Ford*, 46 Cal. 7.)

Executed verbal agreement of exchange. See post, 102.

e. Gifts of Land.

68. The action was brought to recover the possession of certain land to which the defendant claimed to be entitled under a parol gift from her father-in-law. At the time of the gift the defendant was in possession of the premises, and subsequently so continued, without making any improvements thereon, until the house in which she resided was destroyed by fire. After the fire, and subsequent to the death of the donor, the person to whom the land was distributed upon the settlement of his estate, without objection from the defendant, erected a new house thereon, of which the defendant surreptitiously took possession. The gift was made upon an understanding that the defendant would continue to support and educate her minor child. Held, that the gift was void under the statute of frauds, and that the defendant had acquired no equitable rights which could prevail against the legal title. (*Anson v. Townsend*, 73 Cal. 415.)
Cited 77 Cal. 317.

f. Contracts of Leasing.

69. A lease of real estate until such time as the lessor should pay the lessee a certain indebtedness is neither an agreement that by its terms is not to be performed within a year from the making thereof, nor an agreement for a leasing for a longer period than one year, and is not required to be in writing. (*Raynor v. Drew*, 72 Cal. 307.)

70. Lease for two years, executed by the lessees and by the agent of the lessors, but who has no written authority to do so, is within the sixth section of the statute of frauds, and void. (*Folsom v. Perrin*, 2 Cal. 603.)

Part performance of parol agreement to execute lease longer than a year. See post, II.

Rights under void contract of leasing. See post, II.

Surrender of lease must be written. See Landlord and Tenant, 265, 266.

g. Boundaries or Improvements, Contracts Concerning; Releases of Equitable Interests.

71. Agreements between coterminous proprietors as to boundaries are not within the statute of frauds, because they are not considered as extending to the title. They do not operate as conveyances so as to pass title from one to the other, but proceed upon the theory that the true line of separation is in dispute, and to some extent unknown, and in such case the agreement serves to fix the line to which the title of each extends. (*White v. Spreckels*, 75 Cal. 610.)

Parol agreement as to boundaries. See Boundaries, 18, et seq.

72. A parol promise to pay for improvements made upon land is not within the statute of frauds. (*Godeffroy v. Caldwell*, 2 Cal. 499.)

73. A release of an equitable estate in land can only be proved by a deed of conveyance, in writing, subscribed by the party granting

the same, or by his lawful agent thereunto authorized by writing. (*Millard v. Hathaway*, 27 Cal. 119.)
Cited 9 Or. 152.

h. Agreements Concerning Ditches or Use of Water.

74. Absolute interest as tenants in common in ditch and water right is an estate in real property; and an agreement by which such interest is to be acquired is within the statute of frauds, and cannot be proved except by some note or memorandum thereof in writing. (*Hayes v. Fine*, 91 Cal. 391.)

75. When a right of way for a ditch across the land of the grantor is conveyed to a grantee, without further written agreement, a verbal contract for the use of a certain quantity of the water to be taken from the ditch, at a certain price, and used perpetually for irrigating the grantor's land, is within the statute of frauds, and cannot create a servitude or easement upon the ditch property or constitute an irrevocable license, or justify the diversion of the water by the successor in interest of the grantor. (*Dorris v. Sullivan*, 90 Cal. 279.)

Sale of ditch must be by deed. See Watercourses, XII, 11.

Verbal contract for the use of water. See Watercourses, XIV, 2, a.

i. Growing Crops, Agreements for Sale of.

76. Contracts for the sale of growing periodical crops, *fructus industriales*, are not contracts for the sale of an interest in land within the meaning of the statute of frauds, and need not be in writing in order to be valid. (*Davis v. McFarlane*, 37 Cal. 634, cited 77 Cal. 240, 2 Mont. 443; *Marshall v. Ferguson*, 23 Cal. 65, cited 37 Cal. 636, 77 Cal. 240; *Vulicevich v. Skinner*, 77 Cal. 239.)

77. Growing periodical crops are not goods and chattels, within the meaning of the statute of frauds, of which a lien, in order to be valid as against the creditors of the vendor, must be accompanied by an immediate delivery and continued change of possession. (*Davis v. McFarlane*, 37 Cal. 634.)
Cited 57 Cal. 255.

Sale or mortgage of growing crops. See Growing Crops.

j. Agreement to Purchase for Another, or Advance Money for Another's Purchase.

78. Whether the sixth section of the statute of frauds does not apply alone to the sale of lands as between grantor and grantee, and not to contracts for the purchase of land by one person for the benefit of another, query? (*Bayles v. Baxter*, 22 Cal. 575.)
Cited 35 Cal. 487.

Agreement to purchase and hold in trust for another. See post, IV.

Creditor's agreement to purchase on execution for benefit of debtor. See ante, I, 5.

79. An oral agreement under which the defendant advanced money for the plaintiff to pay certain installments upon a contract for the purchase of land, the defendant being named in the contract as the purchaser, but really acting for the plaintiff in pursuance of the agreement, held, to be valid, and not

within the statute of frauds. (*Walton v. Karnes*, 87 Cal. 255.)
Cited 73 Cal. 16.

Agreement to pay installments on purchase of another. See ante, I, 7.

k. Agreement Regarding Proceeds on Resale by Vendee.

80. An oral agreement made at the time of the transfer of real estate, and in consideration of the transfer, that upon a sale of the property by the grantee there should be deducted from the price of the resale the amount of advances made by the grantee to redeem the property from a sale under foreclosure against the grantor, and the amount of any further advances made by the grantee for taxes and assessments, with interest on all advances at a specified rate, and that the residue of the proceeds from the sale should be paid to the grantor, is not an agreement for the sale of real property, or of an interest therein, within the statute of frauds, but is merely for the payment of money agreed on as the consideration of the conveyance, which is not within the statute; and assumption will lie for the surplus proceeds resulting from a resale under the terms of the agreement. (*Byers v. Locke*, 93 Cal. 493.)

81. A verbal agreement made by a grantee, when he buys land and receives a deed therefor, to pay the grantor a further sum of money as a part of the price, out of the proceeds of the sale of the land when he sells it, is valid, and the statute of frauds does not require it to be in writing. (*Price v. Sturgis*, 44 Cal. 591.)
Cited 93 Cal. 496.

82. Such contract is not for the conveyance of land, but for the payment of a certain sum of money upon the happening of a certain event. (*Price v. Sturgis*, 44 Cal. 591.)

l. Oral Modification of Written Contract; Miscellaneous Agreements Concerning Realty.

83. Unexecuted oral agreement altering or modifying written contract for the sale of lands is void under section 1698 of the Civil Code, and a subsequent oral agreement for the sale of lands, made after a written agreement for such sale had ceased and determined by its own terms and by the acts of the parties under it, must stand or fall by itself, and is void under section 1624 of the Civil Code. It is not error to exclude evidence of such oral agreement. (*Smith v. Taylor*, 82 Cal. 533.)

Parol agreement to alter lease. See *Landlord and Tenant*, 233.

Extension of time on parol contract beyond year. See ante, I, 7.

Unsealed bill of sale of land, validity of. See *Seals*.

Deed to funding debt commissioners is void within. See *San Francisco*, 179.

Parol agreement of partition. See *Partition*, IV.

Agreement to form partnership to deal in realty, necessity of writing. See *Partnership*, V.

Writing, necessity of, to mortgage. See *Mortgages*, III, 1.

Release from mortgage must be written. See *Mortgages*, 474.

Writing, necessity of to create easement. See *Easements*, II, 1.

Conveyance of land to partners when not void under. See *Partnership*, 181.

II. Part Performance; Effect of Statute on Executed Agreements.

84. The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, in an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendants, instead of filing a bill in equity, is to require the court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and, on the other hand if it should refuse the relief, it would call a jury to determine the issue upon the general denial. (*Arguello v. Edinger*, 10 Cal. 150.)

Cited 19 Cal. 273, 457, 671; 24 Cal. 141; 35 Cal. 649; 83 Cal. 180, 181; 5 Dak. 504; 4 Nev. 466.

85. Part performance of parol agreement to execute a written lease of land for more than one year takes the agreement out of the operation of the statute of frauds. (*McCarger v. Rood*, 47 Cal. 138.)
Cited 81 Cal. 208; distinguished 52 Cal. 565.

86. A party who claims a right to a conveyance of land under a parol contract on the ground of part performance must make out by clear proof the agreement as alleged; and the acts of performance proved must be unequivocal evidence of such agreement, and the agreement must be certain in its terms, and just and fair in all its parts. (*Blum v. Robertson*, 24 Cal. 127.)
Cited 39 Cal. 301; 64 Cal. 26; 89 Cal. 286.

87. Nothing can be regarded as a part performance to take the case out of the operation of the statute which does not place the party in a situation which is a fraud upon him unless the contract be executed. (*Weber v. Marshall*, 19 Cal. 447; *Arguello v. Edinger*, 10 Cal. 150, cited 19 Cal. 461, 22 Cal. 616, 24 Cal. 176, 84 Cal. 253, 17 Or. 480, 18 Or. 505.)

88. Acts which deed gives grantee a right to do, and which are done under the deed, do not make a case of part performance of an oral agreement for a trust. (*Feeney v. Howard*, 79 Cal. 525.)

89. Taking possession is held such act of part performance, as the party might be treated as a trespasser if he could not invoke the protection of the contract. And if, upon the faith of the contract, the purchaser should proceed to make valuable improvements, the most palpable fraud would be perpetrated if the vendor were permitted to withdraw from its execution. (*Arguello v. Edinger*, 10 Cal. 150.)

90. The taking of actual possession of the

land by a vendee, with the consent of the vendor, and making valuable improvements thereon on faith of the contract, is a sufficient part performance of a verbal contract for the sale of the land to take it out of the operation of the statute of frauds. (*Moulton v. Harris*, 94 Cal. 420.)

91. A verbal contract for the sale of land is taken out of the operation of the statute of frauds, and will be specifically enforced, when there has been a part performance of the contract by the taking of actual possession of the land by the vendee with the consent of the vendor, or by the making of valuable improvements upon the land on the faith of the contract. (*Calanchini v. Branstetter*, 84 Cal. 249.)
Cited 94 Cal. 421.

92. Where a verbal contract for the sale and purchase of land rests not upon proof of any payment of purchase money, but upon proof of the contract and possession by the party purchasing, and improvements made by him, it must clearly appear that the improvements were made with reference to, or were induced by, the contract. (*Weber v. Marshall*, 19 Cal. 447.)

93. When a purchaser of real property, under a verbal agreement, pays the entire consideration of the purchase, enters into the possession of the property, and expends large sums of money upon it in its improvement, there is exhibited such a state of facts as will take the case out of the operation of the statute of frauds. (*Hoffman v. Fett*, 39 Cal. 109.)

94. The payment of part of the purchase price of a tract of land, in pursuance of an oral contract for the purchase and sale thereof, and its use in cutting and removing stove wood therefrom for family use, without an actual change of possession of the land or the erection of improvements upon the premises, is not such a part performance as will take the case out of the statute of frauds and warrant a court of equity in decreeing specific performance of the contract. (*Fulton v. Jansen*, 99 Cal. 587.)

95. K. entered into a parol contract with L. to convey to L. a tract of land upon the payment of a stipulated price therefor. L. paid the price as stipulated, and was let into possession. Thereafter K. brought ejectment to recover the possession of said land, to which action L. pleaded said contract and its said part performance, and prayed judgment for its complete performance on the part of K. Held, that a judgment for L. as prayed was properly rendered. (*King v. Meyer*, 35 Cal. 646.)

96. Under a verbal contract of sale of real estate, the delivery of the title deeds is equivalent to a symbolical delivery of, and admission into, possession of the property, as between vendor and vendee, whatever might be its effect in conferring actual possession, in case the rights of third persons were concerned. (*Tohler v. Folsom*, 1 Cal. 207.)

97. If the plaintiff delivered his conveyance on condition that the defendant convey to the plaintiff, and such delivery was made to the defendant's agent, who was not authorized to accept it, and the defendant thereupon refused

to accept it, or to make the exchange orally agreed upon, there is no part performance sufficient to take the agreement out of the statute of frauds. (*Swain v. Burnette*, 89 Cal. 564.)

98. An oral contract for the sale of land, accompanied by the delivery of a deed therefor in escrow, is not within the statute of frauds. (*Cannon v. Handley*, 72 Cal. 133.)

99. Marriage is not of itself part performance of a parol contract to convey real property, in consideration of the marriage, sufficient to take the case out of the statute. (*Peek v. Peek*, 77 Cal. 106.)

100. If the marriage was brought about by a fraudulent contrivance, as by a promise to have the conveyance executed, and the evasion of such promise by false representations, a court of equity will decree a conveyance. (*Peek v. Peek*, 77 Cal. 106.)

Mexican law, contract for sale of realty under. See ante, 61.

Performance of contract within. See Partnership, 39.

Mutual promises take case out of. See Contracts, 25.

Part performance, taking case out of. See Contracts, 124.

101. The statute of frauds has no application to an executed agreement. (*Bates v. Babcock*, 95 Cal. 479.)

102. Verbal agreement for an exchange of real property which has been carried into effect by the execution of proper conveyances, in pursuance of the agreement, is not void under the statute of frauds. (*Ryan v. Tomlinson*, 39 Cal. 639.)

103. Where plaintiff made a parol contract for the purchase of land, and subsequently by parol agreed with defendant to permit him to become the purchaser in his stead, and, in pursuance of this agreement, and by direction of plaintiff, the land was conveyed to defendant, held, that in an action to recover the value of the assignment, the defendant could not rely upon the statute of frauds. (*McCarthy v. Pope*, 52 Cal. 561.)
Cited 93 Cal. 496.

104. Although the statute requires a contract for the sale of land to be in writing, yet, if in pursuance of a parol contract the land is conveyed, there is nothing immoral about the transaction. (*McCarthy v. Pope*, 52 Cal. 561.)

105. Had the owner refused to convey to defendants, a conveyance could not have been enforced, and the contract would be inoperative. But the contract having been executed, the statute of frauds cuts no figure between plaintiff and defendant. (*McCarthy v. Pope*, 52 Cal. 561.)

Mexican law, executed agreement for sale of realty under. See ante, I, 10, b.

Execution of agreement void under, effect of. See Partnership, V.

III. Memorandum.

106. To take a contract for the sale of lands out of the statute of frauds (c. 1, sec. 8), a mere note or memorandum in writing, subscribed by the vendor or his agent, containing the names of the parties and a summary

statement of the terms of the sale, either expressly or by reference to something else, is all that is required. The note or memorandum required by the statute may be something different and less specific than the contract of sale itself, and may be valid under the statute, although insufficient as part of a pleading declaring on the contract of which it is the evidence. (*Joseph v. Holt*, 37 Cal. 250.)

107. A written memorandum of a contract for the sale of real property, which contains the names of the parties, and the price, and gives a complete description of the property, and is subscribed by the party to be charged, is sufficient to satisfy the statute of frauds, although not subscribed by the party seeking to enforce it. (*Cavanaugh v. Casselman*, 88 Cal. 543.)

Cited 89 Cal. 589.

108. A contract which purports on its face to be inter partes need not invariably be signed by all parties named in the contract, in order to become operative; and in the absence of a showing that the contract was not to be deemed complete until other signatures should be added, the parties signing it will be holden thereon. (*Cavanaugh v. Casselman*, 88 Cal. 543.)

Cited 94 Cal. 94.

109. The execution of a written agreement for the sale of land by the vendor, and its delivery to the vendee and acceptance by him, creates an obligation upon the vendor, which is a sufficient consideration to make a verbal agreement on the part of the vendee to pay the purchase price of the land binding upon him, though the agreement purports to be inter partes, and the vendee failed to sign it. (*Cavanaugh v. Casselman*, 88 Cal. 543.)

Cited 90 Cal. 312.

110. The statute of frauds only requires that the memorandum in writing for the sale of land shall be signed by the vendor or his agent. It need not be signed by the vendee, and need not be a specialty; and the power to an agent to make it may be given verbally. (*Rutenberg v. Main*, 47 Cal. 213.)

Cited 72 Cal. 144.

111. A written memorandum of a contract, whereby a vendor agrees to sell to a purchaser real estate for a specified sum, which sufficiently describes the property, need only be signed by the vendor, to render it valid and binding as against him. (*Dennis v. Strassburger*, 89 Cal. 583.)

112. The memorandum will bind the vendor if signed by him, although not signed by the purchaser, and its execution and delivery by the vendor to the purchaser is a sufficient consideration for a promise by the purchaser to pay the agreed purchase price of the land. (*Easton v. Montgomery*, 90 Cal. 307.)

113. The memorandum will bind the vendor if signed by him, though not signed by the purchaser, and the payment of the deposit by the purchaser is a sufficient acceptance by him of the terms of the contract. (*Benson v. Shotwell*, 87 Cal. 49.)

114. Where the terms of a verbal contract are reduced to writing, but the written paper

is neither signed nor delivered, the contract will be deemed inchoate and incomplete, and neither party will be bound by it. (*Hoen v. Simmons*, 1 Cal. 119.)

115. A deed of land signed by the grantor, in pursuance of an oral agreement for the exchange of lands, but which is not delivered, and is not shown to have contained a memorandum of the oral agreement for the exchange of lands, cannot be regarded as a sufficient memorandum of such oral agreement to take it out of the statute of frauds. (*Swain v. Burnette*, 89 Cal. 564.)

116. A letter signed by the owner of land and addressed to A, stating that he has agreed with B to sell B the land, and giving the general terms of the agreement, with a general description of the land and its price, is a sufficient memorandum of a contract for the sale of the land within the statute of frauds, and may be enforced by B in equity. (*Moss v. Atkinson*, 44 Cal. 3.)

Cited 77 Cal. 282.

117. Letters written by the owner of real estate in regard to a negotiation between the parties for an exchange of land, which do not purport to state the terms of any completed agreement, but are simply a rejection of the proposition to make the exchange, do not constitute a sufficient memorandum of an agreement for the exchange to satisfy the statute of frauds. (*Swain v. Burnette*, 89 Cal. 564.)

118. Where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds. (*Happe v. Stout*, 2 Cal. 460.)

119. A contract to sell "forty acres of the eighty acre tract at Biggs" is sufficiently certain to satisfy the statute of frauds where it appears from the evidence that the vendors at the date of the contract sold the western half of the tract to another purchaser by a contemporaneous agreement clearly specifying the part sold, leaving only the eastern half of the tract as the subject matter of the sale in controversy. (*Preble v. Abrahams*, 88 Cal. 245.)

120. A written memorandum describing the land sold, and stating that it was all sold to a purchaser named for value received, and signed by the vendor, with two sets of figures prefixed, without a dollar-mark, the first of which is shown by parol evidence to denote a total sum of money due from the vendor to the purchaser, of which the land was part payment, and the second a certain other sum which still remained due after the price of the land was deducted, and another memorandum, made at the same time, showing the same balance due to the purchaser, in figures, with the dollar-mark prefixed, and appending after the signature of the vendor a reference to each tract of land sold, with figures annexed, which were shown to denote the agreed price of each tract, and the sum of which corresponds to the difference between the sets of figures prefixed to the first memorandum, constitute, when taken together, sufficient memoranda to satisfy the statute of frauds; and parol evidence is admissible to explain the figures in such written memoranda. (*Mann v. Higgins*, 83 Cal. 66.)

121. A memorandum in writing, made by an agent for the sale of the land of the principal, which declares that the agent has sold the land on account of the principal, and which is signed by the agent as attorney in fact for the principal, is sufficient in form, and is executed in such a manner as complies with the statute of frauds. (*Rutenburg v. Main*, 47 Cal. 213.)

What to contain under Mexican law. See ante, 59.

On contract to answer for debt of another. See ante, I, 8.

Memorandum by auctioneer. See Auctions, II.

IV. Who Cannot Invoke; Effect of in Cases of Fraud and Trust.

122. Mere intruder on real property having no privity with the former owner cannot invoke the aid of the statute of frauds for the protection of such owner. (*Ryan v. Tomlinson*, 39 Cal. 639.)

123. The statute of frauds will never in equity be allowed to operate as a protection to fraud, and for the purpose of showing that a fraud has been committed, or is being attempted, parol evidence will be admitted, even against the words of the statute. (*Hidden v. Jordan*, 21 Cal. 92.)

Cited 35 Cal. 488, 489.

Fraud, effect of on statute. See ante, I, 5.

124. An oral contract for the purchase of real estate to be held in trust is invalid under the statute of 1858, section 6, page 266. (*Donohoe v. Mariposa etc. Co.*, 66 Cal. 317.)

Agreements to purchase for another. See ante, I, 10, j.

125. In cases of constructive trusts, that is to say, trusts arising from either actual or constructive fraud, the statute of frauds is not a bar to relief. (*Brisson v. Brisson*, 75 Cal. 525.)

126. The statute of frauds has no application when a trust sought to be enforced against an agent is not an express trust, but a constructive one, arising from the conduct of the agent, and the confidential relation in which he stood to the plaintiff. (*Mallagh v. Mallagh*, 77 Cal. 126.)

127. Where resulting trust exists, the statute of frauds has no application. (*Walton v. Karnes*, 67 Cal. 255, 256.)

Resulting trust is not within statute. See ante, I, 5; I, 10, j.

Trust, oral, agreement for part performance, what is not. See ante, 88.

Sufficiency of contract under, estoppel to deny. See Estoppel, 70.

V. Contracts Partly Void.

128. If part of entire contract is void under the statute of frauds, it is void in toto. (*Fuller v. Reed*, 38 Cal. 99.)

Whole contract void where part void. See ante, 6.

VI. Remedies on Contract Void Under.

129. In case where one orally agrees to pay another a certain sum for services in effecting

a sale, the injured party has no remedy at law upon the contract; he may, however, disaffirm the contract, and maintain his action to recover back the money paid, or the value of the services rendered. (*Fuller v. Reed*, 38 Cal. 99.)

130. For labor and services performed under a contract, which is void under the statute of frauds, a recovery may be had by declaring a quantum meruit, but not by declaring on the contract itself. (*Patten v. Hicks*, 43 Cal. 509.)

131. Although a contract between the borrower and lender of money, as to the time of its payment, may be void under the statute of frauds, yet, as the borrower has the lender's money, the law presumes a promise that he will repay it on demand. (*Swift v. Swift*, 46 Cal. 266.)

132. If the declaration for rent had contained a count for use and occupation, query? (*Folsom v. Perrin*, 2 Cal. 603.)

Rights of vendee where contract void under statute of frauds. See Vendor and Vendee, III.

Parol agreements, enforcement of. See Specific Performance, IV, 12.

Assignment of contract void under is no consideration. See Assignments of Contracts, 41.

VII. Pleading and Walver of; Presumption as to Contract Being Written.

133. If an agreement, to be valid, must have been in writing, then the allegation that it was so agreed implies that it was so agreed in writing. (*Curtiss v. Aetna L. Ins. Co.*, 90 Cal. 245.)

134. A complaint on a contract within the statute of frauds need not allege that such contract was in writing. It will be presumed on demurrer to have been in writing. (*McMenomy v. Talbot*, 84 Cal. 279.)

135. An allegation that a contract was made, without stating whether or not it was in writing, will be construed to mean that the contract was in writing if the law requires it to be so. (*Barnard v. Lloyd*, 85 Cal. 131.)

136. A complaint on an agreement required by the statute of frauds to be in writing need not allege that it was in writing; and, where the complaint is silent as to the form of the agreement, it will be presumed, on demurrer, to have been in writing. (*Broder v. Conklin*, 77 Cal. 330.)

Cited 90 Cal. 250.

137. An agreement which is required by statute to be in writing, if in other respects properly pleaded, will be presumed, for the purpose of testing the sufficiency of the pleading, to have been in writing. The exception to the rule arises only in cases where the agreement must necessarily be in writing to confer jurisdiction on the court. (*Reagan v. Justice's Court*, 75 Cal. 253.)

138. It is not necessary, in the pleading of a contract within the statute of frauds, to aver that the contract was in writing, and this rule applies as well to a cross-complaint as to a complaint upon such contract. (*Nunes v. Morgan*, 77 Cal. 427.)

139. The ordinary rule that where it is alleged that a contract was made for the sale of lands it will be assumed, if nothing else appears, that the agreement was in writing, does not apply, when it is expressly stated in the answer and cross-complaint of a defendant who is sued for the recovery back of purchase money paid upon a written contract of sale, on account of a failure of title, that a portion of the contract which he seeks specifically to enforce was a parol agreement made subsequent to the written agreement sued upon. (*Smith v. Taylor*, 82 Cal. 533.)

Presumption that contract written. See *Contracts*, V, 3, a.

140. A plaintiff's recovery cannot be barred by the statute of frauds, unless the statute be pleaded. (*Osborne v. Endicott*, 6 Cal. 149.) Cited 6 Cal. 358; 77 Cal. 336; 1 Idaho, N. S., 259.

141. It seems that a defendant relying upon the defense of the statute of frauds must plead it. (*Broder v. Conklin*, 77 Cal. 330.)

142. If the plaintiff relies upon a contract within the statute of frauds, a denial of the contract is sufficient to raise the question of its validity under the statute. (*Feeney v. Howard*, 79 Cal. 525.)

143. If it appears upon the face of the complaint, in an action to enforce an express trust in land, that the alleged trust rests in parol, the defense of the statute of frauds may be taken advantage of by demurrer. (*Barr v. O'Donnell*, 76 Cal. 469.)

144. Where the answer discloses the fact that the contract is not in writing, but also avers acts of part performance, which take the contract out of the operation of the statute, the answer is not demurrable. (*Arguello v. Edinger*, 10 Cal. 150.) Cited 25 Cal. 597; 26 Cal. 39.

145. When a contract within the statute of frauds is proved by parol evidence without objection or exception, the right to invoke the statute is waived, and it cannot afterward be insisted upon. (*Nunez v. Morgan*, 77 Cal. 427.)

146. If a defendant, sought to be charged as trustee on a contract within the statute of frauds, admits the contract in his answer, and does not claim the benefit of the statute, he is considered as waiving its protection; but if he claims the benefit of the statute in his answer, he is entitled to it. (*Burt v. Wilson*, 28 Cal. 632.)

Question not considered on appeal when. See *Appeals*, 1410.

Statute need not be pleaded, when. See *Partnership*, 120.

VIII. Findings.

147. It is not necessary to find that a contract for the conveyance of land was in writing, especially if the right to invoke the statute of frauds has been waived by the defendant. (*Nunez v. Morgan*, 77 Cal. 427.)

STATUTE OF LIMITATIONS.

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3. *Acknowledgment of Debt or New Promise.*
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Prosecution for crime, when barred. See Criminal Law, XIII.

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Proceedings to disbar attorney are not subject to. See Attorney and Client, 183.

When begins to run in favor of grantee of cotenant. See Cotenantcy, 69, et seq.

Action for grading done on Bay street, when barred. See San Francisco, 64.

Limitation of time for issuance of execution. See Executions, I, 3.

Interest, effect of statute. See Mortgages, 230.

On mortgage to and by executor. See Estates of Deceased Persons, 161.

I. Constitutionality of.

1. Whether the legislature has any power to discriminate, by special or general law, be-

tween holders of one class or description of legal titles and the holders of another class or description; to say, for example, that A's claim to his estate shall be governed by one set of rules and B's by another; that a Mexican title shall be, though of the same grade, governed by one statute of limitation, and an American title, in law of no higher dignity, shall be governed by another; and whether such legislation would not break the uniformity of the operation of a general law which the constitution enjoins, not decided. (*Lathrop v. Mills*, 19 Cal. 513.)

Constitutionality of statute. See Constitutional Law, 368.

Statute in relation to is constitutional. See San Francisco, 110.

Constitutionality of statute ignoring Mexican grants. See post, VI, 3, f.

II. Construction of; Retrospective Operation of.

2. It is a universally accepted rule that statutes of limitations are to be strictly construed. General words in the statute must receive a general construction, and if there be no express exception, the courts can make none. (*Tynan v. Walker*, 35 Cal. 634.)

3. Statutes of limitations do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage. (*Nelson v. Nelson*, 6 Cal. 430, cited 3 Mont. 415; *Lehmaier v. King*, 10 Cal. 373, cited 23 Cal. 458, 3 Mont. 415.)

4. The act of April 2, 1857, cannot be pleaded in an action brought in 1856 on a foreign judgment obtained in 1847. (*Nelson v. Nelson*, 6 Cal. 430.)

5. The statute of limitations can only be construed to apply to judgments not in esse at the time of the passage of the act of 1855, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the act of 1850. (*Scarborough v. Dugan*, 10 Cal. 305.) Cited 22 Cal. 554; 85 Cal. 85; 5 Or. 20.

6. If the statute of limitations had commenced running as to a cause of action before the codes took effect, it continued to run, notwithstanding the passage of the codes, and was not lengthened by them. (*Benjamin v. Eldridge*, 50 Cal. 612.)

Construction of two year limitation in case of contracts executed out of state. See post, VIII, 4.

Actions where relief not provided, statute applies to equity cases. See post, VII.

Construction of section relating to actions on written obligations. See post, VI, 4, a.

Construction of statute relating to actions arising under Mexican grants. See post, VI, 3, f.

Construction of statute relating to actions for recovery of real property. See post, VI, 3, a.

Foreign judgment is not contract, obligation, etc., founded on writing. See post, VI, 2.

III. Amendment of Statute, Effect of.

7. The right of the grantee of the deed of land in this state, intended as security, to redeem therefrom, and the time within which redemption might be made, were fixed by the laws of this state in force at the time of the execution of the deed; and no subsequent legislation could change the rights or obligations of the parties, or extend the time for action, section 346 of the Code of Civil Procedure having been enacted after the execution of the deed, and the decisions based on that section do not apply in determining the effect of the deed. (*Allen v. Allen*, 95 Cal. 184.)

8. Amendatory act of 1855 does not divest rights vested under the old law of 1850; for statutes of limitations affect the remedy and not the right. (*Billings v. Hall*, 7 Cal. 1.)

Change in statute, effect of. See post, 36; VI, 3, a.

Amendment of statute relating to actions for recovery of real property. See post, VI, 3, a.

IV. Conflict of Laws as to.

9. Where a deed and contract of security were executed in the state of New York, between residents of that state, either party could have maintained an action in that state on the contract, the one to enforce the right to redeem, and the other to recover the amount for which the land was held as security; and when the action in that state to recover the debt became barred by the laws of that state, no action to redeem from the security could thereafter be maintained in this state where it appears that, by the law in force in this state at the time of the execution of the deed, the legal title passed to the grantee by the deed, and the right to redeem was barred whenever the debt, to secure which the deed was made, became barred by the statute of limitations. (*Allen v. Allen*, 95 Cal. 184.)

Action on judgment barred in state where rendered. See Judgments, 838.

V. In Whose Favor and Against Whom Runs.**1. Municipalities; Federal Government.**

10. Municipal corporation has legal right to avail itself of the defense of the statute of limitations as fully as any other creditor. (*Bates v. Gregory*, 89 Cal. 387.)

11. The statute of limitations of the several states are not binding upon the rights of the United States. (*Gardiner v. Miller*, 47 Cal. 570.) Cited 47 Cal. 591.

City, statute does not run against until patent issued. See Mexican Lands, 505.

Municipality, action against for overflow from grading when barred. See Streets, 385.

In action to recover back money paid on invalid sale. See San Francisco, 303.

Limitation of action against city for money paid for city slip property. See San Francisco, 306.

License tax, action for, when barred. See Licenses, 99.

Lien of tax, statute does not affect. See Taxation, 509, 510.

Taxes, action to recover. See Taxation, 569.
Action for percentage on delinquent tax. See Taxation, 696.

Delinquent taxes, suits for, when barred. See Taxation, XII, 4, e.

2. Foreign Corporations.

12. If a foreign corporation has a managing agent in this state who exercises his authority openly as such, without fraudulent concealment, it may be sued in the courts of this state, and service of process made personally upon such managing agent; and if the agent, as such, has held and possessed land for the company for five years, the corporation may claim the benefit of the statute of limitations. (*Lawrence v. Ballou*, 50 Cal. 258.) Cited 4 Mont. 8.

3. Junior Mortgagees or Grantees; Third Persons.

13. Where a note is secured by mortgage upon real property, and subsequently, after the remedy on the note is barred by the statute, the mortgagor executes a second mortgage to a third party, such third party can interpose the plea of the statute of limitations in a suit to foreclose the first mortgage, and thus secure priority for his subsequent mortgage; and this, even though the mortgagor had, after the execution of the second mortgage and after the note was barred, indorsed on the first note that he renewed, revived, and agreed to pay the same. (*Lord v. Morris*, 18 Cal. 482, cited 43 Cal. 188, 58 Cal. 151, 85 Cal. 507; *Lent v. Shear*, 26 Cal. 361, cited 43 Cal. 188, 58 Cal. 151, 85 Cal. 507.)

14. In an action to recover judgment for the amount of a debt secured by a mortgage on real estate, and also to foreclose the mortgage, the grantees of the mortgagor, purchasers subsequent to the execution of the mortgage, have a right to plead the statute of limitations as to that part of the claim of plaintiff which asks for a decree foreclosing the mortgage and a sale of the mortgaged premises. (*Grattan v. Wiggins*, 23 Cal. 16.) Cited 22 Cal. 595; 85 Cal. 507; 1 Idaho, N. S., 258.

15. A party who, subsequent to the execution of a mortgage, purchases the property from the mortgagor, may avail himself of the statute of limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured. (*McCarthy v. White*, 21 Cal. 495.) Cited 23 Cal. 25, 143; 26 Cal. 144; 43 Cal. 188; 58 Cal. 151; 85 Cal. 507.

16. When third persons have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the statute of limitations as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection. (*Wood v. Goodfellow*, 43 Cal. 185.)

17. If an action of ejectment is continued in the name of the plaintiff, who has sold pending the action, the defendant cannot plead the statute of limitations as against the vendee of the plaintiff. (*Moss v. Shear*, 30 Cal. 468.)

18. One who buys land in adverse possession of another is barred by the statute of limitations from commencing an action for its recovery when five years have expired from the time a cause of action first accrued, to any of those through whom by mesne conveyances he has acquired title. (*Le Roy v. Rogers*, 30 Cal. 229.)

19. As a general rule, the plea of the statute of limitations is a personal privilege of the party, and cannot be set up by a stranger. This is true with respect to personal obligations, which concern only the party himself, or with respect to property which the party possesses the power to charge or dispose of. But with respect to property placed by him beyond his control, or subjected by him to liens, he has no such personal privilege. He cannot at his pleasure affect the interests of other parties. (*Lord v. Morris*, 18 Cal. 482.) Cited 23 Cal. 25, 143; 85 Cal. 505.

Transfer by mortgagor. See post, 89.

Junior mortgagee in possession as agent of first mortgagee may plead. See post, 289.

Subsequent lienholder may plead statute of limitations. See post, 96.

4. Bar of Executor or Trustee, How Affects Heir or Beneficiary.

20. Under the statutes of California in force in 1862, determining the rights of minors in the property of the estates of deceased persons, where the executor or administrator of the estate neglects to bring an action to recover real property of the estate until his right of action is barred under the statute of limitations, the heir or devisee is also barred, even though he be a minor at the time the action accrues to the executor or administrator. (*McLeran v. Benton*, 73 Cal. 329.) Cited 73 Cal. 608; 79 Cal. 15; 85 Cal. 167; 95 Cal. 128.

21. The rule that the statute of limitations does not bar a trust estate holds only between cestui que trust and the trustee, and not as between the cestui que trust and trustee on one side and strangers on the other; and when a trustee is barred by the statute of limitations, the cestui que trust is likewise barred, even though an infant. (*Patchett v. Pacific Coast Ry. Co.*, 100 Cal. 505.)

Appointment of administrator, how affects infant. See post, VIII, 2.

Executor cannot plead statute if decedent could not. See post, 176.

Distributees cannot claim bar of statute where ancestor could not. See post, 175.

Infants are barred by prescription against trustee. See Easements, 15.

VI. Particular Actions, How Affected by.

1. Actions by State.

22. Under section 315 of the Code of Civil Procedure, an action by the state to quiet title to lands may be brought at any time within ten years after the cause of action accrued. (*People ex rel. Love v. Center*, 63 Cal. 551.) Cited 83 Cal. 287.

23. Action brought by state to cancel patent for land alleged to have been procured by

fraud, must be brought within three years from the time the cause of action accrued; and the cause of action accrues at the time of the discovery of the fraud. (*People v. Blankenship*, 52 Cal. 619.)

Cited 71 Cal. 530; 91 Cal. 503.

24. Party in possession of tide lands belonging to the state, who afterward locates school land warrants on such lands, and thenceforth claims and occupies under such locations, holds not adversely, but in subordination to, the title of the state, and the statute of limitations will not run against the state. (*Farish v. Coon*, 40 Cal. 33.) Cited 66 Cal. 565.

25. The locator of the warrants is in the position of a purchaser in possession, whose possession is not hostile, but in consonance with the title of the vendor; and in order to put the statute of limitations in motion, it must appear that the locator repudiated the title of the state, and claimed to hold, not under that title, but in hostility to it. (*Farish v. Coon*, 40 Cal. 33.)

26. The tide lands, held by the state in virtue of its sovereignty, are not within the purview of the third section of the statute of limitations. (*Farish v. Coon*, 40 Cal. 33.)

No prescription against state. See Watercourses, XIV, 2, g, A.

Limitation against state. See Wills, 146.

2. Judgments, Actions on; Herein of Actions on Foreign Judgments.

27. The statute of limitations does not begin to run against an action upon a judgment until its entry upon the records of the court. (*Crim v. Kessing*, 89 Cal. 478.)

28. The statute of limitations of this state only commences running against a judgment from the time of the final entry thereof. (*Parke v. Williams*, 7 Cal. 247.)

29. The time prescribed for the limitation of an action upon a judgment begins to run with the entry of the judgment, and not upon its rendition. (*Trenouth v. Farrington*, 54 Cal. 273.) Cited 89 Cal. 491.

30. Judgments recovered in the courts of this state are within the first subdivision of the seventeenth section of the Limitation Act, and actions thereon are barred by the lapse of five years from the time they are rendered. (*Mason v. Cronise*, 20 Cal. 211.) Cited 23 Cal. 353; 10 Mont. 209, 210; 5 Or. 499; 1 Wyo. 233.

31. The statute of limitations requires an action on a judgment to be brought within five years; but when a judgment is rendered payable in installments, the time begins to run from the period fixed for the payment of each installment as it becomes due. (*De Uprey v. De Uprey*, 23 Cal. 352.)

32. An action brought in a court of equity to enforce a setoff of one judgment against another, is "an action upon a judgment or decree" within the meaning of section 17 of the statute of limitations, and may be brought at any time within five years of the date of the judgment or decree. (*Hobbs v. Duff*, 23 Cal. 596.)

Judgments obtained before passage of statute. See ante, II.

Limitation of action on new promise to pay judgment. See post, XII, 7.

Stay of proceedings, effect of. See post, IX, 3.

33. A foreign judgment is not "a contract, obligation, or liability for the payment of money, founded on an instrument of writing executed out of this state," within the meaning of the statute of limitations. (*Patten v. Ray*, 4 Cal. 287.) Cited 90 Cal. 66.

34. A foreign judgment is not an "instrument in writing executed out of the state," within the meaning of subdivision 1 of section 339 of the Code of Civil Procedure, and though it is a contract in writing within the meaning of the term "contract or obligation" as used in the statute, yet, as such, it is not embraced in the two years' limitation prescribed by the provisions of that subdivision of the section, the word "executed" applying only to the act of a party sought to be charged, and not to the judgment of a court. (*Dore v. Thornburgh*, 90 Cal. 64.)

35. An action on a foreign judgment is not barred by the statute of limitations within two years, under section 339 of the Code of Civil Procedure, but falls within the provisions of section 343, respecting actions not otherwise provided for, and is not barred by the statute until four years after the cause of action has accrued. (*Dore v. Thornburgh*, 90 Cal. 64.)

36. The act of May 4, 1852, "defining the time of commencing civil actions in certain cases," only alters a portion of the act of April 22, 1850, section 17; it does not change the period (five years) in which suit may be brought on judgments, or decrees of courts of the United States, or any state or territory. (*Cavender v. Guild*, 4 Cal. 250.) Cited 4 Cal. 287.

37. Where a judgment by confession was entered in Pennsylvania, which was afterwards opened, and a trial had, which resulted in judgment for plaintiff, held, that our statute of limitations did not commence running until the final entry, although, by the laws of Pennsylvania, the lien of the first judgment was not destroyed. (*Parke v. Williams*, 7 Cal. 247.)

Foreign judgment obtained before passage of statute. See ante, II.

3. Actions in Relation to Real Property.

a. Limitations in Generally; Construction of Statutes.

38. Period of limitation in this state, to bar a right of entry upon real estate, commences to run from the 22d of April, 1855. (*Clarke v. Huber*, 25 Cal. 593.) Cited 63 Cal. 268.

39. Act of 1855 is the only statute of limitations to actions for recovery of real property, and the time fixed therein runs only from the date of that act. (*Billings v. Harvey*, 6 Cal. 381.) Cited 7 Cal. 3; 25 Cal. 596.

When begins to run against one seeking to recover lands. See San Francisco, 238.

40. Amendatory act of 1855 repeals section 6 of the statute of limitations of 1850, and the five years allowed for the commencement of real actions only begins to run from the date of the passage of the amendatory act. (*Billings v. Hall*, 7 Cal. 1.) Cited 25 Cal. 596; 63 Cal. 268; 72 Cal. 600; 1 Idaho, N. S., 257; 3 Mont. 415.

41. The act of April 11, 1855, amending the sixth section of the statute of limitations of 1850, by a proviso extending the time for commencing actions of ejectment under Spanish or Mexican titles, repeals that section in toto. (*Billings v. Harvey*, 6 Cal. 381.) Cited 15 Cal. 284; 63 Cal. 268.

42. Section 7 of act defining time for commencing civil actions, and the proviso thereto attached, refer to personal actions founded upon the title to real property, and not to actions for the recovery of such property. (*Richardson v. Williamson*, 24 Cal. 289.) Cited 29 Cal. 335; 68 Cal. 351; 71 Cal. 348.

Statute governing actions. See post, VI, 3, f.

Change in statute, effect of. See ante, III.

b. Actions Between Vendor and Vendee; to Compel Conveyance.

43. Under a contract to purchase, the purchaser in possession cannot defend on the ground that the amounts due on the contract of sale are barred by the statute of limitations. The only question under that statute is, whether or not plaintiff's right to recover the land is barred. (*Kerns v. Dean*, 77 Cal. 555.)

44. Where vendor covenanted to procure a reconveyance to himself of portions of the land described in the deed which he had conveyed to others, such covenant is broken upon a failure to procure such conveyance within a reasonable time, or to convey to the vendee other lands of equal value, and the statute of limitations will commence running from such breach. (*Vance v. Peña*, 41 Cal. 686.)

45. When two parties enter into contract for exchange of lands the facts that one of the parties has performed on his part by conveying the land, which he agreed to convey, in exchange for the tract to be conveyed by the other, and that the grantee has entered into possession and sold portions of the land thus conveyed, do not prevent the statute of limitations from running as to the right of the party who has performed, to a conveyance from the other. (*Brennan v. Ford*, 46 Cal. 7.) Cited 99 Cal. 659.

46. When mutual agreements to convey lands are to be performed concurrently, the statute of limitations does not commence running until one party has performed by delivering a deed, or has offered to perform by making a tender. (*Brennan v. Ford*, 46 Cal. 7.)

47. Where land purchased by one is conveyed to another as security an action to compel the execution of a deed comes within the nineteenth section of the statute of limitations, and not within the provision relative to the commencement of actions, based on a con-

tract, obligation, or liability not founded upon an instrument in writing. (*Dodge v. Clark*, 17 Cal. 586.)

48. Until making of demand upon vendor for repayment of the purchase money, its retention by the vendor is lawful, and no cause of action arises to recover it, and the statute of limitations does not commence to run. (*Rose v. Foord*, 96 Cal. 152.)

49. Defendant being vendee in possession, and having paid full purchase price, the statute did not run in favor of the vendor or his assignee, nor against the vendee's right to demand a conveyance. (*Davis v. Baugh*, 59 Cal. 568.)

Adverse possession between vendor and vendee. See *Adverse Possession*, III, 4, c.

Limitation of action by vendor for price. See *Vendor and Vendee*, XI, 5, c.

c. Actions for Rents and Profits.

50. In an action to recover lands the plaintiff can recover the rents and profits for three years only prior to the commencement of the action, if the defendant pleads the statute of limitations. (*Carpentier v. Mitchell*, 29 Cal. 330.)

d. Actions for Public, Patented, or Overflowed Lands.

51. The eleventh section of the act of 1856, limiting time to bring actions for the recovery of public land, for the protection of actual settlers, and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. (*Morton v. Folger*, 15 Cal. 275.)

52. Neither section 315 nor section 316 of the Code of Civil Procedure, limiting the right of the state and its grantees to the period of ten years' limitation against the state, has any application to a case where a state patent is issued, when not more than five years of the ten year limit against the state has run. In such case the five year limit prescribed by the various sections of the code respecting the adverse occupancy of lands between private individuals applies, and begins to run from the date of the patent in favor of an adverse occupant then in possession of the lands. (*Wilhoit v. Tubbs*, 83 Cal. 279.)

53. The statute of limitations of California has no application to the title of a patentee of the United States anterior to the issuance of the patent. (*Gardiner v. Miller*, 47 Cal. 570.) Cited 48 Cal. 17, 408; 49 Cal. 13; 50 Cal. 273; 51 Cal. 165; 54 Cal. 23; 55 Cal. 98; 64 Cal. 609; 92 Cal. 455.

54. Statute of limitations has no application to the title of a patentee until the patent has issued. (*Hill v. Den*, 54 Cal. 6, 23.)

55. Where one is in adverse possession of public land the statute of limitations does not commence to run until the issuing of the patent. (*O'Connor v. Fogle*, 63 Cal. 9.) Cited 83 Cal. 288.

56. In a suit for the recovery of land, after the issuance of the patent, the statute of limitations cannot be held to have commenced running prior to the date of the patent. (*Manly v. Howlett*, 55 Cal. 94.)

Cited 63 Cal. 11, 309; 6 Utah, 313; distinguished 70 Cal. 513.

57. The statute of limitations does not commence to run in favor of the holder of a tax title in possession of state school land, as against the holder of a patent issued to an assignee of the certificate of purchase therefor, until the issuance of the patent to the assignee. (*Dorn v. Baker*, 96 Cal. 206.)

58. Action to quiet title. The plaintiff disclaimed title under a patent of the United States issued within five years of the commencement of the action. The defendants pleaded title by the statute of limitations, and also facts which they contended constituted the plaintiff trustee for them of the title; but on this issue the court found against them. Held, as to the latter defense, that the finding was justified by the evidence, and as to the former that the statutes could not avail the defendants against the patentee. (*Nessler v. Bigelow*, 60 Cal. 98.)

59. The title of the plaintiff to the property in controversy, consisting of marsh and overflowed lands, was founded upon a certificate of purchase from the state. Held, that the statute of limitations did not commence to run against the plaintiff until the lands were certified to the state by the United States government. (*Packard v. Moss*, 68 Cal. 123.)

Action to annul patent, when barred. See *Public Lands*, 793.

Limitation of action to recover land after patent issued. See *Mexican Lands*, I, 26.

Time for commencing land contest. See *Public Lands*, XVII, 3.

Time of commencing action under Van Ness ordinance. See *San Francisco*, XIV, 7, 8.

e. Pueblo Lands.

60. The statute of limitations does not begin to run in relation to pueblo lands until a patent has been issued by the United States. (*Beach v. Gabriel*, 29 Cal. 580.) Cited 43 Cal. 291, 294; 60 Cal. 521; 63 Cal. 11; 84 Cal. 152; 12 Nev. 114.

61. Under the act of 1863 the statute of limitations commenced to run against pueblo lands derived from the Spanish or Mexican government, from the date of final confirmation of the official survey of the lands. Under the codes, which went into effect January 1, 1873, the limitation runs against such lands, without regard to the confirmation of the survey or grant, or to the issuance of any patent. (*Norris v. Moody*, 84 Cal. 143.) Cited 90 Cal. 345.

f. Actions Arising Under Mexican Grants.

62. Section 6 of the act defining the time for commencing civil actions is the only section in the act applicable to actions for the recovery of lands, and covers every case for the recovery of the possession of land; and the proviso to section six covers every case of title derived from the Spanish or Mexican government. (*Richardson v. Williamson*, 24 Cal. 289.)

63. The provisos to sections 6 and 7 of said act are not limited in their application to cases where the plaintiff claims under a Mexi-

can or Spanish grant, and the defendant contests the validity of such grant, but apply to all cases where the original source of title is from such grant, even if both parties claim to derive title from the same grant. (*Richardson v. Williamson*, 24 Cal. 289.)

64. The whole act of 1856 absolutely ignores Mexican grants, and is unconstitutional. Such grants are titles within the full protection, not only of the treaty of Guadalupe Hidalgo, but of the constitution of the United States, and the constitution of the state of California. (*Lathrop v. Mills*, 19 Cal. 513; *Pioche v. Paul*, 22 Cal. 105, cited 36 Cal. 633.)

Statute discriminating between Mexican titles and American titles. See ante, I.

65. The statute of limitations does not commence to run, with regard to lands held under a Mexican or Spanish grant, until a patent for the same has been issued by the government of the United States. (*Reed v. Spicer*, 27 Cal. 57; *Johnson v. Van Dyke*, 20 Cal. 225, cited 26 Cal. 48, 29 Cal. 585, 33 Cal. 457, 479, 43 Cal. 294, 60 Cal. 521, 63 Cal. 11; *Downer v. Smith*, 24 Cal. 114; *Gardiner v. Schmaelsle*, 47 Cal. 588, cited 64 Cal. 609; *Hagar v. Spect*, 48 Cal. 406, cited 55 Cal. 98, 64 Cal. 609, 6 Mont. 415; *Galindo v. Wittenmeyer*, 49 Cal. 12, cited 55 Cal. 98, 64 Cal. 609; *Gage v. Downey*, 79 Cal. 140.)

66. The statute of limitations does not run in favor of purchasers under a void executor's sale as against the heirs of the testator, when it appears that the premises consisted of a confirmed Mexican grant, the patent for which did not issue until after the commencement of the action. (*Huse v. Den*, 85 Cal. 390.)

67. In an action brought by a riparian proprietor deriving title under a Mexican grant, patented within five years of the commencement of the actions to quiet his title against parties claiming the right to an exclusive use of the water under an adverse and exclusive user, by themselves and predecessors, for over twenty years, held, (1) that the patent having issued within five years, the statute of limitations could have no application; and (2) that for the same reason the defendants had not acquired a prescriptive right. (*Pope v. Kinman*, 54 Cal. 3.)

68. The final confirmation of a Mexican grant, so as to set the statute of limitations in motion, under the act of 1855, passed by the legislature of California, was the issuance of a patent to the grantee. (*Sabichi v. Aguilar*, 43 Cal. 285.)

69. Under the act of 1863, amending the statute of limitations of 1855 (*Laws 1863*, p. 327), the final confirmation which set the statute of limitations in motion was the final confirmation of a survey by the courts of the United States provided for in the act of Congress of June 14, 1860, or the issuance of a patent. (*Sabichi v. Aguilar*, 43 Cal. 285.) Cited 63 Cal. 11.

70. The terms, "final confirmation by the government of the United States," as used in the act of 1855, mean the definitive confirmation of the title to certain specifically described premises, and include not only the

recognition of the validity of the title by the judicial department, but also by the executive department, which formerly exercised supervision and control over the location of confirmed Mexican grants. (*Johnson v. Van Dyke*, 20 Cal. 225.) Cited 43 Cal. 291.

71. After the passage of the act of Congress of June 14, 1860, giving the United States district court authority over surveys, a judicial approval of a survey was a final confirmation within the intent of the sixth section of the statute of limitations of this state, as amended in 1855. (*Morris v. De Celis*, 51 Cal. 56.)

72. The approval of a survey of a Mexican grant, by the surveyor general alone, was not final, so as to set the statute of limitations in motion. (*Sabichi v. Aguilar*, 43 Cal. 285.) Cited 51 Cal. 62.

73. The statute of limitations in relation to Mexican and Spanish grants commences running from the time of the final approval of the survey, and not from the time of the issuance of the patent. (*Mahoney v. Van Winkle*, 33 Cal. 448.) Cited 43 Cal. 292.

74. Statute is not set in motion by survey made under the act of Congress of June 14, 1860, becoming final. The statute, in such case, does not commence running until the patent issues. (*Miranda v. Toomey*, 51 Cal. 165.)

Cited 54 Cal. 23; 64 Cal. 609.

75. Pendency of proceedings for approval of survey of a Mexican grant of land does not stop the running of the statute of limitations in favor of one in the adverse possession. (*Hayes v. Martin*, 45 Cal. 559.) Cited 57 Cal. 67; 90 Cal. 345.

76. Owner of Mexican grant which has not been finally surveyed or patented cannot recover possession of the same from one who has been five years in the adverse possession thereof after the owner has attained his majority. (*Burton v. Robinson*, 51 Cal. 186.)

77. Five years of adverse possession at any one time since the passage of the act of April 18, 1863, bars an action of ejectment by the holder of an imperfect unpatented title of Spanish or Mexican origin. (*Ohm v. San Francisco*, 92 Cal. 437.)

78. The owners of grants of land by Mexico or Spain, which grants had not been finally confirmed by the United States more than five years before the passage of the act of April 18, 1863, amending the statute of limitations, had five years after the passage of said act of 1863 in which to commence actions for the recovery of the same. (*Morris v. De Celis*, 51 Cal. 56.)

Cited 64 Cal. 608.

79. If the claim to a rancho has been confirmed by final decree of the supreme court of the United States prior to the alleged publication of the survey under the congressional law of 1860, the plaintiff would have five years to bring his action for its recovery after the taking effect of the statute of April 18, 1863, limiting the time for the commencement of civil actions. (*Younger v. Pagles*, 60 Cal. 517, 522.)

80. Under the act of April 18, 1863, limiting the time within which to commence civil actions, every person claiming under a Mexican grant or title was given full five years after the act took effect to bring his action for the recovery of his property, unless the grant or title was finally confirmed more than five years before the act took effect. (*Younger v. Pagles*, 60 Cal. 517, 521.)

81. Where the plaintiff in ejectment claims under a title derived from the Spanish or Mexican government, and the defendant relies on and shows five years' adverse possession, it is incumbent on the plaintiff to prove that proceedings for a final confirmation are pending, or that the title has been finally confirmed within five years before the commencement of the action, in order to defeat the bar of the statute of limitations. (*Vassault v. Seitz*, 31 Cal. 225.)

82. The party claiming title under a Mexican grant, if the other relies on five years' adverse possession, must show that the patent has not been issued for the same, or that the official survey has not been approved by the district court, under the act of Congress of June 14, 1860. (*Morris v. De Celis*, 51 Cal. 56.)

g. Lands Subject to an Easement.

83. Fact that an easement has been created upon land, or that an offer of an easement has been made, but not accepted, does not prevent the statute of limitations from being set in motion and running in favor of one who enters upon and claims the soil upon which the easement has been imposed adversely to the grantor of the easement. (*San Francisco v. Calderwood*, 31 Cal. 585.)
Cited 50 Cal. 575; 65 Cal. 436; 74 Cal. 19; 79 Cal. 378; 84 Cal. 125; 18 Nev. 273.

4. Actions on Contracts.

a. Meaning of Section Relating to Actions on.

84. The language, "an action upon any contract, obligation, or liability founded upon an instrument of writing" in the seventeenth section of the statute of limitations, refers to contracts, obligations, and liabilities resting in or growing out of written instruments, not remotely or ultimately, but immediately, that is, to such contracts, obligations, or liabilities as arise from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities. (*Chipman v. Morrill*, 20 Cal. 130.)
Cited 64 Cal. 273, 279; 70 Cal. 510; 83 Cal. 551; 90 Cal. 57; 95 Cal. 322.

85. The two years' limitation for commencing an action, found in the first clause of the first subdivision of section 339 of the Code of Civil Procedure, applies to all actions at law not specifically mentioned in other portions of the statute. (*Piller v. Southern Pac. R. R. Co.*, 52 Cal. 42.)
Cited 65 Cal. 490; 72 Cal. 366; 73 Cal. 575; 95 Cal. 319.

Contracts founded on instruments in writing. See post, 87, 89, 133, 147, 207, 244.

Liability created by statute. See post, 102, 179; *Inns*, 25.

b. Breach of Covenant.

86. The statute of limitations, upon an implied warranty of title to chattels sold by one in possession, does not commence running until the vendee is disturbed in his possession by the true owner. (*Gross v. Kierski*, 41 Cal. 111.)

For breach of covenant of quiet enjoyment. See *Covenants*, 19.

In action for breach of covenant of quantity. See *Covenants*, 26.

c. Actions to Foreclose Mortgage or to Redeem.

Offer to redeem after right of redemption barred. See post, XII, 2.

87. A mortgage given to secure a debt, for the payment of which there is no written agreement, is a contract "founded upon an instrument of writing" within the meaning of the Limitation Act, and an action for its foreclosure may be maintained at any time within four years from its breach, notwithstanding that the statute has in the mean time run against the debt. (*Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620.)

88. The right to enforce the lien of a mortgage given to secure a debt is barred by the statute of limitations at the end of four years from the time the right of action accrues on the debt. (*Cunningham v. Hawkins*, 24 Cal. 403.)

89. Where a mortgagor transfers his interest in the mortgaged premises to a third person, the mortgage, as contradistinguished from the mortgage debt, is to be deemed a contract in writing in the sense of the statute on which an action must be brought within four years from the time when the action would lie, in order to avoid the bar of the statute of limitations. (*Wood v. Goodfellow*, 43 Cal. 185.)

90. The entry of the mortgagee into the possession of the mortgaged premises cannot, as between him and the mortgagor, extend the time allowed by the statute for the enforcement of the mortgage. (*Cunningham v. Hawkins*, 24 Cal. 403.)
Cited 24 Cal. 473.

91. If the mortgagee, after obtaining a judgment foreclosing his mortgage, by an agreement with the mortgagor, enters into the possession of the mortgaged property, and receives the rents and profits, and applies them towards the satisfaction of the amount due, and the mortgagee further agrees not to issue an order of sale, the statute of limitations does not run against the rights of the mortgagee, so long as the debt remains unpaid, and the parties acquiesce in the arrangement. (*Frink v. Le Roy*, 49 Cal. 315.)
Cited 73 Cal. 294.

92. Where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute of limitations, the remedy upon the mortgage is also barred. (*McCarthy v. White*, 21 Cal. 495, cited 22 Cal. 102, 24 Cal. 409, 498, 26 Cal. 144, 365, 367, 66 Cal. 336; *Heinlen v. Castro*, 22 Cal. 100.)

93. In this state, where an action upon a promissory note, secured by a mortgage of the

same date upon real property, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage; and, although he may pursue distinct remedies upon the note or the mortgage, the limitation prescribed is the same in both cases. (*Lord v. Morris*, 18 Cal. 482.)

Cited 21 Cal. 501; 24 Cal. 498; 28 Cal. 144, 365, 369; 42 Cal. 501, 503; 66 Cal. 336; 1 Nev. 621; 9 Nev. 208.

94. An action cannot be maintained to enforce a mortgage given to secure a note, if at the time the action is commenced more than four years have transpired since the note fell due, and this fact appears on the face of the complaint, or the statute of limitations is pleaded. (*Wormouth v. Hatch*, 33 Cal. 121.)

95. A complaint containing such a statement of facts shows upon its face that the note was outlawed, and, in case of the submission of such a case upon the pleadings, judgment was properly rendered for defendants. (*Wormouth v. Hatch*, 33 Cal. 121.)

96. Where the debt, to secure which a mortgage is given, is barred by the statute of limitations, the mortgage is also barred; and, if an action is brought to foreclose it, one who has purchased or acquired a lien on the property subsequent to the mortgage has a right to intervene in the action and plead the statute of limitations. (*Coster v. Brown*, 23 Cal. 142.)

Cited 66 Cal. 336; 85 Cal. 107.

97. A note payable six months after date, with interest payable monthly in advance, contained the following clause: "In case the said interest, or any portion thereof, should become due, and remain unpaid after demand, then the mortgage given by me, of even date herewith, which is given to secure the payment of this note, may be foreclosed," etc., and the mortgage contained a provision by which the mortgagee was "empowered to foreclose said mortgage, according to the provisions in said note contained." Held, that prompt payment of the interest on demand when it fell due did not, under these clauses in the note and mortgage, prolong the time of payment beyond the time specified in the note, and that a cause of action accrued upon the note and to foreclose the mortgage immediately upon the expiration of the six months, although there had been no default in the payment of interest. Held, further, that an action not commenced within four years after the expiration of six months from the date of the note is barred by the statute of limitations. (*Pendleton v. Rowe*, 34 Cal. 149.)

98. Where three persons execute their joint mortgage on land to secure their joint and several promissory note to the mortgagee, and one of them leaves the state, and the note afterwards becomes barred by the statute of limitations as to the two who remain in the state, the lien of the mortgage is also barred as to the interest of the two in the land, and it can only be enforced against the interest of the one as to whom the note is not barred. (*Low v. Allen*, 26 Cal. 141.)

Cited 26 Cal. 366; 36 Cal. 20; 42 Cal. 503; 43 Cal. 188.

99. The right of the mortgagor to maintain an action to redeem the property from the lien of the mortgage is barred by the statute of limitations at the end of four years from the time the right of action accrues on the debt. (*Cunningham v. Hawkins*, 24 Cal. 403.)

Cited 34 Cal. 369; 66 Cal. 336; 80 Cal. 355.

100. The right of the mortgagee to maintain an action on the debt, and enforce the lien of a mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal, and when one is barred by the statute of limitations the other is also. (*Cunningham v. Hawkins*, 24 Cal. 403.)

Cited 27 Cal. 146; 34 Cal. 372; 36 Cal. 434; 60 Cal. 552; 72 Cal. 311.

101. The right of the mortgagee to maintain an action on the debt, and to enforce the lien of the mortgage given to secure it, and the right of the mortgagor to maintain an action for the redemption of the property from the lien of the mortgage, are reciprocal; and when one is barred by the statute of limitations the other is also barred. (*Arrington v. Liscom*, 34 Cal. 365.)

Cited 66 Cal. 336; 72 Cal. 311; 80 Cal. 355.

Action to foreclose, effect of death before accrual of cause of action. See post, 263.

d. Actions on Bonds or Coupons.

102. An action upon an official bond is not an action "upon a liability created by statute," mentioned in the third subdivision of the seventeenth section of the statute of limitations, and is not, therefore, barred by such statute after the expiration of three years. (*Placer County v. Dickerson*, 45 Cal. 12.)

103. Bonds of the city of Sonora, dated March 25, 1853, and falling due in two years, are sued on April 5, 1860. March 9, 1855, an act of the legislature was passed, reincorporating the city, and providing that, "in case the public debt is not liquidated at the expiration of three years, the trustees shall have power to levy a sufficient tax, in addition to the one per cent authorized" in another section for general purposes of revenue, "to pay the outstanding debt." March 29, 1858, another similar act was passed, the time mentioned being six instead of three years. These acts were passed at the instance of the corporators. Held, that these acts recognize the city debt, and provide for its payment; and hence withdraw the bonds from the statute of limitations. (*Underhill v. Trustees of the City of Sonora*, 17 Cal. 172.)

104. In such case, even if the acts had not been passed at the instance of the corporators, probably the result would be the same by virtue of the control the legislature has over municipal bodies. (*Underhill v. Trustees of the City of Sonora*, 17 Cal. 172.)

105. In this case, if the city be equitably entitled to set up the statute of limitations, she must do so in some other form—the case standing on demurrer to the complaint. (*Underhill v. Trustees of the City of Sonora*, 17 Cal. 172.)

106. A cause of action upon an undertaking for an injunction does not accrue until the final determination of the action in which the injunction was obtained. (*Dougherty v. Dore*, 63 Cal. 170.)

107. A right of action on an undertaking on appeal in an ejectment suit, given to secure the value of the use and occupation of the property in controversy, accrues on the affirmation of the judgment, and an action thereon must be brought within four years thereafter, or it will be barred by the statute of limitations. (*Clark v. Smith*, 66 Cal. 645.)

108. Interest coupons are not barred by the statute of limitations until the bonds to which they belong are barred. (*Meyer v. Porter*, 65 Cal. 67.)

109. Where a statute provides for the issuing of bonds of a city, with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury, in accordance with the terms of the act. (*Freehill v. Chamberlain*, 65 Cal. 603.)

Bail, action against, when arises. See Bail, IX, 3, a.

Cause of action on indemnity bond, when accrues. See Sheriffs, 176, et seq.

e. Actions on Notes; Suit to Cancel Note.

110. An action on a promissory note is barred by statute of limitations if not commenced within four years from the time the cause of action accrues. (*Banks v. Marshall*, 23 Cal. 223.)

111. In computing the time at which the statute of limitations begins to run on promissory notes the day on which the note becomes due is excluded, in all cases, when days of grace are allowed. (*Bell v. Sackett*, 38 Cal. 407.)
Cited 82 Cal. 34.

112. The statute of limitations begins to run against a promissory note from the date of its actual delivery, and not from the date it bears. (*Collins v. Driscoll*, 69 Cal. 550.)
Cited 82 Cal. 34; 89 Cal. 542.

113. A promissory note payable on demand is due immediately without an actual demand, and the statute of limitations commences to run at once from the time of its execution. (*O'Neil v. Magner*, 81 Cal. 631.)

114. A promissory note made payable one day after the happening of a particular event is not due until one day after such event happens, and a suit on it is not barred by the statute of limitations if commenced on the day after such event happens. (*Hathaway v. Patterson*, 45 Cal. 295.)

115. A note given on the twenty-ninth day of February, 1868, due twelve months after date, falls due on the twenty-seventh day of February, 1869, and it is too late to commence an action on it on the first day of March, 1873, even if the last day of February, 1869, is Sunday. (*Hibernia Bank v. O'Grady*, 47 Cal. 579.)

116. Upon a note payable six months after

date, with interest payable monthly, and further providing that, "in case default be made in any payment of interest when the same shall become due, then the whole amount of principal and interest to become due and payable immediately upon such default," the cause of action, within the true meaning of the statute of limitations, arises at the expiration of the credit fixed by the note, and not at the time when default is made in the payment of the interest. (*Belloc v. Davis*, 38 Cal. 242.)

117. If suit is brought on a promissory note executed out of this state and due more than two years before the action is commenced, the presumption is that it is barred by the statute of limitations; and, if the defendant has been absent from the state during any portion of the two years, that fact should be averred in the complaint. (*Bass v. Berry*, 51 Cal. 264.)
Cited 3 Mont. 271.

118. Destruction of notes in no respect impairs the liability of the maker, or the right of the plaintiff to recover upon them. This right of action upon a contract in writing is not barred by the statute of limitations until the lapse of four years after it has accrued. The fact that the contract is in writing, and not the present existence of the writing, determines the period within which the action must be brought. (*Bagley v. Eaton*, 10 Cal. 128.)

119. If the maker of a promissory note makes a parol agreement with the holder to furnish him goods, or perform services for him to the amount of the note, and furnishes the goods, or performs the services, and the value of the same equals the amount due on the note, after the statutory period had expired, during which an action can be brought for the goods or services, the maker cannot sue in equity to have the note canceled or surrendered. (*Gates v. Lane*, 49 Cal. 266.)

When commence to run on demand note. See Bills and Notes, 147.

Running of where note given in payment. See Payment, 12.

f. Accounts, Actions on.

120. Where an open account is verbally stated before the items comprising it are barred the statute of limitations begins to run against the stated account from the date of the statement, and an action may be brought thereon at any time within two years after the statement. (*Kahn v. Edwards*, 75 Cal. 192.)

121. Where an open account is not barred by the statute of limitations at the time of a statement of the account, although the statement is verbal, the statute of limitations begins to run upon the new cause of action thus brought into existence from the date of the settlement and new promise arising thereunder, and an action may be brought thereon within two years after such settlement. (*Baird v. Crank*, 98 Cal. 293.)

122. Where accounts bear upon their face words "audited and approved," and "certified to be correct," held, that this is language sufficient to create them instruments of writ-

ing within the meaning of the statute. (*Sannickson v. Brown*, 5 Cal. 57.)
Cited 24 Cal. 328.

123. Such instruments are not barred by that part on of the statute of limitations applying to accounts. (*Sannickson v. Brown*, 5 Cal. 57.)

124. When account is not a mutual one the statute of limitations bars each item of the same two years after its delivery. (*Adams v. Patterson*, 35 Cal. 122.)

125. Where there have been reciprocal demands between parties upon a mutual, open, and current account the statute of limitations commences running at the time of the last item of the account proved on either side. (*Norton v. Larco*, 30 Cal. 126.)

126. Where there are demands on each side, the striking of a balance converts the setoff into a payment, and from that time the statute of limitations commences running. (*Norton v. Larco*, 30 Cal. 126.)

127. Where the statute of limitations of two years was pleaded to a suit upon an implied contract for services rendered as secretary to a corporation, and the court below ruled that the statute did not apply, because the account was a "mutual, open, and current" account, and hence within the eighteenth section of the act of 1850 (*Woods Digest*, p. 48), held, that the court erred; that to constitute such an account there must have been reciprocal demands between the parties, which was not the case here, the items of the account all being on one side. (*Fraylor v. Sonora Min. Co.*, 17 Cal. 594.)

128. Where the items of an account are all on one side, the account is not mutual, and the statute of limitations is a bar to so much of the account as did not accrue within the period limited for the commencement of suit. (*Fraylor v. Sonora Min. Co.*, 17 Cal. 594.)

129. Payments made on an open account for goods sold and delivered due for more than a year do not make the account a mutual account, within the eighteenth section of the Limitation Act of 1850, and the account is barred. (*Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 344.)
Cited 30 Cal. 131, 134; 2 Utah, 470.

130. The fact that defendants once gave plaintiff a lump of gold amalgam to be sent to the mint for coinage, the proceeds to be applied to plaintiff's account, does not make the account mutual, nor affect the case in respect to the statute of limitations. (*Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 344.)
Cited 4 Nev. 111.

131. The action being regarded by the court as one to recover a balance due on a mutual, open, and current account, held, that the statute of limitations was not a bar. (*Kutz v. Fleisher*, 67 Cal. 93.)

Action on account, effect of death. See post, 266.

Accounting, statute of limitations on. See Executors and Administrators, VIII, 1.

Mutual account. See Accounts, 6.

Action against copartner for amount due on settlement, when commences to run. See Partnership, 387.

Suit by tenant in common for accounting. See Cotenancy, 136.

g. Certificate of Deposit, Action on.

132. The statute of limitations begins to run against a banker's certificate of deposit, payable on demand, from the date of the same, and no special demand is necessary to put it in motion. (*Brummagim v. Tallant*, 29 Cal. 503.)

Cited 81 Cal. 633; 82 Cal. 34.

h. Receipts, Actions on.

133. Mere naked receipt in writing, acknowledging delivery of money, is not a contract, and does not import a promise, obligation, or liability, and an action upon it is therefore barred by the statute of limitations in two years. (*Ashley v. Vischer*, 24 Cal. 322.)

134. A receipt or acknowledgment in writing for money, which also contains a clause stating that the money received is to be applied to the account of the person from whom received, partakes of the double nature of a receipt and contract, and shows upon its face a liability to account, and an action upon it is not barred by the statute of limitations until four years have expired. (*Ashley v. Vischer*, 24 Cal. 322.)
Cited 68 Cal. 473.

i. Optional Contracts, or Contracts Where Time of Performance Uncertain.

135. A cause of action for the enforcement of a parol contract that if a division line is found to be incorrect the owner occupying the land of the other could elect to have a claim for clearing the land or purchase it at its uncleared value, does not accrue so as to put the statute of limitations in motion until the true line is determined, and it is known which one of the parties is called upon to exercise his option, and to make the election provided for. (*Calanchini v. Branstetter*, 84 Cal. 249.)

136. If money is loaned to be repaid on demand, and no note or obligation is given in writing to repay it, the statute of limitations commences running from the time of the loan. (*Estate of Galvin*, 51 Cal. 215.)

137. Where no time is specified within which loan of money is to be repaid the presumption of law is that it is to be repaid on demand, and the statute of limitations begins to run from the time of the loan. (*Dorland v. Dorland*, 66 Cal. 189.)

138. M., in writing, promised to pay W. a certain sum, with the express understanding that if certain mines belonging to M. paid him no profit the note was not to be paid. M. sold the mines before they yielded any profit. Held, that the statute of limitations commenced to run only from the time of the conveyance. (*Wolf v. Marsh*, 54 Cal. 229.)

139. Where S. covenanted with H. that the original Mexican title to certain lands which S. conveyed to H. was valid, and in the event said title should not be confirmed by the courts of the United States before which it was then pending, upon the final adjudication of the same, that S. and his legal representatives should and would be liable to H. for the

purchase price of said lands, with interest; and where the district court of the United States for the northern district of the state of California, on the ninth day of November, 1859, adjudged said title invalid, from which judgment no appeal was taken or waiver made of the right thereto, or acquiescence in the finality of said judgment declared, within five years thereafter, held, that the right of action for a breach of said covenant only accrued after the lapse of five years from November 9, 1859, during which time said judgment was subject to appeal, and, as regards its subject matter, was not a final adjudication. (*Hills v. Sherwood*, 33 Cal. 474.)

Note payable on happening of particular event. See ante, 114.

Action on joint venture. See post, VI, 4, j.

j. Actions Between Partners or on Partnership Agreement.

140. Statute of limitations does not run between partners until the accounts are settled and a balance agreed upon. (*Hendy v. March*, 75 Cal. 566.)

141. In an action by Hill, to recover one-half his advances made under a contract between him and Haskin, whereby they agreed to buy and sell on a joint account certain mining stock, Hill to advance all the money and Haskin to repay one-half with interest, and Hill to hold all the stock purchased as security for his advances, but without specifying any time within which the repayment was to be made, held, that an offer to account and a demand for repayment by Hill were conditions precedent to his right to maintain the action, and that the statute of limitations would not commence running against him until such offer and demand. (*Hill v. Haskin*, 42 Cal. 156.) Cited 51 Cal. 177.

142. A court of equity, on account of the staleness of the claim, will not entertain an action for an accounting of the affairs of a partnership, which is brought by the personal representative of one partner, twenty-five years after his death, against the personal representative of the other, when the complaint fails to account for the delay by showing that the heirs of the former partner had no knowledge of their rights, or that there was some impediment to a prior action by them. (*Bell v. Hudson*, 73 Cal. 285.)

143. In February, 1852, one McCain entered into a contract in Pennsylvania with one McFarlane, whereby it was agreed that the former should go to the gold mines in California, engage there in business for a period of eighteen months, or longer, as might be arranged, and at the end of such time, and on his return to Pennsylvania, should give to McFarlane one-half of what he might up to that time have made. The contract further provided that if McCain did not return, or died, McFarlane was to be entitled to one-half, the same as if he had returned. In 1852, McCain came to California, but did not go to the mines. While there he acquired certain property, which he owned at the time of his death, in February, 1885. The present action for an accounting was brought on the

1st of May, 1886. Held, by Thornton, J., Paterson, J., and Sharpstein, J., that the action was barred by the statute of limitations, and by McKinstry, J., and McFarland, J., that the plaintiff and his intestate had lost the right to an accounting by reason of their laches. (*West v. Russell*, 74 Cal. 544.)

k. Stockholders, Actions by and Against.

144. The rights and remedies of a subrogated stockholder are barred by the statute of limitations within three years after the accruing of the liability; and the fact that the subrogation is to a promissory note of the corporation paid by the subrogated stockholder will not extend the statute, the note adding nothing to the remedy of the creditors to whom it was given as against the stockholder, so far as the statutes of limitations are concerned. (*Redington v. Cornwell*, 90 Cal. 49.)

145. A creditor of a corporation, who seeks to make the stockholders liable for his demand, must bring his action against them within the time prescribed by the statute of limitations. The statute begins to run when the debt falls due, and the time prescribed by the statute of limitations is not extended, as to the right to sue the stockholders, by a judgment against the corporation. (*Stilphen v. Ware*, 45 Cal. 110.) Cited 82 Cal. 653; 80 Cal. 57.

In action against subscribers to capital stock. See Corporations, 112.

Stockholder's liability, when accrues and when barred. See Corporations, IV, 7, h, IX, 7, i, A.

l. Principal and Surety, Actions Against or Between; Action for Contribution.

146. The liability of sureties on a promissory note is not discharged by the statute of limitations until four years after their liability becomes fixed. (*Dussol v. Bruguiere*, 50 Cal. 456.)

147. Where two persons executed a note, one as principal and the other as surety, and a judgment obtained upon the note is paid by the surety, held, that the obligation of the principal to repay the surety is not "founded upon a written instrument," within the meaning of the statute, and that, more than two years having elapsed after the payment before suit brought, the demand was barred. (*Chipman v. Morrill*, 20 Cal. 130.) Cited 95 Cal. 322.

Action by surety against principal. See post, VIII, 4.

148. In an action for contribution between joint obligors the statute of limitations does not begin to run until after the payment of the debt by the plaintiff. (*Sherwood v. Dunbar*, 6 Cal. 53.)

149. Where the payment was made by plaintiff, by a settlement of accounts with the payee of the note, the statute only begins to run from the date of the appropriation of money due by the payee to the plaintiff, to the payment of the note. (*Sherwood v. Dunbar*, 6 Cal. 53.)

Contribution, action for. See post, VIII, 4.

Bar of original claim, effect of on guaranty. See Guaranty, II.

m. Attorneys' Fees, Actions for.

150. If an attorney is employed to act as such for a party to an action, and there is but one employment, the statute of limitations does not commence to run against his claim for legal services until his services under the single employment are ended. (*Hancock v. Pico*, 47 Cal. 161.)

Action for compensation, when accrues. See Attorney and Client, VI, 6, a.

n. Miscellaneous Actions.

Time to sue on insurance policy. See Insurance, I, 13, a.

Maturity of cause of action against insurance policy. See Insurance, I, 13, a.

Limitation of actions against factors. See Factors.

Suit for specific performance, when barred. See Specific Performance, 115.

Suit for specific performance against executor, when barred. See Specific Performance, 52, 53.

Innkeepers, action against, when to be brought. See Inns, 24.

Innkeeper's liability is not liability created by statute. See Inns, 25.

Reward, action, when barred. See Reward, 5.

5. In Cases of Trusts.

151. Statute of limitations never runs in favor of a trustee, as against his cestui que trust, while the latter is in possession of the estate. (*Gilbert v. Sleeper*, 71 Cal. 290, 294.) Cited 80 Cal. 381.

152. The statute of limitations does not run in favor of a trustee, as against the cestui que trust, while the latter is in the possession of his estate, and there has been no adverse holding on the part of the trustee. (*Love v. Watkins*, 40 Cal. 547, cited 49 Cal. 506, 58 Cal. 624, 71 Cal. 294, 80 Cal. 381, 89 Cal. 582, 91 Cal. 417, 418; *Wormouth v. Johnson*, 58 Cal. 621.)

153. Where there is no adverse possession against a tenant in common by any of his cotenants, and no open repudiation of trust has been made, to his knowledge, by a trustee in possession, the possession of the trustee is as much his possession as that of the other cotenants, and the statute of limitations cannot run against him, though the trustee had not declared a trust in his favor, but had declared a trust in favor of the other cotenants, and had purchased his interest from another cotenant, if such declaration of trust and conveyance were unknown to such tenant in common. (*Watson v. Sutro*, 86 Cal. 500.)

154. Where a trust, voluntarily assumed, was, by the understanding of the parties, to be a continuing one, and the trustees continued to hold according to the understanding, and never repudiated the relation or did any acts inconsistent with it, the statute of limitations does not run as against the cestui que trust. (*Butler v. Hyland*, 89 Cal. 575.)

155. If an express trust, established in relation to personal property, is made to affect

real property, because of the act of the trustees in investing the trust money in land, so as to create a trust therein by operation of law under sections 852 and 853 of the Civil Code, such investment does not change the character of the trust as an express trust, since a resulting trust, under section 853 of the Civil Code, may still be an express trust and a continuing trust; and the statute of limitations will not run against the cestui que trust in such case until repudiation by the trustee brought home to the knowledge of the beneficiary. (*Roach v. Caraffa*, 85 Cal. 436.)

156. The statute of limitations runs in favor of a defendant chargeable as trustee of an implied trust, and it is not necessary, in order to set the statute in motion, that he should have denied or repudiated the trust. In such a case the statute begins to run when the wrong complained of is done, and the limitation, under sect on 843 of the Code of Civil Procedure, is four years. (*Hecht v. Slaney*, 72 Cal. 363.) Cited 91 Cal. 418, 578.

157. Claim of defendants to hold legal title as trustees of express trust in favor of the plaintiff as sole beneficiary is not adverse to the title of plaintiff as such beneficiary. (*Harrigan v. Mowry*, 84 Cal. 456.)

158. The statute of limitations does not begin to run in the case of an express trust until the trustee, with the knowledge of the cestui que trust, has disavowed and repudiated the trust. (*Miles v. Thorne*, 38 Cal. 335, cited 91 Cal. 417, 418; *Fox v. Tay*, 89 Cal. 339.)

159. As between trustees and cestui que trust, in the case of an express trust, the statute of limitations does not begin to run until the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the knowledge of the cestui que trust. (*Janes v. Throckmorton*, 57 Cal. 363.) Cited 80 Cal. 380, 435; 85 Cal. 446; 89 Cal. 349; 91 Cal. 417.

160. The statute of limitations does not begin to run in favor of the trustee of an express trust, nor in favor of a tenant in common in possession until a repudiation of the trust or of the cotenancy is made by clear and unequivocal words or acts, nor until such repudiation and an adverse claim to the property are brought home to the knowledge of the cestui que trust or of the cotenant whose rights are denied. Nor does it ever run while the cestui que trust is in possession of the trust estate. (*McClure v. Colyear*, 80 Cal. 378.)

161. In the case of an express trust, although the actual possession of the vendor or nonpossession of the vendee is a circumstance to be considered in determining whether there has been a repudiation of the trust and notice thereof to the vendee, yet such possession is not conclusive thereof, and the mere fact that the vendee is out of possession will not set the statute of limitations running. It is only in cases of implied trusts that actual possession by the beneficiary is necessary to

prevent the running of the statute. (*Luco v. De Toro*, 91 Cal. 405.)

162. If trust attaches to legal title acquired through sheriff's certificate of purchase and deed, the statute of limitations does not commence running until the execution of the sheriff's deed, and expires at the end of four years from that time. (*Currey v. Allen*, 34 Cal. 254.)
Cited 72 Cal. 366.

163. If A conveys land to B, with a provision in the deed that B shall reconvey to him, B holds the land in trust for A, and the statute of limitations does not commence running on A's right to a reconveyance until B repudiates the trust and such repudiation is brought to the knowledge of A. (*Hearst v. Pujol*, 44 Cal. 230.)
Cited 57 Cal. 388; 85 Cal. 446; 89 Cal. 349; 91 Cal. 417.

164. If one holds legal title to land in trust for another, and there is a stipulation that the trustee shall deed the land to the beneficiary upon the payment of the purchase money and interest to the trustee, a cause of action does not accrue to compel the execution of the trust until the money is paid, nor does the statute of limitations commence running until this time. (*Millard v. Hathaway*, 27 Cal. 119.)
Cited 65 Cal. 509; 74 Cal. 439.

165. In February, 1877, certain real property was transferred by deed to the plaintiff, under an agreement that he should reconvey the same to the defendants, for whom the consideration of the transfer to the plaintiff was paid by a third person. The defendants were in possession of the property at the time of the transfer, and so continued until the commencement of the action in April, 1881, the plaintiff retaining the naked legal title. Held, that a trust resulted in favor of the defendants, and that they were not guilty of laches in failing to assert their rights against the plaintiff until he had taken some steps to disturb them. (*Barroilhet v. Anspacher*, 68 Cal. 116.)
Cited 80 Cal. 380; 81 Cal. 121; 5 Utah, 332.

166. If one holds legal title to land as security for sum of money due him by the one having the equitable estate, although the trustee, after the lapse of four years from the time the money falls due, cannot be compelled to accept the money and execute a conveyance, yet, if he voluntarily receives the money when tendered, he is not discharged by the statute of limitations from executing the trust and giving a deed to the beneficiary. (*Millard v. Hathaway*, 27 Cal. 119.)

167. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff. (*Baker v. Joseph*, 16 Cal. 173.)
Cited 27 Cal. 279.

168. If moneys were deposited by defendant with the firm of which plaintiff is surviving partner, to keep for defendant until demand-

ed, the transaction constituted an express trust, and the statute of limitations did not commence running until demand. (*Zuck v. Culp*, 59 Cal. 142.)
Cited 85 Cal. 445, 446.

169. A deposit of money by one with another, to be held by him in trust for the depositor until he shall demand it, constitutes an express continuing trust, and no right of action will accrue to the cestui que trust until the trustee assumes a position in hostility to the trust relation, either by refusing to pay the money on demand, or by some other act, nor will the statute of limitations commence running until a demand is made for the money, or the trustee has violated his contract. (*Schroeder v. Jahns*, 27 Cal. 274.)
Cited 85 Cal. 446.

170. In such case, if no demand be made on the trustee, and he does not violate his contract in his lifetime, but demand is made on his administrator after his death, the statute of limitations does not commence running against the intestate, but the cause of action accrues against the administrator. (*Schroeder v. Jahns*, 27 Cal. 274.)

171. The statute of limitations does not commence to run against the right of the creditors to enforce the trust while the attorney remains in possession of the property and before he repudiates the trust. (*Broder v. Conklin*, 77 Cal. 330.)
Cited 89 Cal. 349.

172. The statute of limitations begins to run against the trust established by a contract, by which an attorney is to procure a patent for an equitable owner in consideration of an undivided interest, only from the time it is openly disavowed by the trustee insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust. (*Luco v. De Toro*, 91 Cal. 405.)

173. Findings that the executor of the patentee refused upon demand to convey to the assignee of the attorney, as tenant in common, the interest due the attorney under the terms of the contract, without stating any reason for the refusal, and that the patentee in his lifetime, and his representative after his death, repudiated any obligation under the contract to the attorney or his assignee, and claimed to have and hold the whole interest to which the patentee held the legal title when he died, adversely to the attorney or his assignee, free from any claim on the part of either under the contract, do not sufficiently show notice to the beneficiary of a disavowal of the trust relations created by the contract. There may be a disavowal and repudiation of the trust without knowledge or notice of the same being brought home to the beneficiary. (*Luco v. De Toro*, 91 Cal. 405.)

174. The fact that the plaintiff neglected to sue until sixteen years after she had attained majority, and two years after her trustee's death, does not constitute such laches as will prevent her obtaining relief, where it appears that for most of the time she was a member of the family of her trustee, who stood in loco parentis to her, and nothing is shown which would make it inequitable to

enforce the trust. (*Butler v. Hyland*, 89 Cal. 575.)

175. Where the wife died in 1843, in this state, and the husband managed and in part disposed of the common property, and then, in 1858, died, leaving a will giving his property to certain persons, held, that they, in suit by the children for a settlement and distribution of their mother's share in the common property, cannot set up the statute of limitations, because the husband and father held the property in trust. (*Ord v. De La Guerra*, 18 Cal. 67.)
Cited 85 Cal. 446.

176. When a decedent was possessed of a trust fund as an executor, in respect to which he could not plead the statute of limitations, his representatives stand in no better position, and are not entitled to claim the benefit of the statute. (*Fox v. Tay*, 89 Cal. 339.)

177. Bar of statute will apply to all items not connected with the trust relations between the parties upon a contract to account and pay moneys held in trust. (*Butler v. Austin*, 64 Cal. 3.)

178. In an action to quiet title to land the right of the defendant to charge the plaintiff as trustee of the land for his benefit on the ground of fraud, held, barred by the statute of limitations. (*Croghan v. Spence*, 71 Cal. 124.)

Trust, statute begins to run on, when. See Bills and Notes, 332; Trust Deeds, 40.

Statute does not affect depositor in bank. See Banks and Banking, 93.

Bank, action against, when arises. See Banks and Banking, VIII.

6. Actions by or Against Officers.

179. Claim of district attorney for his commission on debts recovered for the county comes within that clause of section 17 of the Limitation Act of 1850, which bars "an action upon a liability created by statute, other than a penalty or forfeiture," in three years. Such claim is exclusively the creature of the statute. (*Higby v. Calaveras County*, 18 Cal. 176.)
Cited 24 Or. 146.

180. Statute of limitations for breach of official bond does not commence running until the expiration of the official term, and the period thereafter required to effect a bar is four years. (*People v. Van Ness*, 79 Cal. 84.)

181. Under section 345 of the Code of Civil Procedure an action brought by the people on the relation of the controller against a former secretary of state, on an account stated by the controller under section 437 of the Political Code, for money alleged to have been received by the defendant in his official capacity, but for which he had failed to account or make any settlement with the controller, is affected by the statute of limitations in the same manner as it would be were the action brought by a private person. (*People ex rel. Dunn v. Melone*, 73 Cal. 574.)
Cited 76 Cal. 124.

182. The statute of limitations commences to run against an action upon the default of the secretary to pay over the money received

by him according to law, and not from the time of the demand made on him by the controller under section 437 of the Political Code; and under subdivision 1 of section 339 of the Code of Civil Procedure, the action is barred upon the expiration of two years from the time of the default. (*People ex rel. Dunn v. Melone*, 73 Cal. 574.)

183. A cause of action to recover for fees unlawfully retained by the commissioner accrued in favor of the state upon the expiration of his term of office, without any demand being made therefor, and, under section 338, subdivision 1, of the Code of Civil Procedure, became barred by the statute of limitations after the lapse of three years. (*People ex rel. Dunn v. Van Ness*, 76 Cal. 121.)
Cited 15 Col. 357.

184. Fees collected by county recorder, and not paid over, are held by him in trust for the county, and the statute of limitations does not commence to run against the right of the county to recover the same until a demand has been made on the recorder therefor. (*County of San Luis Obispo v. King*, 69 Cal. 581.)
Cited 71 Cal. 155.

185. An action against a sheriff and his sureties upon his official bond for the seizure of property by the sheriff under attachment comes within the provisions of the second subdivision of section 339 of the Code of Civil Procedure, and must be brought within two years from the time the action accrues. (*Paige v. Carroll*, 61 Cal. 211.)

186. The limitation of an action against a tax-collector and the sureties upon his official bond for failure to pay over taxes collected is not that of two years prescribed by subdivision 2 of section 339 of the Code of Civil Procedure, concerning an action against a sheriff, though the sheriff be tax-collector *ex officio*; but is four years from the time of his dereliction of duty, as prescribed by section 337 of that code. (*People v. Burkhart*, 76 Cal. 606.)

187. The tax-collector of the city and county of San Francisco is legally bound to pay over the moneys collected by him in his official capacity upon the expiration of his term of office, without any demand being made upon him for payment. If he fails to do so the statute of limitations commences to run from that time against the right of the city and county to maintain an action on his official bond to recover for his default. (*San Francisco v. Heynemann*, 71 Cal. 153.)
Cited 76 Cal. 124, 608; 15 Col. 357.

188. An action to recover money paid to a tax-collector, under protest, must be commenced within six months from the time the cause of action accrued. (*Cameron v. Smith*, 50 Cal. 303.)

189. The statute of limitations does not commence to run against the right of the claimant to recover back from the tax-collector money paid by a claimant of outside lands for an assessment in pursuance of order 800 and in favor of the sureties on his official bond, until it has been judicially determined whether or not the claimant is the person entitled to a deed of the land from the city. (*Lawrence v. Doolan*, 68 Cal. 309.)

190. The statute of limitations would not begin to run against a member of a board of trustees for illegal acts until after the election of a new and innocent board. (*City of Oakland v. Carpentier*, 13 Cal. 540.)

When begins to run against claim of president for compensation. See *Corporations*, 493.

Claim of officer for salary, when barred. See *Municipal Corporations*, 177.

7. Purchaser at Execution or Foreclosure Sale, Running of Statute Against.

191. The statute of limitations does not commence to run against a purchaser of land at a sheriff's sale until the sheriff's deed has been delivered to him. (*Leonard v. Flynn*, 89 Cal. 535; *Jefferson v. Wendt*, 51 Cal. 573, cited 68 Cal. 120, 89 Cal. 542.)

192. The statute of limitations does not begin to run against a purchaser of real estate at an execution sale before he becomes entitled to a deed. Whether the statute commences to run then or at the time when the deed is actually executed and delivered to the purchaser, not decided. (*Barroilhet v. Ansbacher*, 68 Cal. 116.)

193. Where a sheriff seizes firm property on execution against a partner a subsequent sale of the entire property, and an appropriation of the proceeds by the purchaser, is a conversion, and the statute of limitations begins to run in his favor from the date of the sale by him. (*Wright v. Ward*, 65 Cal. 525.)

194. The purchaser of land at a mortgage sale then in the adverse possession of another, when he obtains the sheriff's deed becomes the assignee of the mortgagor, and cannot maintain an action for its recovery, unless it is commenced within five years from the time a cause of action first accrued to the mortgagor or those under whom he claims title. (*Le Roy v. Rogers*, 30 Cal. 229.)

195. In action by real owner to recover land sold under foreclosure, if the purchasers under the foreclosure sale acquire nothing, the question of the statute of limitations does not arise. It is not as if they took a title, and the beneficial owner was attempting to set up a secret trust. (*Randall v. Duff*, 79 Cal. 115.)

8. Actions to Set Aside Probate Sales or Fraudulent Conveyance.

196. The sales mentioned in the one hundred and ninetieth section of the Probate Act, which reads as follows: "No action for the recovery of any real estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale," include and comprise all sales, whether valid, voidable, or void, made under orders made by probate courts, of real estate belonging to persons who have died since the passage of the Probate Act. (*Harlan v. Peck*, 33 Cal. 515.)

Cited 66 Cal. 111; 68 Cal. 97; 93 Cal. 108; 94 Cal. 251.

197. The provision of section 190 of the

Probate Act (Code Civ. Proc., sec. 1573), for a three-year limitation of actions for the recovery of real property sold by an executor or administrator does not bar minor heirs, if the person who assumed to act as administrator had not taken out letters of administration, and had not given an official bond as public administrator, and had not taken the oath of office as such. (*Staples v. Connor*, 79 Cal. 14.)

Action to set aside probate sale, when to be brought. See *Estates of Deceased Persons*, 470, et seq.

Actions to set aside guardian's sale, when barred. See *Guardian and Ward*, 89.

Actions by creditor to set aside conveyance by intestate. See *Fraudulent Conveyances*, 194.

Action to set aside fraudulent conveyances. See *Fraudulent Conveyances*, III, 8, a.

9. Actions for Conversion; Actions Against Transferees of Pledges.

198. The complaint alleged that one C., being the owner of certain stocks, deposited them with the defendants for safe-keeping, and authorized them to receive the dividends and pay the assessments thereon. Afterwards he demanded the stocks, and the defendants refused to deliver them to him. After that he was induced by their false and fraudulent representations to execute and deliver to them a release of all his claims and demands against them. Subsequently he assigned the stocks, and all his claims and demands against the defendants growing out of the fraud to the plaintiff, who thereupon demanded of the defendants the delivery of the stocks to him. Held, that the refusal of the defendants to deliver the stocks to C. on his demand constituted a conversion, that the cause of action stated in the complaint was founded up on such conversion, and not upon the deceit of the defendants in procuring the release, and that the statute of limitations commenced to run from the time of the conversion. (*Doyle v. Callaghan*, 67 Cal. 154.) Cited 85 Cal. 196.

199. Where possession of property is obtained (in good faith or otherwise) from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary. Accordingly, in an action against defendants, who had, in good faith, and without notice of the plaintiff's rights, received in pledge the plaintiff's goods from her bailee, and afterwards sold them, held, that the statute of limitations commenced to run from the time of the defendant acquiring possession, and not from the time of the subsequent sale by them. (*Harpending v. Meyer*, 55 Cal. 555.) Cited 57 Cal. 210; 15 Or. 546.

Limitation of action to recover proceeds of collateral security. See *Bills and Notes*, 333.

10. Malicious Prosecution, Attachment, or Injunction; Suing Out Execution on Satisfied Judgment.

200. The statute of limitations does not begin to run against a claim for damages for the

malicious prosecution of a civil action upon an unfounded claim until the action is terminated, although an attachment may have issued in the action. (*Berson v. Ewing*, 84 Cal. 89.)

201. A cause of action for a malicious attachment of the property of the plaintiff without probable cause is barred in two years from the date of the levy of the attachment, and the accruing of the cause of action is not postponed until a dissolution of the attachment, nor is a motion to dissolve it necessary before commencing the action. (*McCuaker v. Walker*, 77 Cal. 208.)

Cited 84 Cal. 374; distinguished 84 Cal. 93.

202. It is only where an illegal and malicious attachment is the gist of the action that limitation runs from the date of its issuance and levy; and this rule does not apply where the gist of the action is the malicious prosecution of an unfounded claim in which, so far as the record is concerned, a writ of attachment might have properly issued. (*Berson v. Ewing*, 84 Cal. 89.)

203. The statute of limitations begins to run against a claim for damages for maliciously procuring the levy of an attachment at the time of the levy. (*Sharp v. Miller*, 57 Cal. 431.) Cited 77 Cal. 212; distinguished 84 Cal. 93.

204. A temporary injunction was granted, and dissolved, and afterwards judgment went for defendant. In an action by the defendant against the plaintiff in the injunction suit for suing out the writ maliciously, and without probable cause, commenced more than two years after the dissolution of the injunction, but within two years after the judgment, held, that the cause of action was barred. (*Anderson v. Coleman*, 56 Cal. 124.)

205. The statute commenced running only upon the final termination of the injunction suit, as until then want of probable cause could not be established. *Sharpstein, J.*, concurring in the judgment, on the ground that there was no evidence of malice. (*Anderson v. Coleman*, 56 Cal. 124.)

206. Under the provisions of the Code of Civil Procedure an action for false imprisonment is barred in one year, and an action for malicious prosecution in two years. (*Krause v. Spiegel*, 94 Cal. 370.)

207. Procuring of levy of execution issued upon satisfied judgment is a tort, and constitutes a liability not founded upon an instrument in writing; and an action thereon is barred in two years. (*Wood v. Currey*, 57 Cal. 208.)

Cited 65 Cal. 491; 72 Cal. 590; 77 Cal. 212; 88 Cal. 166; 95 Cal. 318.

208. The statute begins to run in such case at the time of the levy, and subsequently accruing damages do not constitute separate causes of action, and do not postpone the operation of the statute. (*Wood v. Curry*, 57 Cal. 208.)

Action for issuance of execution on satisfied judgment. See post, IX, 3.

11. Tortious or Negligent Acts, Malicious Burning of Buildings; Seduction.

209. Section 339 of the Code of Civil Proceed-

ure, providing that an action upon a contract, obligation, or liability, not founded upon an instrument in writing, must be brought within two years after the cause of action shall have accrued, is applicable to all actions at law not specifically mentioned in other portions of the statute, and includes liabilities arising in consequence of torts committed, as well as those arising from contracts, express or implied, not founded upon an instrument in writing. (*Lattin v. Gillette*, 95 Cal. 317.)

210. A cause of action founded on a tort arises when the wrongful act causing damage is done, and the statute of limitations then begins to run against it, although the damages occasioned by the act may not all have been sustained at that time. (*Raynor v. Mintzer*, 72 Cal. 585.)

Actions arising out of fraud. See post, IX, 7. Trespass, limitations of actions for. See Trespass, III, 2.

Action for trespass by animals, when barred. See Animals, 15.

Limitation of action for trespass by cattle. See Animals, 13.

When commences to run in favor of one diverting water on railroad land. See Railroads, 40.

211. The statute of limitations begins to run against an action for misconduct or negligence from the date when the misconduct or negligence was completed, and it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty. (*Lattin v. Gillette*, 95 Cal. 317.)

212. The right to maintain an action for negligence is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged. (*Lattin v. Gillette*, 95 Cal. 317.)

213. The liability of a railroad company for damages for an injury done to a passenger by collision of its cars accrues when the collision occurs, and the action must be brought within two years from such time. (*Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42.) Cited 57 Cal. 201; 72 Cal. 590.

214. The fact that the injured person does not recover for a long time does not extend the time for bringing the action. (*Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42.)

215. An action for causing death by wrongful act or neglect must be commenced within two years after the death of the person injured. (*Benjamin v. Eldridge*, 50 Cal. 612.)

216. Under section 339 of the Code of Civil Procedure, a cause of action against an attorney for neglect of duty in the management of an action is barred at the expiration of two years after the neglect occurred. (*Hays v. Ewing*, 70 Cal. 127.)

217. Section 337 of the Code of Civil Procedure, prescribing the limitation of four years for an action upon a contract, obligation, or liability, founded upon an instrument

in writing, refers to contracts, obligations, or liabilities arising from instruments of writing executed by the parties who are sought to be charged in favor of those who seek to enforce the contracts, obligations, or liabilities, and does not apply to a certificate of title given by a searcher of records employed to examine and make a written report of the condition of the title, where damages are claimed for negligence of the searcher in giving an incorrect certificate. (*Lattin v. Gillette*, 95 Cal. 317.)

218. An action against a searcher of records, for damages resulting from his negligence in the examination and report upon the condition of the title to realty, must be commenced within two years after the giving of the report, or it is barred by the statute of limitations, although the plaintiff was deprived of a portion of the land by means of a suit brought within two years before the commencement of the action for damages. (*Lattin v. Gillette*, 95 Cal. 317.)

Action by distributees for land lost by negligence. See *Executors and Administrators*, 324.

219. An action for maliciously burning a building, and the personal property contained therein, whether considered as an action for a trespass upon real property, or for injuring personal property, is barred by the statute of limitations after the expiration of three years from the time of the injury. (*Gale v. McDaniel*, 72 Cal. 334.)

220. The statute of limitations commences to run against an action for maliciously burning a building from the time of the injury, and not from the time the plaintiff discovered the person who did it. (*Gale v. McDaniel*, 72 Cal. 334.)

221. The statute of limitations does not commence to run against the right of a minor to sue for her seduction until she attains her majority. (*Morrell v. Morgan*, 65 Cal. 575.)

VII. Limitations in Equity.

222. The statute of limitations is applicable alike to causes of action in equity and at law. (*Boyd v. Blankman*, 29 Cal. 19.)

223. The statute of limitations of this state differs essentially from the statutes of James I, and from the statutes of limitations in force in most of the other states. Those statutes apply in their terms only to particular legal remedies, and courts of equity hold themselves not bound by them, except in cases of concurrent jurisdiction, but act merely by analogy to them. (*Lord v. Morris*, 18 Cal. 482.)

Cited 23 Cal. 34; 24 Cal. 409; 4 Nev. 289; 20 Nev. 140.

224. Those statutes as a general thing also apply, so far as actions upon written contracts not of record are concerned, only to actions upon simple contracts, that is, contracts not under seal, fixing the limitation at six years, and leaving actions upon specialties to be met by the presumption established by the rule of the common law, that after a lapse of twenty years the claim has been satisfied. In those statutes where specialties are mentioned the limitation is generally fixed either at fifteen

or twenty years. The case is entirely different in this state. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject matter and not to the form of the action, or the forum in which the action is prosecuted. Nor is there any distinction in the limitation prescribed between simple contracts in writing and specialties. (*Lord v. Morris*, 18 Cal. 482.)

225. Courts of equity generally follow the analogy of the law in cases where statutes of limitation are invoked, one of the defenses peculiar to equity being the lapse of time or staleness of the demand. Per *Murray, C. J.* (*Dominguez v. Dominguez*, 7 Cal. 424.) Cited 23 Cal. 34; 66 Cal. 338.

226. The four years' limitation for commencing actions in section 343 of the Code of Civil Procedure applies to all suits in equity not strictly of concurrent cognizance in law and equity. (*Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42.) Cited 90 Cal. 67.

227. Courts of equity will, in proper cases, refuse their aid to enforce stale demands against a party in possession. (*Healy v. Buchanan*, 34 Cal. 567, 570.)

228. Section 343 of the Code of Civil Procedure, providing that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued," applies to suits in equity as well as to actions at law. (*Lux v. Haggin*, 69 Cal. 255.) Cited 90 Cal. 67.

Action to quiet title. See *Law of the Case*, 33.

Right of grantor to quiet title to land included by mistake, when barred. See *Quiet-ing Title*, 82.

Action to quiet title by heir, when barred. See *Estates of Deceased Persons*, 470.

Trademarks, infringement of, laches. See *Trademarks*, 33.

VIII. Disabilities.

1. Insanity.

229. If a person, while insane, is fraudulently induced to execute a conveyance of his property to another the statute of limitations will not commence running against the grantor's right to commence an action to set aside the deed, until he recovers his reason and discovers what he has done. (*Crowther v. Rowlandson*, 27 Cal. 376.)

2. Infancy.

230. Infant heir is entitled to five years after attaining majority in which to assert his rights to the real property of his ancestor. (*Crosby v. Dowd*, 61 Cal. 557, 601.)

231. Protection of infancy once attaching continues until the disability is removed. (*Crosby v. Dowd*, 61 Cal. 557, 598.)

232. Right of infant heir to bring suit for his ancestor's realty within five years after attaining majority is not affected by the appointment of an administrator. (*Crosby v. Dowd*, 61 Cal. 557, 601.)

233. The statute of limitations affords no

defense to one who, without right, enters into possession of a Spanish grant belonging to an infant, if a suit for its recovery is commenced within five years after the infant attains his majority. (*Burton v. Robinson*, 51 Cal. 186.)

234. Ouster sets the statute of limitations running in favor of the disseisor, and the ouster and notice thereof is not suspended by the infancy of the disseised, though the effect of his knowledge thereof is suspended until his majority, and protection is given to the infant by the provision of the statute that the adverse holding must continue for five years after his majority. (*Winterburn v. Chambers*, 91 Cal. 170.)

Bar of executor bars minor heir. See ante, V, 4.

Seduction of minor, action for, when begins to run. See ante, VI, 11.

3. Marriage.

235. Adverse possession for five years of the separate property of a married woman creates a bar under the Limitation Act of April 18, 1863 (Stats. 1863, p. 325), and is a good defense to an action of ejectment by her or her grantees. (*Kapp v. Griffith*, 42 Cal. 411.)

236. The general statute of limitations applies to a cause of action concerning the wife's separate estate, where she may sue alone. (*Cameron v. Smith*, 50 Cal. 303.)

237. As a married woman, under section 7 of the Practice Act, may maintain ejectment for her separate property, without joining her husband, her coverture does not create a disability so as to save the bar of the statute of limitations as to such property, the amendment of April 18, 1863 (Stats. 1863, p. 325), having changed the rule of the statute of 1850 on this subject. (*Kapp v. Griffith*, 42 Cal. 411.)

Cited 67 Cal. 390.

238. In this state, prior to 1863, if a married woman was entitled to maintain an action on a promissory note, the statute of limitations did not run as against her right of action during her coverture. Since 1863 the statute of limitations runs against a married woman in all those actions to which her husband is not a necessary party plaintiff with her. (*Wilson v. Wilson*, 38 Cal. 447.)

Cited 67 Cal. 390.

Married women, statute runs against, when. See *Homesteads*, 316.

4. Absence from the State.

239. There is no difference in principle between the suspension of the running of the statute of limitations resulting from an express waiver and one caused by voluntary act in absenting oneself from the state. (*Wood v. Goodfellow*, 43 Cal. 185.)

240. So long as a mortgagor holds the equity of redemption, and no other rights intervene by reason of subsequent liens or encumbrances, he has the power, by written stipulation under the statute, or by absenting himself from the state, to suspend the running of the statute of limitations. (*Wood v. Goodfellow*, 43 Cal. 185.)

Cited 66 Cal. 205.

241. If, when the cause of action here accrues, the person against whom the same exists resides in the state, and he afterwards departs from the state, his successive absences from the state must be aggregated together and deducted from the whole time which has elapsed since the cause of action accrued, and the balance is the time the statute of limitations has run. (*Rogers v. Hatch*, 44 Cal. 280.)

Cited 66 Cal. 205; 8 Mont. 273.

242. If the statute of limitations has been set in motion by a departure from the state, and is then interrupted by a return, it commences running again by a second absence from the state. (*Rogers v. Hatch*, 44 Cal. 280.)

243. The absence of a mortgagor from the state stops the running of the statute of limitations as to him, but not as to subsequent lienholders. (*Watt v. Wright*, 66 Cal. 202.)

244. The liability of the principal to reimburse a surety for payment of the original debt, not being founded upon an instrument in writing, is barred in two years from the date of such payment; and although the liability of another surety, for contribution to his cosurety who has paid the debt, may be kept alive by the absence of such other surety from the state, such absence does not extend the time within which an action may be brought by him against the principal upon payment to his cosurety of his contributive share of the principal debt. (*Stone v. Ham-mell*, 83 Cal. 547.)

245. The defendant S. pleaded the statute of limitations. Held, as the note was executed in the state of Nevada, and there is no pretense that the defendant openly visited California more than two years before the commencement of the action, the court below properly found against the defendant as to the bar of the statute. (*Lang v. Specht*, 62 Cal. 145.)

246. Suit commenced January 8, 1859, on a note executed in New York, and due January 1, 1856. Defendant not in this state when the cause of action accrued, but arrived here March 23, 1856, and remained until June 20, 1856, from which time he was absent until February 14, 1857. Plaintiff resided in New York, and was fully informed of the movements of defendant. Some evidence tending to show that defendant came to this state in 1856, for a temporary business purpose, intending to return to New York and form a partnership, according to previous arrangement. Defense, statute of limitations of two years. Held, that the case is within the statute, and that the statute commenced running on the arrival of the defendant here in March, 1856, there being no fraud or concealment on the part of defendant, and his presence here between March and June being open and public, and sufficient for the commencement of a suit. (*Palmer v. Shaw*, 16 Cal. 93.)

247. The word "return" used in the twenty-second section of the Limitation Act of 1850, is held by the authorities to apply as well to persons coming from abroad as to the citizens

of the country going abroad for a temporary purpose and then returning. But the coming from abroad must not be clandestine, and with an intent to defraud the creditor, by setting the statute in operation and then departing. (*Palmer v. Shaw*, 16 Cal. 93.) Cited 44 Cal. 282; 3 Mont. 273; 1 Utah, 182.

248. The general language of section 1 of the Limitation Act of 1855, that actions in the cases therein named "can only be commenced within two years from the time the cause of action has accrued, or shall accrue," is controlled and limited by the twenty-second section of the Limitation Act of 1850, respecting the effect of absence from the state. (*Palmer v. Shaw*, 16 Cal. 93.)

249. Statute of limitations of Vermont deducts from the time fixed to sue on a judgment all the time the defendant may be absent from that state, unless he has left attachable property to satisfy the judgment; and by the construction of the statute, given to it by the courts of that state, it means that such attachable property must be sufficient to satisfy the judgment. (*Nelson v. Nelson*, 6 Cal. 430.) Cited 10 Cal. 374.

Absence from state of part of several joint debtors. See ante, 98.

Absence from state should be averred. See ante, 117.

5. Subsequent Disabilities.

250. Where person who could have maintained action to recover her interest in land during her lifetime dies, the running of the statute of limitations is not suspended during the minority of one who claims the property under the decedent. (*Alvarado v. Nordholt*, 95 Cal. 116.)

251. Where a person in whose favor a cause of action for the recovery of real estate exists, and who is under no disability, dies, the statute of limitations does not cease running against those to whom the property is devised or descends, notwithstanding their disability at that time. (*McLeran v. Benton*, 73 Cal. 329.) Cited 95 Cal. 123.

252. By common law, when the statute of limitations begins to run, a subsequent disability, as death of the party bound, etc., does not stop it. But this doctrine has no application where judgment is obtained against an intestate in his lifetime and no execution levied. In such case the judgment creditor being prevented by the statute from suing after the death of the debtor, the statute ceases to run until presentation of the claim to the administrator. (*Quivey v. Hall*, 19 Cal. 97.)

Successive absences. See ante, VIII, 4.

IX. What Prevents Running of Statute.

1. Existence of Person Competent to Sue, Necessity of.

253. The clause in the statute of limitations which provides that civil actions shall be commenced within certain periods prescribed "after the cause of action shall have accrued," does not imply, in addition, the existence of a person legally competent to enforce it by suit.

The statute must run in all cases not therein expressly excepted from its operation. (*Tynan v. Walker*, 35 Cal. 634, cited 67 Cal. 180, 181; *Hibernia etc. Soc. v. Conlin*, 67 Cal. 178.)

2. Bankruptcy.

254. Where the right to maintain an action on a note or other demand has been suspended by the pendency of bankruptcy proceedings in the case of the debtor, the period of such suspension is not to be counted as part of the time prescribed by the statute of limitations to bar the action. (*Hoff v. Funkenstein*, 54 Cal. 233; *Goldtree v. Funkenstein*, 54 Cal. 594.)

3. Injunction, Stay of Proceedings, or Judgment in Ejectment.

255. The running of the statute in an action for procuring the levy of an execution on a satisfied judgment is not suspended by injunction proceedings restraining the enforcement of the execution. (*Wood v. Currey*, 57 Cal. 208.)

256. An order staying proceedings upon a judgment and order of sale does not operate to suspend the running of the statute of limitations for the enforcement of the judgment. (*Cortez v. Superior Court*, 86 Cal. 275.) Cited 92 Cal. 397.

257. Judgment in ejectment does not create new estate or vest a new title in the plaintiff so as to interrupt the running of the statute of limitations, where it has begun to run. An actual entry is necessary to stop the running of the statute. (*Carpenter v. Natoma etc. Min. Co.*, 63 Cal. 616.)

Suspension of running of time for issuance of execution. See Executions, I, 3.

Suspension of powers of executor, effect on limitations. See Executions, 12.

Limitation on bonds where statute suspends right of action. See Constitutional Law, 355.

Injunction does not suspend limitation. See Executions, 14.

4. Appeal.

258. The mortgage in question was executed on the 3d of September, 1878, to secure a promissory note which matured one year thereafter. The present action to foreclose the mortgage was commenced on the 25th of March, 1880. On the 19th of August, 1880, the plaintiff asked leave to amend her complaint so as to obtain a reformation of the mortgage and its foreclosure as reformed. The court refused to allow the amendment, and rendered judgment for the defendants. The judgment was reversed on appeal on the 28th of March, 1883, and the amended complaint was filed on the 11th of May, 1883. Held, that pending the appeal the statute of limitations did not run against the right of the plaintiff to have the mortgage reformed, and that the amended complaint should be treated as filed as of the date of the application therefor. (*Hutchinson v. Ainsworth*, 73 Cal. 452.)

5. Agreements not to Sue.

259. If party enters into valid agreement, in writing, with the defendant, not to sue

upon a particular demand which he holds until the happening of a particular event, the running of the statute is suspended until the event occurs. (*Smith v. Lawrence*, 38 Cal. 24.)

260. To make such agreement valid it is not necessary that the debtor should sign it. (*Smith v. Lawrence*, 38 Cal. 24.)

Suspension of statute by written stipulation. See ante, VIII, 4.

Suspension by agreement of parties to contract. See ante, 91.

Statutes suspend limitations on city bonds, when. See ante, 103, 104.

6. Death, Effect on; Running of Statute Pending Administration.

261. There is no provision made in the statute excepting from its operation a case where the party who would have been entitled to sue dies before the cause of action has accrued. (*Tynan v. Walker*, 35 Cal. 634.)

262. In such case the person interested in his estate—his creditors, heirs, and devisees—have the full time allowed by the statute (six months) to obtain a grant of administration and commence an action. (*Tynan v. Walker*, 35 Cal. 634.)

263. Death of mortgagor before the accrual of the cause of action does not affect the running of the statute of limitations. (*Hibernia etc. Soc. v. Conlin*, 67 Cal. 178.)

264. B., being seized of certain lands, shortly before his death, which occurred April 5, 1854, placed W. in possession under him. In October, 1854, W. made entry and claim of said lands as his own, and thereafter, under said claim, held the undisturbed possession of the same for more than twelve years. On the fifth day of October, 1866, T. was appointed administrator of the estate of B., and on the eighth day of November following brought ejectment against W. to recover the possession of said lands, to which action W. pleaded the statute of limitations in bar. Held, that the plea was well taken, and the action was barred. (*Tynan v. Walker*, 35 Cal. 634.)

Death, subsequent disabilities. See ante, VIII, 5.

265. The statute of limitations, as a rule, does not begin to run when no administration exists on the estate of the deceased at the time the cause of action accrued. (*Smith v. Hall*, 19 Cal. 85.)

266. Where D. had a running account with L. from 1838 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857, and D., within one year after the granting of letters of administration, commenced his suit on said account against the estate, held, that the suit was commenced in time. (*Danglada v. De la Guerra*, 10 Cal. 386.) Cited 19 Cal. 86.

267. The fact that a long period intervened between the death and the administration taken on the estate can make no difference. (*Danglada v. De la Guerra*, 10 Cal. 386.)

268. The allowance and approval of a claim against the estate of a deceased person by the administrator and judge stops the run-

ning of the statute of limitations against the claim. (*Wise v. Williams*, 88 Cal. 30.)

269. After a claim founded upon a note secured by a mortgage has been duly presented to the personal representative of a deceased mortgagor, and allowed and approved, the right of the mortgagee to maintain an action to foreclose the mortgage is not affected by the statute of limitations pending the proceedings for the settlement of the estate of the mortgagor. (*German Sav. etc. Soc. v. Hutchinson*, 68 Cal. 52.) Cited 72 Cal. 548.

270. The statute of limitations does not run, while the administration is pending and unsettled, as to a claim against an estate which has been allowed, nor as to a judgment which has been recovered against an administrator or an executor for a debt of the estate. (*Estate of Schroeder*, 46 Cal. 305.) Cited 85 Cal. 153.

271. Until the entry of a decree discharging the executor or administrator the administration of the estate is still pending, and until then (under section 1569 of the Code of Civil Procedure) no claim against the estate which has been presented and allowed is affected by the statute of limitations. (*Dohs v. Dohs*, 60 Cal. 255.) Cited 63 Cal. 475; 72 Cal. 548.

Suspension of statute on judgment pending administration. See ante, VIII, 5.

Actions on claims against estate. See *Estates of Deceased Persons*, VI, 8.

Death, effect of on pending action. See *Estates of Deceased Persons*, 217.

Action against executor when not barred. See *Executors and Administrators*, VII, 3, a. Statute pending settlement of estate. See *Estates of Deceased Persons*, 198.

Effect of statute on an application for sale. See *Estates of Deceased Persons*, 342, et seq.

Statute before substitution of administrator. See *Executors and Administrators*, 310.

7. Fraud.

272. Statutes of limitations are intended to prevent the assertion of stale claims, which it may be difficult or impossible to defeat by furnishing the requisite proof, owing to the lapse of time; and also proceeding upon the presumption of payment. They are not intended to protect a party who, by a fraudulent concealment, has delayed the assertion of a right. (*Kane v. Cook*, 8 Cal. 449.)

273. Where the plaintiff filed a bill in equity in 1852 to set aside a sale of land made in 1835, on the ground of fraud, held, that his right to recover would be barred by ten years' prescription under the Mexican law, and that the full period having run, he could not recover. (*Dominguez v. Dominguez*, 7 Cal. 424.)

274. Where relief is sought on the ground of fraud the statute of limitations does not commence running until the discovery of the fraud. (*Currey v. Allen*, 34 Cal. 254.)

275. An action for relief on the ground of fraud may be commenced at any time within three years after a discovery of the facts constituting the fraud, or of facts sufficient to put a person of ordinary intelligence and

prudence on inquiry. (*Boyd v. Blankman*, 29 Cal. 19.)

Cited 34 Cal. 258; 71 Cal. 529, 530.

276. If a judgment removing an alleged cloud on title to real estate is obtained by fraudulent practices, and the defendants do not reside in the state, they may maintain an action to set aside the judgment, and have their title to the land established within three years after their discovery of the facts constituting their cause of action, and the case is not stale because twelve years may have elapsed before suit was commenced. (*Hayden v. Hayden*, 46 Cal. 337.)

277. The clause in the seventeenth section of the statute of limitations, providing that an action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the facts constituting the fraud, is applicable to constructive fraud as well as fraud in fact. (*Boyd v. Blankman*, 29 Cal. 19.)

278. For the purposes of the statute of limitations, if the means of knowledge exist, and the circumstances are such as to put the party on inquiry, he must be held to have had knowledge. Therefore, where the fact that defendants were stockholders was shown by the books of the company, a person who advanced money to the company must be held to have had knowledge of the facts upon which the defendant's liability was created. (*Moore v. Boyd*, 74 Cal. 167.)

Cited 90 Cal. 57.

279. A party seeking to avoid the bar of the statute on account of undiscovered fraud must show that he used due diligence to detect it, and should state when any particular discovery was made, what it was, and why it was not made sooner, and will be presumed to have known what, with reasonable diligence, he might have ascertained concerning the fraud of which he complains, but where the complaint states facts showing that the relations of the parties are such as would naturally inspire trust and confidence on the part of the plaintiff in the defendant, and that he relied upon the defendant's representations without knowledge or reason to suspect that a fraud was being practiced upon him, and nothing appears to have put him on inquiry, he cannot be presumed to have known anything concerning it prior to the actual discovery of the fraud. (*Lataillade v. Orefa*, 91 Cal. 565.)

280. An order setting aside a homestead, in insolvency proceedings, being a matter of public record, the plaintiff was charged with notice thereof, and ignorance of the fraud in the procurement of the order setting aside the homestead will not stay the running of the statute. (*Hecht v. Slaney*, 72 Cal. 363.)

Cause of action accrues at discovery of fraud. See ante, VI, 1.

281. Conceding that subdivision 4 of section 338 of the Code of Civil Procedure, providing that actions for relief on the ground of fraud must be commenced within three years after the discovery of the fraud, does not apply to actions of that nature in relation to real property, then the limitations affecting

such actions are to be determined by the rules of equity, which are substantially the same. (*Duff v. Duff*, 71 Cal. 513.)

282. An equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions. (*City of Oakland v. Carpentier*, 13 Cal. 540.)

Cited 65 Cal. 405; 71 Cal. 529.

283. The judgment creditor who has received a sheriff's deed of the debtor's land may bring an action to cancel a fraudulent deed of the same made by the debtor before judgment, at any time within three years after the execution and delivery of the sheriff's deed. (*Hager v. Shindler*, 29 Cal. 47.)

Cited 32 Cal. 263.

284. An action by an administrator to recover back real estate conveyed by the decedent in his lifetime for the purpose of defrauding his creditors may be commenced within three years after the creditors recover judgment against the estate. (*Forde v. Exempt Fire Co.*, 50 Cal. 299.)

Cited 85 Cal. 548.

285. The limitation of actions for relief on the ground of fraud to three years after the discovery of the fraud alleged does not apply to an action to set aside and cancel a conveyance upon the ground that it is a cloud upon the title of the plaintiff, even if the court is asked to set aside the conveyance because it was made to defraud a creditor. (*Stewart v. Thompson*, 32 Cal. 260.)

Cited 3 Wash. 511.

286. One on whose relation an action is brought in the name of the state to cancel a patent on the ground of fraud is not the "aggrieved party" within the meaning of section 338 of the Code of Civil Procedure, which provides that a cause of action on the ground of fraud is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; and an averment that the fraud was not known to the relator until within the past two years is not sufficient to prevent the bar of the statute. (*People ex rel. Eadie v. Noyo Lumber Co.*, 99 Cal. 456.)

Action by state to cancel patent for fraud. See ante, VI, 1.

287. The action was brought to recover damages alleged to have been sustained by the plaintiff on account of the wrongful and fraudulent acts of the defendants in attempting to deprive him of certain land belonging to him. On a review of the facts alleged in the complaint, held, that the action was barred by the statute of limitations. (*Raynor v. Mintzer*, 72 Cal. 585.)

288. The action was brought by a judgment creditor of an insolvent to establish and enforce a constructive trust as against him in certain land, which had been set aside to him in the insolvency proceedings as a homestead, on the ground that the same was not a valid homestead when the order setting it

aside was made, and that the court was induced to make the order through the fraudulent representations of the defendant that it was a homestead. The complaint alleged that the plaintiff had no notice of the order, or of the fraud of the defendant until about two years prior to the commencement of the action. Held, that the statute of limitations commenced to run against the action from the time of the termination of the insolvency proceedings, and barred the same at the expiration of four years. (*Hecht v. Slaney*, 72 Cal. 363.)

289. If one who has a mortgage upon a tract of land leaves the same with another who has a subsequent mortgage upon the same land, and makes him his attorney in fact, with knowledge of such subsequent mortgage, with power to demand, collect, and receive the monthly interest, but without any power or any instructions to enforce the collection of the mortgage, and without the attorney in fact undertaking the trust of enforcing the collection of the mortgage, and while in the hands of the attorney in fact the mortgage becomes barred by the statute of limitations, the attorney in fact has not been guilty of such fraud as will preclude him, when made a party to a suit afterward brought to foreclose the mortgage, from taking advantage of the statute of limitations to prevent the same from having priority over his subsequent mortgage. Had the attorney in fact undertaken the trust and assumed the duty of enforcing the mortgage by legal proceedings, and failed to do so until it was barred by the statute of limitations, he would have been precluded from availing himself of the statute as a defense in a suit afterward brought to foreclose it, and the same would still be entitled to priority over his own mortgage. (*Lent v. Shear*, 26 Cal. 361.) Cited 33 Cal. 97; 36 Cal. 20; 42 Cal. 503.

290. An action commenced more than four years after the maturity of a note and mortgage, executed by an executrix in her individual capacity, to obtain cancellation thereof, and to recover the money loaned as a claim against the estate of the decedent, and to obtain subrogation to a claim of a third person against the estate, which was paid by the executrix with the money loaned, the complaint alleging that the loan was induced by false and fraudulent representations of the executrix that she was the sole owner of the unencumbered land, the falsity of which was discovered within three years before the commencement of the action, is not an action for relief upon the ground of fraud within the meaning of subdivision 4 of section 338 of the Code of Civil Procedure, and is barred by section 337 of the same code. (*Clausen v. Meister*, 93 Cal. 555.)

291. The real cause of action being for the recovery of the money loaned by the plaintiff, and the other relief demanded being but incidental thereto, the time allowed by statute within which to commence an action for the recovery of the money cannot be extended by alleging the discovery of facts which in equity would have entitled him to look for its repayment to other security than the note and mortgage received at the time

of the loan. The right to equitable relief was lost when the bar of the statute attached to the note and mortgage. (*Clausen v. Meister*, 93 Cal. 555.)

292. Although an action is for an accounting, yet where the grievance complained of is that defendant knowingly received moneys in trust for plaintiff, and appropriated the same to his own use, and at all times fraudulently concealed from plaintiff the fact that he had received such moneys, or any money in which plaintiff had an interest, the case is one for relief upon the ground of fraud within the meaning of the statute of limitations, and the cause of action does not accrue until discovery of the facts constituting the fraud. (*Lataillade v. Orefia*, 91 Cal. 565.)

293. An action by a banking corporation to recover from a defendant a sum of money paid to him by the corporation as the purchase price of certain shares of the capital stock of the corporation, and for an accounting for profits made by him from the use of the money, upon the ground that the sale was the result of a fraudulent conspiracy between the defendant and his codefendants, is an action for relief upon the ground of fraud, the limitation for which is prescribed by subdivision 4 of section 338 of the Code of Civil Procedure, and a demurrer to the complaint specifying that the cause of action is barred by other sections does not present the question whether such cause of action is barred by subdivision 4 of section 338 of the Code of Civil Procedure, although a demurrer, upon the general ground that the action is barred by the statute of limitations, without naming any particular section, might be sufficient. (*Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655.)

294. Where three persons entered into a partnership agreement, by the terms of which the partnership was to be kept secret, and plaintiff, ignorant of the existence of the partnership, sold goods to one of the firm individually in 1854, and afterward, in 1860, discovering that the partnership existed in 1854, and that the goods went to the uses of the concern, brought suit against the three. Held, that this agreement to keep the partnership secret, and its mere concealment from plaintiff, do not amount to such a fraud as to avoid the statute of limitations. (*Soule v. Atkinson*, 18 Cal. 225.)

Inducing insane man by fraud to execute deed. See ante, VIII, 1.

Fraudulent representations by bailee after refusal to deliver. See ante, VI, 9.

295. In an action for relief on the ground of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. (*Sublette v. Tinney*, 9 Cal. 423.) Cited 5 Cal. 157, 268.

296. If the plaintiff wishes in such a case to bring himself within the exception of the statute he must allege the fact of a discovery of the fraud at a period bringing him within the exception. (*Sublette v. Tinney*, 9 Cal. 423.)

Cited 19 Cal. 481; 23 Cal. 353; 29 Cal. 44; 30 Cal. 444; 34 Cal. 258.

297. In an action for money had and received, where the complaint avers receipt of the money within two years, and the answer denies all the material allegations of the complaint, and alleges that the cause of action is barred by the statute of limitations, the plaintiff may prove, and the jury may take into consideration, any evidence of concealment of facts, misrepresentations, deceit, or other facts constituting fraud on the part of the defendant which would take the case out of the statute, though the complaint contains no averment as to those matters. (*Williams v. Dennison*, 94 Cal. 540.)

298. In an action commenced in 1879 to cancel a deed executed in 1873 the complaint alleged fraudulent representations upon the part of the grantee, and that the plaintiff had no recollection or knowledge of having made the conveyance, but had seen the original deed, and it bore his true signature, and that he was first informed of the claim of the defendant under the deed within thirty days before the commencement of the action. Held, that this did not amount to an averment that the plaintiff had discovered the facts constituting the fraud within three years before the commencement of the action, and that upon the face of the complaint the plaintiff was barred. (*Le Roy v. Mulliken*, 59 Cal. 281.)

Fraud, inexcusable neglect. See *Marriage and Divorce*, 242.

Action to set aside judgment for fraud. See *Trust Deeds*, II.

Fraud, effect of on running. See *Public Lands*, 793.

8. Mistake.

299. Where it appears that the mistake in the declaration of trust was not discovered until an attachment was levied by the plaintiff, less than three years before the commencement of suit and the filing of the complaint of intervention, the claim of the intervenor to have the declaration revised or reformed is not barred by section 338, subdivision 4, of the Code of Civil Procedure. (*Ward v. Waterman*, 85 Cal. 488.)

300. Two tenants in common of a tract of land containing over forty-eight thousand acres, for the purpose of making a partition, entered into an agreement for the division thereof into two equal parts, and for the interchange of deeds, so that each would own a half in severalty. In pursuance of their agreement, they employed a surveyor, believed by them to be competent, who ran a line which he assured them divided the land into halves. The cotenants thereupon, mutually relying upon the assurance of the surveyor, exchanged deeds in accordance with the line so run. The line did not divide the land in halves, but included in that conveyed to the ancestor of the defendants upwards of five hundred acres more than he was entitled to. The plaintiff, who was the heir of the other cotenant, did not discover the mistake until thirteen years after the interchange of deeds. Since that time the land had been used exclusively for grazing, and no improve-

ments had been placed thereon by the defendants. Held, that the plaintiff could maintain an action to reform the mistake in the conveyance, and that the statute of limitations did not commence to run against his right until the discovery of the mistake. (*Breen v. Donnelly*, 74 Cal. 301.)

X. Pleading and Practice in Relation to.

1. Action When Commenced; Effect of Amended or Supplemental Complaint or Bringing in New Parties.

301. A suit is commenced within the Limitation Act of 1850 by simply filing the complaint. To prevent the bar of the statute no other proceeding is necessary. (*Sharp v. Maguire*, 19 Cal. 577.)
Cited 21 Cal. 368; 34 Cal. 166.

302. The filing of a complaint in the proper court, without the issuance of a summons thereon, is the commencement of an action within the terms and meaning of the Limitation Act, and stops the running of the statute. (*Pimental v. San Francisco*, 21 Cal. 351.)
Cited 34 Cal. 166.

303. The provision in the General Limitation Act of 1850, that the filing of the complaint shall be deemed a commencement of suit, applies to that act only, and not to the Mechanics' Lien Act. Under this latter act, to commence a suit within six months from the expiration of a credit given, a complaint must be filed and a summons issued. (*Flandreau v. White*, 18 Cal. 639.)
Cited 19 Cal. 577; 23 Cal. 356, 458; 74 Cal. 263.

Actions, when commenced. See *Pleading and Practice*, VI.

304. The time to which the statute of limitations runs is the filing of the original complaint. The filing of an amended complaint does not extend this time up to the period when it is filed. (*Lorenzana v. Camarillo*, 45 Cal. 125.)

305. Where the action was trespass, and an amended complaint was filed for the purpose of including a parcel of land inadvertently omitted from the original complaint, held, that the filing of the original complaint did not stop the statute of limitations from running against the trespass upon the omitted parcel. (*Atkinson v. Amador etc. Canal Co.*, 53 Cal. 102.)
Cited 58 Cal. 150.

306. If a complaint on a judgment is amended so as to state a cause of action on a promissory note the action on the note is not commenced until the amended complaint is filed, and the statute of limitations on the note commences running at the time last mentioned. (*Anderson v. Mayers*, 50 Cal. 525.)

307. When an action is brought against an administrator for the return of articles pledged to the decedent, or for their value, and the complaint is amended by striking out the prayer for their return, but alleging the same facts as alleged in the original complaint as the foundation of the action, there is no change in the identity of the cause of

action, and the statute of limitations, as to actions against the estates of deceased persons, runs only to the filing of the original complaint. (*Vanderslice v. Matthews*, 79 Cal. 273.)

308. The original complaint alleged that, by reason of injuries inflicted upon the plaintiff's son by the defendant, the plaintiff had been compelled to pay certain sums of money for surgical and medical attention, etc., amounting in the aggregate to three hundred and sixty-nine dollars. The complaint, more than four years after the cause of action accrued, was amended so as to allege that the plaintiff paid a portion of the said amount, and incurred liability for the balance prior to the beginning of the suit. Held, the cause of action to recover the sum for which the plaintiff had become liable, but which he had not paid, was barred by the statute of limitations. (*Meeks v. Southern Pac. R. R. Co.*, 61 Cal. 149.)

309. The filing of a supplemental complaint in an action to foreclose a mortgage, which contains, in addition to the matters stated in the original complaint, allegations of the death of the mortgagor and the appointment of his executors, who were named as defendants therein, and that the other persons who were named as defendants therein claimed an interest in the property mortgaged, and which also contains an express waiver of recourse against any other property of the decedent, is a continuation of the original action, and not the commencement of a new action, and, where the original action was commenced within the time limited by section 337 of the Code of Civil Procedure, the cause of action stated in the supplemental complaint is not barred by the provisions of that section, though the time therein specified had expired before the filing of the supplemental complaint. (*Hibernia Savings etc. Soc. v. Wacker-ender*, 99 Cal. 503.)

Relation of amendment, where complaint amended. See ante, IX, 4.

310. In ejectment a party who is brought in on motion of the plaintiff as an additional defendant, after the suit has been pending a long time, may claim the benefit of the statute of limitations up to the day he is made a party. (*Lawrence v. Ballou*, 50 Cal. 258.) Cited 58 Cal. 151; 63 Cal. 119.

2. Delay Less than Statutory Period.

311. Where an express statute of limitations applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute is never a reason for dismissing it. (*Lux v. Haggin*, 69 Cal. 255.)

312. In action to recover possession of land, where the plaintiff asserts no equitable rights, the statute of limitations, and not the doctrine of laches, generally furnishes the rule by which to determine whether the delay to assert the right is fatal to the action. (*Anzar v. Miller*, 90 Cal. 342.)

3. Duty to Recognize Defense; Waiver of.

313. The defense of the statute of limitations is a privilege personal to the debtor, and whenever in any legal proceeding it is invoked

by the debtor the court is compelled to recognize it as a defense. (*Bates v. Gregory*, 89 Cal. 387.)

314. If the defendant pleads the statute of limitations, and the court finds an adverse possession of five years, the supreme court will not presume that the defense of the statute was waived, unless the record shows such waiver. (*Vassault v. Seitz*, 31 Cal. 225.)

315. The defense of the statute of limitations is a personal privilege of the debtor which he may assert or waive at his option. (*Grattan v. Wiggins*, 23 Cal. 16.) Cited 68 Cal. 213.

Waiver of statute. See ante, VIII, 4.

Debtor may waive as against attachment creditor. See Reformation of Contracts, 40.

Statute of limitations is waived unless taken advantage of. See post, X, 4.

Instructions excluding defense of. See Instructions, 93.

4. Pleading of Statute.

316. On demurrer to a complaint, founded upon the statute of limitations, if the complaint fails to show whether the contract in suit was verbal or in writing, it will be presumed to have been in writing for all the purposes of the demurrer. (*Miles v. Thorne*, 38 Cal. 335.)

Cited 46 Cal. 13; 68 Cal. 391; 75 Cal. 255; 77 Cal. 336; 85 Cal. 132.

317. A complaint, showing money to have been loaned at a date sufficiently remote to admit of the running of the statute of limitations, does not raise a presumption that the statute has run. If the allegation is consistent with the supposition that the debt is not barred by reason of a promise in writing, or written acknowledgment of the debt, the defense must be raised by answer. (*Curtiss v. Aetna L. Ins. Co.*, 90 Cal. 245.)

318. The right to interpose the plea of the statute of limitations is waived, unless taken advantage of by demurrer or answer. (*Reagan v. Justice's Court*, 75 Cal. 253; *Grattan v. Wiggins*, 23 Cal. 16, cited 68 Cal. 213; *People ex rel. Harbor Commrs. v. Broadway Wharf Co.*, 31 Cal. 33; *Kelley v. Kriess*, 68 Cal. 210; *Osment v. McElrath*, 68 Cal. 466; *Lux v. Haggin*, 69 Cal. 255; *Gilbert v. Sleeper*, 71 Cal. 290, 294.)

319. Where a party desires to avail himself of the statute, which provides that no action for the recovery of any estate sold by an executor or administrator shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale, he must plead it. The objection that the action is barred cannot be taken to the admissibility of evidence when the statute had not been pleaded. (*Meeks v. Hahn*, 20 Cal. 620.)

Complaint in assumpsit, when demurrable because of. See Assumpsit, 16.

Allegation as to time of discovery of fraud. See Fraud, 117.

320. When the plea of the statute is claimed as a mere legal right it must be pleaded in the first instance, and has no day of

grace thereafter. (*Cooke v. Spears*, 2 Cal. 409.)

Objection not apparent on face of complaint must be taken by answer. See *Quieting Title*, 28.

Action for accounting, statute cannot be taken advantage of by demurrer, when. See *Partnership*, 348.

Objection cannot be taken by demurrer, when. See *Estates of Deceased Persons*, 236.

Answer setting up, sufficiency, objection, when taken. See *Appeals*, 2337.

Plea of statute of limitations, when sham. See *Pleading and Practice*, 282.

Evidence of adverse possession without plea of statute. See *Trespass*, 16.

321. It is not error for a court to refuse permission to set up the statute of limitations after answering to the merits. (*Stuart v. Lander*, 16 Cal. 372.)

Cited 90 Cal. 66; 1 Idaho, N. S., 258.

322. The plea of the statute of limitations is not favored unless in aid of justice; but the court should allow it to be pleaded at any time when justice will be attained thereby. (*Cooke v. Spears*, 2 Cal. 409.)

323. Under the old system of pleading in actions at law a party, to avail himself of the statute of limitations, was required to plead it, even where it appeared upon the face of the declaration that the limitation prescribed by statute had expired. (*Smith v. Richmond*, 19 Cal. 476.)

324. In equitable suits the rule was otherwise. There, if it appeared upon the face of the bill that the remedy was barred, the defendant could demur; and, if the case came within any of the exceptions of the statute, it was necessary to aver the fact. (*Smith v. Richmond*, 19 Cal. 476.)

325. Under our system the rule is the same in law and equity; and if it appear upon the face of the complaint that the action is barred, and no facts are alleged taking the demand from the operation of the statute, the complaint is defective and demurrer lies. (*Smith v. Richmond*, 19 Cal. 476.)

Cited 20 Cal. 217; 68 Cal. 213; 77 Cal. 189; 1 Idaho, N. S., 267; 3 Mont. 271.

326. If the demand be in truth barred, but the fact does not appear upon the face of the complaint, the defense must be made in the answer. (*Smith v. Richmond*, 19 Cal. 476, cited 20 Cal. 626, 23 Cal. 353, 5 Cal. 263, *Wise v. Williams*, 72 Cal. 544; *Cameron v. San Francisco*, 68 Cal. 390, cited 72 Cal. 548.)

327. A defendant who claims the benefit of an act for the limitation of actions, which applies only to a particular class of cases, must plead it specially. A plea of the general statute of limitations is not sufficient. (*Howell v. Rogers*, 47 Cal. 291.)

Cited 85 Cal. 166; 7 Utah, 238.

328. A defendant relying on the statute of limitations should not allege matter of law, but the facts which bring him within the statute. (*Boyd v. Blankman*, 29 Cal. 19.)

329. The general allegation in an answer, that the action is barred by the statute prescribing two or any other number of years as the limitation for bringing the action, is not

the correct method of pleading the statute of limitations. (*Schroeder v. Jahns*, 27 Cal. 274.)

Cited 31 Cal. 393.

330. An answer stating that the cause of action has not accrued within five years is sufficient for five years, and for any period of limitation named in the statute, less than five years. (*Boyd v. Blankman*, 29 Cal. 19.)

331. A plea of the statute of limitations which states that the plaintiff was not seised or possessed of the land within five years before the commencement of the action, is fatally defective in not stating that neither plaintiff, his predecessor, nor grantor was thus possessed. (*Sharp v. Daugney*, 33 Cal. 505.)

332. Such plea should also state that the defendant has been for five years before the commencement of the action in the adverse possession of the land. (*Sharp v. Daugney*, 33 Cal. 505.)

333. A party relying upon an adverse possession of five years of land owned by himself and the adverse party as tenants in common must allege, by pleading facts from which it will affirmatively appear, that his possession was of an adverse and hostile character, otherwise his possession of the land, though exclusive, will be deemed to be according to his right and in support of the title in common. (*Lick v. Diaz*, 30 Cal. 65.)

Cited 94 Cal. 663.

334. An answer which avers that "if plaintiffs ever had any right or title to their claims, or to any portion thereof, they are barred by the statute of limitations, as they, the defendants, have been in the quiet and peaceable possession of the same adversely to these plaintiffs for a period of over five years," is not a good plea of the statute of limitations. (*Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387.)

Cited 7 Utah, 238.

335. An answer in ejectment stating that the defendant was, when the suit was commenced, is now, and has been for more than five years immediately prior thereto, the owner of and seised in fee, and entitled to the possession of, the demanded premises, is not a plea of the statute of limitations. (*McCreery v. Sawyer*, 52 Cal. 257.)

Cited 10 Cal. 69.

336. If the plaintiff, in his complaint in ejectment, relies on a title derived from the Mexican government and confirmed by the United States, without stating the time of confirmation, an answer which sets up as a defense the statute of limitations is good without stating that the Mexican grant was finally confirmed within less than five years next before the commencement of the action. (*Anderson v. Fisk*, 38 Cal. 625.)

337. In an action for the value of services rendered a plea which does not aver that the cause of action accrued more than two years before the commencement of the action, but only that the services contracted to be rendered by the plaintiff were rendered more than two years before action brought, is insufficient as a plea of the statute of limitations. (*Hartson v. Hardin*, 40 Cal. 284.)

338. When the complaint states a cause of action for goods sold and delivered, and a bill of items is annexed to the same as an exhibit, with the date of each item, an answer which refers to the exhibit, and avers that the last item only is within two years previous to the commencement of the action, and that, except as to the last item, "no action has accrued to said plaintiff by reason of the matter mentioned and set forth in said complaint, at any time within two years next preceding the commencement of this action," is a good answer of the statute of limitations to all the items except the last. (*Adams v. Patterson*, 35 Cal. 122.)

339. The words "preceding the commencement of this action" in such answer are equivalent to the words preceding the filing of the complaint. (*Adams v. Patterson*, 35 Cal. 122.)

340. If the complaint in an action against an administrator avers that the intestate received plaintiff's money in his lifetime, to keep the same for plaintiff as the depository thereof until the same should be demanded of him, and that the money remained in the intestate's hands at the time of his death, subject to plaintiff's order, an answer which sets up as a defense that the cause of action did not accrue to plaintiff within two years text before the death of the intestate, and that the same is barred by the statute of limitations, does not raise any issue in the case. (*Schroeder v. Jahns*, 27 Cal. 274.)

341. The statute of limitations may be pleaded by reference to the appropriate section. (*Webber v. Clarke*, 74 Cal. 11; *Hagely v. Hagely*, 68 Cal. 348, cited 74 Cal. 17; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598; *Allen v. Allen*, 95 Cal. 184.)

342. References to explanatory sections are unnecessary. (*Webber v. Clarke*, 74 Cal. 11.)

343. The defense of the statute of limitations must be pleaded either by alleging the facts constituting the defense, or by a general statement that the cause of action is barred by the provisions of the particular section of the Code of Civil Procedure relied upon, giving the number of the section, and its subdivision, if subdivided. A general allegation that the cause of action is barred by chapter 3, title 2, part 2, of the code, is insufficient. (*Manning v. Dallas*, 73 Cal. 420.)

344. To suit on an account, defendant averred that "each and every item of said account prior to the tenth day of March, 1859, is barred by time; and he pleads and relies upon the statute of the state of California entitled 'An act defining the time of commencing civil actions,' approved April 22, 1850, in bar of any recovery in said action." Held, that this plea is fatally defective, because an averment of a conclusion of law; that a plea of the statute of limitations must aver the facts which brings the demand within the operation of the statute. (*Caulfield v. Sanders*, 17 Cal. 569.)

Cited 22 Cal. 168; 31 Cal. 195, 393; 35 Cal. 126; 7 Utah, 238.

345. Where a demurrer to a complaint, on the ground that the cause of action is barred by the statute of limitations, specifies the

particular sections upon which the defendant relies to defeat the action, only the sections specified are pleaded, and the question as to whether or not the cause of action is barred by any other section or sections cannot be considered. (*Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655.)

Pleading by reference to statute. See post, 364.

346. Where, to ejectment on a patent to plaintiffs for land from the United States, defendants plead possession in themselves and the parties through whom they claim for five years before the commencement of the action, on the 4th of March, 1860, but admitted the issuance of the patent on the 19th of February, 1856, held, that the plea is of no avail because the admission shows plaintiffs were seized of the premises within the five years. (*Fremont v. Seals*, 18 Cal. 433.)

347. Where it appears on the face of the complaint that the cause of action is barred by the statute of limitations demurrer lies. (*Smith v. Hall*, 19 Cal. 85, cited 68 Cal. 213, 6 Cal. 90; *Sublette v. Tinney*, 9 Cal. 423, cited 68 Cal. 213, 77 Cal. 311; *Mason v. Cronise*, 20 Cal. 211; *Cameron v. San Francisco*, 68 Cal. 390, cited 72 Cal. 548.)

348. Where a complaint shows prima facie upon the facts stated that the claim or debt upon which suit is brought is barred by the statute of limitations, the defendant may take advantage of the defect by demurrer. But, when the complaint does not directly show prima facie a case for the operation of the statute, a demurrer cannot be sustained on this ground. This is the chancery rule, under the English system, and, as our pleadings approximate more nearly to the chancery than the common-law form, we have adopted the former. (*Barringer v. Warden*, 12 Cal. 311.)

Cited 20 Cal. 217; 23 Cal. 353; 68 Cal. 213, 391.

349. The defense of the statute of limitations cannot be taken by a demurrer to the complaint, unless it clearly appears therefrom that the plaintiff's cause of action is barred. (*Wise v. Williams*, 72 Cal. 544; *Ord v. De la Guerra*, 18 Cal. 67, cited 68 Cal. 391, 82 Cal. 211, 90 Cal. 60; *Harmon v. Page*, 62 Cal. 448, cited 72 Cal. 548, 77 Cal. 189, 311, 19 Nev. 174; *Farris v. Merritt*, 63 Cal. 118, cited 77 Cal. 189, 311, 90 Cal. 60; *Jenness v. Bowen*, 77 Cal. 310.)

350. The fact that a cause of action as set out in the complaint does not show on its face whether it is or is not barred by the statute of limitations cannot defeat a recovery, nor sustain a demurrer for ambiguity. Unless the complaint shows affirmatively that the cause of action is barred by the statute, that objection cannot be raised by demurrer. (*Doe v. Sanger*, 78 Cal. 150, cited 90 Cal. 250; *Kraner v. Halsey*, 82 Cal. 209, cited 87 Cal. 458, 90 Cal. 60, 250.)

Statute of limitations, how set up. See ante, 105.

351. In order to enable a party to avail himself of the defense of the statute of limitations by demurrer the statute should be distinctly

stated in the demurrer. (*Brown v. Martin*, 25 Cal. 82.)

Cited 28 Cal. 107; 29 Cal. 72; 30 Cal. 672; 31 Cal. 46; 46 Cal. 12; 5 Col. 173.

352. The party relying upon the statute of limitations by demurrer must specially point out the objection in his demurrer, or it will be disregarded. (*Farwell v. Jackson*, 28 Cal. 106.)

Cited 5 Col. 173; 1 Idaho, N. S., 258.

353. The defense of the statute of limitations cannot be made by a demurrer which states in general terms that the complaint does not state facts sufficient to constitute a cause of action. (*Brown v. Martin*, 25 Cal. 82.)

Cited 13 Col. 285; 1 Idaho, N. S., 256, 258.

354. In an action for an accounting the defense of the staleness of the claim of the plaintiff may be taken advantage of by a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. (*Bell v. Hudson*, 73 Cal. 285.)

355. An allegation in a demurrer "that it appears by the complaint that the cause of action is barred by the statute of limitations" is sufficient in form to raise the question of law as to whether the alleged cause of action is barred by the statute. (*Brennan v. Ford*, 46 Cal. 7.)

Cited 99 Cal. 659; 5 Col. 173.

356. When a defendant pleads the statute of limitations, matters upon which the plaintiff relies to relieve him from the bar of the statute are deemed to have been pleaded in reply to the answer. (*Fox v. Tay*, 89 Cal. 339.)

357. If, in an action for money, the defendant, in his answer, sets up a counterclaim, which is barred by the statute of limitations, the plaintiff, under the provisions of the Practice Act, is considered to have pleaded the statute by way of replication. (*Curtiss v. Sprague*, 49 Cal. 301.)

Cited 57 Cal. 386, 589; 82 Cal. 95; 84 Cal. 204; 94 Cal. 543.

358. When the practice act required a replication to new matter set up in the answer, and the defendant pleaded five years' adverse possession, the plaintiff, if he claimed under title derived from the Mexican government, could not prove that proceedings for a final confirmation were still pending, or that five years had not elapsed since a final confirmation, unless he stated the same in his replication. (*Vassault v. Seitz*, 31 Cal. 225.)

Cited 34 Cal. 390; 36 Cal. 632; 51 Cal. 63.

In action arising out of fraud. See ante, IX, 7.

Amendment setting up. See Pleading and Practice, XI, 10.

Separate plea of by one defendant, allowing. See Appeals, 2160.

Supplemental complaint setting up statute of limitations. See Supplemental Pleadings, 6.

5. Motion for Nonsuit on Ground of.

359. When the statute of limitations is pleaded only as to two counts of a complaint, and not as to the third count, the question as to the bar of the statute cannot be raised

upon motion for a nonsuit upon the ground that the claim of plaintiff is barred. The word "claim," as thus used in the grounds of the motion, includes the whole claim set forth in the three counts, and the action in its entirety could not be held to have been barred. (*Castagnino v. Balletta*, 82 Cal. 250.)

6. Who to Determine Question of Bar.

Jurisdiction to determine question of. See Mexican Lands, 130.

360. When facts are agreed upon or ascertained it is a question of law whether the case is brought within the bar of the statute of limitations; and in such case it is error to submit to the jury the question whether a demand is barred by the statute. (*Reed v. Swift*, 45 Cal. 255.)

7. Burden of Proof; Instructions.

361. Where interest of partner is sold under execution, and the purchaser subsequently sells the entire property and appropriates the proceeds in an action against the purchaser, the burden of showing the bar of the statute is on the defendant. (*Wright v. Ward*, 65 Cal. 525.)

Burden of proof on defense of statute of limitations. See Ante, VI, 3, f.

Instruction excluding defense of is error. See Instructions, 93.

Contradictory instructions as to time of commencement of running. See Instructions, 19.

8. Findings.

362. No finding is required on the statute of limitations where no issue is raised concerning it; but held, further, that the court substantially found on the issue. (*Blackford v. Whistler*, 57 Cal. 136.)

363. A finding that the cause of action is barred by certain sections of the statute of limitations, by reference to their number as pleaded in the answer, is a finding of an ultimate fact, and not of a conclusion of law. (*Luco v. De Toro*, 91 Cal. 405.)

364. Inasmuch as the code permits the statute to be pleaded by a reference to the section, a finding as a fact that the action was barred by a certain section of the code might be sufficient. (*Biddel v. Brizzolara*, 56 Cal. 374.)

Cited 78 Cal. 376.

365. The statute of limitations was pleaded by specifying certain sections of the Code of Civil Procedure as a bar to the action. The court found that the action was not barred by the statute or by the sections of the code so specified. Held, that the finding was sufficient. (*Oakland Gas Light Co. v. Dameron*, 67 Cal. 663.)

Cited 91 Cal. 426.)

366. Court should expressly find whether or not action is barred by the statute, on an issue raised as to the statute of limitations, and not merely the facts from which it may be inferred. (*Duff v. Duff*, 71 Cal. 513.)

Cited 91 Cal. 426.

367. In an action of ejectment commenced September 22, 1880, in which the defendant pleaded the statute of limitations, as to a por-

tion of the land in controversy, the court found, upon that issue, in effect, that the defendant purchased from a tenant at sufferance of the plaintiffs, and entered into possession of a house standing upon the land in question, but that he did not claim or hold the land adversely to the plaintiffs until about the first day of March, 1878, and it was objected that the finding did not cover the issue as to the statute. Held, from these probative facts the ultimate fact results that the cause of action was not barred by the statute. The finding therefore covered the issue. (*Osborne v. Clark*, 60 Cal. 622.) Cited 72 Cal. 601; 89 Cal. 288.

368. The defendants pleaded that the plaintiff's cause of action was barred by sections 318 and 319 of the Code of Civil Procedure, and the court found "that the plaintiff was, and has been at all times since the 6th of April, 1870, seised in fee simple, and the owner of and entitled to the possession of" the lands in controversy; and "that the said defendants had, prior to the commencement of this action, been in the possession of the said pieces and parcels of land at no time prior to the 19th of May, 1870." Held, if there was a plea of the statute of limitations, the finding covered it. (*Rousset v. Reay*, 60 Cal. 328.)

369. The findings on the plea of the statute of limitations examined, and held sufficient and supported by the evidence. (*Cox v. Clough*, 70 Cal. 345.)

Findings as to notice of disavowal of trust. See ante, 173.

Failure to find when immaterial. See Appeals, 2128; Findings, 139.

Finding need not follow language of pleadings. See Findings, 103.

Finding as to, when within issues. See Findings, 199.

Finding as to, placing among conclusions of law. See Findings, 74.

Finding that all allegations of complaint are true, sufficiency of. See Findings, 116.

8. Review on Appeal.

370. The question of the statute of limitations cannot be raised upon an appeal from a judgment by default taken upon a judgment-roll containing neither answer nor demurrer. (*Hunter v. Bryant*, 98 Cal. 248.)

371. If the statute of limitations is pleaded, and the court finds all the facts necessary to sustain this issue, and gives judgment for the party pleading it, the fact that the prevailing party did not urge the statute in his argument in the court below does not preclude him from raising it in the supreme court. (*Vasault v. Seitz*, 31 Cal. 225.)

Defense of statute not presumed waived. See ante, X, 3.

Appeal, objection of statute first raised on. See Appeals, XI, 14, 1.

Appeal, presumption that action is not barred. See Appeals, XI, 24, m.

Review, questions relating to statute, how presented for review. See Appeals, VII, 5.

Defense not available on appeal where lower court finds against. See Appeals, 2629.

Action to recover on, modification on appeal. See Mortgages, 911.

XI. Effect of Running of Statute; Moral Obligation.

372. Expiration of time fixed in statute of limitations with reference to actions for money due on contracts does not discharge the debt or extinguish the right, but only takes away the remedy. (*Sichel v. Carrillo*, 42 Cal. 493.) Cited 50 Cal. 150; 14 Nev. 232; 5 Or. 130.

373. The statute of limitations does not have the effect to extinguish a debt nor raise a presumption of its payment. It only bars the remedy, and thus becomes a statute of repose. (*McCormick v. Brown*, 36 Cal. 180.) Cited 72 Cal. 600; 14 Nev. 232.

374. It is not a correct theory of the statute of limitations that the expiration of the period fixed by it raises a presumption of payment, and that the effect of an acknowledgment is to rebut this presumption. The statute is to be regarded as one of repose, the benefit of which may be relinquished by the party interested, but cannot be taken from him without his consent. (*McCarthy v. White*, 21 Cal. 495.) Cited 22 Cal. 102.

375. The expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, does not operate as an extinguishment or payment; therefore, where the legal title of land has been conveyed to a trustee to secure a debt, the title and power of the trustee is not affected by the expiration of the period prescribed to bar the debt, and a court of equity will not interfere to enjoin a sale under the deed. The statute of limitations is to be employed as a shield, not as a sword; as a means of defense, not a weapon of attack. (*Grant v. Burr*, 54 Cal. 298.) Cited 72 Cal. 600; 79 Cal. 536; 88 Cal. 444; 99 Cal. 69; 3 Utah, 275.

376. The moral obligation to pay indebtedness is not extinguished by the statute of limitations, and even though the debt is barred, the debtor cannot recover property pledged to secure its payment, without first paying the debt; and, where the objection of the statute is not properly raised upon the record, the court may order the pledged property to be sold to satisfy the indebtedness. (*Zellerbach v. Allenberg*, 99 Cal. 57.)

Consideration for new promise. See post, 413.

Consideration for note given for barred debt. See post, XII, 6.

Title by prescription under Mexican law. See Mexican Law.

Barring of mortgage debt. See Mortgages, XVII.

Claims under statute of limitations in San Francisco. See San Francisco, XIV, 3.

Barred debt is not extinguished. See Suretyship, 108.

Barred debt is not subject of setoff. See Setoff, 8.

One quieting title against barred mortgage must pay debt. See Quieting Title, II, 7.

Act requiring county to act on barred claim. See Constitutional Law, 811.

XII. Revival of Debt Barred by.

7. Writing Signed by the Party to be Charged.

377. Debt cannot be revived, except by promise in writing signed by the debtor, when the statute of limitations has run. (*Estate of Galvin*, 51 Cal. 215.) Cited 66 Cal. 190.

378. Object of the statute was to substitute a written contract for that which might be implied from admissions, and to avoid the mischief arising from parol testimony to prove either an express promise or facts from which a promise would follow as a legal and logical result. (*Fairbanks v. Dawson*, 9 Cal. 89.) Cited 1 Idaho, N. S., 535; 5 Nev. 215.

379. A memorandum indorsed upon an overdue bond, stating a receipt of a portion of the debt, and also extending the time and changing in some respects the terms of payment, signed by the obligee alone, but assented to by the obligor, is not a writing "signed by the party to be charged thereby," and does not affect the operation of the limitation statute. (*Peña v. Vance*, 21 Cal. 142.)

Part payment must be evidenced in writing. See post, XII, 2.

New promise or acknowledgment must be written. See post, XII, 3.

Receipt written by debtor and signed by creditor. See post, XII, 3.

2. Part Payment or Offer to Pay.

380. Part payment has always been held sufficient to take the debt on which it is made out of the statute. Unless accompanied at the time with qualifying declarations or acts on the part of the party making the payment, it is deemed an unequivocal admission of a subsisting contract or liability, from which a jury is justified and bound to infer a new promise. And it matters not whether the payment be either upon the principal or interest of the debt. (*Barron v. Kennedy*, 17 Cal. 574.) Cited 21 Cal. 149; 22 Cal. 103; 74 Cal. 69; 1 Idaho, N. S., 535; 5 Nev. 214; 23 Or. 111.

381. Part payment indorsed upon promissory note, whether made before or after expiration of the period fixed by the statute of limitations, does not avoid the bar of the statute. (*Heinlin v. Castro*, 22 Cal. 100.)

382. Part payment made before contract has expired by limitation is insufficient to take the case out of the statute. (*Fairbanks v. Dawson*, 9 Cal. 89.)

Cited 17 Cal. 578; 21 Cal. 149; 22 Cal. 102; 74 Cal. 69.

383. If several notes are given in payment of a debt, and only a part of the notes are paid, the original debt is revived as to the notes unpaid. (*Crawford v. Roberts*, 50 Cal. 235.) Cited 78 Cal. 20.

384. A part payment does not take a debt from the operation of our statute of limitations, unless such payment is evidenced by a writing signed by the party to be charged thereby. (*Peña v. Vance*, 21 Cal. 142.) Cited 74 Cal. 69.

385. Section 31 of the Limitation Act excludes all acknowledgments and promises

not in writing; and a promise implied from the fact of part payment constitutes no exception. (*Peña v. Vance*, 21 Cal. 142.) Cited 22 Cal. 102; 25 Cal. 292; 5 Nev. 215.

386. The thirty-first section of our statute of limitations does not alter this rule as to the effect of such payment; it only alters the mode of proof, and is directed, principally at least, against the admission of oral acknowledgments and promises. (*Barron v. Kennedy*, 17 Cal. 574.)

387. *Fairbanks v. Dawson*, 9 Cal. 89, holds that this section of the statute covers an acknowledgment by payment, and requires it to be evidenced by a writing; and this case does not require any departure from the rule there laid down, the payment of interest being by checks, inclosed in letters, stating that the checks were for interest on the debt for certain months. (*Barron v. Kennedy*, 17 Cal. 574.)

Memorandum of payment on overdue bond. See ante, XII, 1.

388. When the right to maintain an action for the redemption of the mortgaged property from the lien of the mortgage is barred by the statute of limitations it cannot be revived by an offer of the mortgagor to pay the debt. (*Cunningham v. Hawkins*, 24 Cal. 403.)

3. Acknowledgment of Debt or New Promise.

389. A creditor cannot recover after the statute has run upon the original contract or obligation without proving a new promise. (*McCormick v. Brown*, 36 Cal. 180.)

390. To establish a new contract for the purpose of taking a case out of the statute of limitations there must be a promise to pay, or an acknowledgment from which a promise is necessarily implied, and such promise or acknowledgment must be made to the creditor himself. (*Biddel v. Brizzolara*, 64 Cal. 354.)

391. The new promise may be either express or implied. An express promise can only be established by producing the promise itself, in the form prescribed by the thirty-first section of the statute; while an implied promise can only be established by the production in like form of the acknowledgment prescribed in said section. (*McCormick v. Brown*, 36 Cal. 180.)

Cited 36 Cal. 192; 56 Cal. 344, 382; 5 Nev. 213.

392. The writing, relied on as evidence of a new promise, must contain an express promise, or an acknowledgment of the debt as an existing debt, from which a present promise may be inferred. (*Biddel v. Brizzolara*, 66 Cal. 374.)

Cited 64 Cal. 355; 70 Cal. 414; 76 Cal. 101.

393. An acknowledgment, within the statute, to support an implied promise, must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay. Such acknowledgment cannot be deduced from an offer or promise to pay a part of the debt, or the whole debt in a particular manner, or at a specified time, or upon specified conditions. (*McCormick v. Brown*, 36 Cal. 180, cited 56 Cal. 382, 70 Cal. 414, 7 Mont. 549, 5 Nev. 216,

2 Utah, 471; *Farrell v. Palmer*, 36 Cal. 187, cited 56 Cal. 382, 68 Cal. 473, 2 Utah, 471, 5 Utah, 417.)

394. An express promise, to be available to the creditor, must be either direct, certain, and unconditional as to time or manner to pay the debt, or a direct offer to pay, unconditionally, a specified part of the debt, or a like offer, upon specified conditions, as to either time or manner, or both, to pay the whole or some part of the debt, or a direct conditional promise to pay the whole or a specified part of the debt; but, in case of such offer or conditional promise, the creditor can only recover by showing an acceptance by him of the offer as made, or a performance on his part of the prescribed conditions of the promise. (*McCormick v. Brown*, 36 Cal. 180; *Farrell v. Palmer*, 36 Cal. 187, cited 56 Cal. 382, 68 Cal. 473, 2 Utah, 471, 5 Utah, 417.)

395. To take a contract out of the statute there must be an acknowledgment or new promise "contained in some writing signed by the party to be charged thereby." (*Heinlin v. Castro*, 22 Cal. 100.) Cited 5 Nev. 215.

396. The purpose of section 360 of the Code of Civil Procedure is to establish a rule, not with respect to the character of the promise or acknowledgment from which a promise may be inferred, but with respect to the kind of evidence by which the promise or acknowledgment shall be proved. (*Biddel v. Brizola*, 56 Cal. 374.)

397. The fact that the memorandum-book of plaintiff in which the account was kept, and the pass-book of the defendant were compared by them, and the result ascertained and the account orally acknowledged by defendant to be correct, amounts to no more than a parol admission of its correctness, which would not take the case out of the statute. And, had these books been produced on the trial, the mere entries therein of the items of the account with this oral acknowledgment of its correctness would not place the account on any different footing, so far as the statute of limitations is concerned, than if no such acknowledgment had been made. (*Weatherwax v. Cosumnes Valley Mill Co.*, 17 Cal. 344.) Cited 74 Cal. 80; 1 Idaho, N. S., 535.

398. Under section 360 of the Code of Civil Procedure the written acknowledgment by the debtor, required to take the debt out of the operation of the statute of limitations, need not be subscribed by him. It is sufficient if it be evident from any part of the written acknowledgment that the debtor named therein has given to it his assent. (*Auzerais v. Naglee*, 74 Cal. 60.)

399. A written agreement between a debtor and creditor for the arbitration of a disputed indebtedness, which recites in general terms the fact of indebtedness, and contains a promise by the debtor to pay the amount of the award, whether made before or after the statute of limitations has run against the demand, is not sufficient to defeat the bar of the statute in an action brought on the original indebtedness after the statute has run. (*Curtis v. City of Sacramento*, 70 Cal. 412.) Cited 90 Cal. 255.

400. Certain letters written to plaintiff by defendant examined, and held to be a sufficient acknowledgment of his indebtedness to the plaintiff to constitute a contract, obligation, or liability founded upon an instrument in writing. (*Osment v. McElrath*, 68 Cal. 466.)

401. A receipt indorsed by the debtor on the back of the account, and entirely in his own handwriting, except the subscription of the creditor's name, by the terms of which the creditor acknowledges the receipt from the debtor, whose name is stated therein, of a certain amount in the account, is a sufficient acknowledgment in writing by the debtor to remove the account from the operation of the statute of limitations. (*Auzerais v. Naglee*, 74 Cal. 60.)

402. Where the demand is not barred at the date of the account stated, although the statement is verbal, the statute begins to run upon the new cause of action, thus brought into existence, from the date of the settlement and new promise arising thereunder; and, if verbal, an action may, under subdivision 1 of section 339 of the Code of Civil Procedure, be brought within two years after such settlement. (*Auzerais v. Naglee*, 74 Cal. 60.) Cited 5 Utah, 407.

403. An open account already barred by the statute of limitations cannot be relieved from the bar of the statute by an oral settlement of such account, for the reason that under section 360 of the Code of Civil Procedure no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing signed by the party to be charged thereby. (*Auzerais v. Naglee*, 74 Cal. 60.) Cited 75 Cal. 194.

404. An acknowledgment of a debt, as provided in the thirty-first section of the statute of limitations, if made to the administrator of the estate of the creditor, deceased, is sufficient. (*Farrell v. Palmer*, 36 Cal. 187.)

Acknowledgment by joint obligor. See post, XII, 4.

Effect of acknowledgment on third person. See post, XII, 4.

Identification of acknowledged debt, evidence of. See post, 425.

4. *Acknowledgment by Joint Obligor or Third Person; Effect of Acknowledgment on Third Person.*

405. If two or more persons are bound, the statute affords the same protection to each, and an acknowledgment by one is not available against another, unless he had authority to make it, either expressly given or resulting from the relation of the parties. (*McCarthy v. White*, 21 Cal. 495.)

406. The principles which govern as to the operation of the statute, and the effect of an acknowledgment, in cases of personal liability, are equally applicable to cases where an attempt is made to enforce a security. (*McCarthy v. White*, 21 Cal. 495.) Cited 23 Cal. 34.

Partner, power of to revive barred debt. See Partnership, 340.

Executor cannot allow barred claim. See Estates of Deceased Persons, 125.

Husband, power of to extend time to sue. See Homesteads, 297.

Funding debt commissioners, power to allow barred claim. See San Francisco, 88.

407. W. and K. owning a tract of land in common, W., in 1853, mortgaged his interest in a portion of the tract, containing four hundred and eighty acres to M., to secure a note falling due March 4, 1854. April 3, 1856, W. and K. entered into a written agreement for the partition of the whole tract, by which the four hundred and eighty acres mortgaged was to belong exclusively to K., W. stipulating to make him a deed of the same as soon as it could legally be done. May 10, 1858, M. and W. had an accounting, and signed a writing stating that there was a balance of seventeen hundred and six dollars and sixty cents then due on the note, and that the time of payment was extended to January 1, 1859. April 8, 1859, W., in pursuance of the agreement of 1856, executed a deed of the premises to K., who had notice of the previous transactions between W. and M. The agreement between W. and K. in 1856 was not recorded, nor did M. have actual notice of its existence until after May 10, 1858. In an action by M. to foreclose the mortgage, in which K. set up as a defense the statute of limitations, held, that this defense was available to him by reason of his interest in the property acquired under the agreement of 1856; that he was not affected by the acknowledgment made by W. in 1858; that the want of knowledge of K's purchase by plaintiff when he received W's acknowledgment, and extended the time of payment, was not material, for the reason that the period of limitation had already expired, and that plaintiff gave no consideration for the acknowledgment. (McCarthy v. White, 21 Cal. 495.)

408. If the debt had not been barred at the time of W's acknowledgment the position of the plaintiff would have been different; that, having no notice of the agreement of purchase, if he had suffered the statute to run, relying upon the acknowledgment, he would have been entitled to protection. (McCarthy v. White, 21 Cal. 495.)

5. Renewal of Note, Effect of on Mortgage.

409. Under the provisions of the Code of Civil Procedure a mortgage barred by the statute of limitations is not renewed by a renewal of the note secured. (Wells v. Harter, 56 Cal. 342.)

410. Whether, where a party revives a note secured by mortgage upon real estate, after the note is barred, he thereby revives the mortgage, query? (Lord v. Morris, 18 Cal. 482.) Cited 22 Cal. 102.

Execution of new mortgage in place of old. See Homesteads, 288.

6. Revival by Mistake.

411. If the widow is executrix of the estate of the deceased husband, and the estate is

community property, so that she has an interest in the same, and she gives her own note for a debt of the deceased husband, which is outlawed, under the mistaken opinion that it is not outlawed, there is a sufficient consideration to support the note. (Mull v. Van Trees, 50 Cal. 547.)

7. Effect of Revival: Action on; Limitation of and Renewal; Pleading and Evidence.

412. Under the provisions of the thirty-first section of the statute of limitations, there are two ultimate facts that may be proved in the mode therein prescribed—a continuing contract, and a new contract. The statutory acknowledgment or promise, if made while the original contract is a subsisting liability, establishes a continuing contract; while, if made after the bar of the statute, a new contract is created. (McCormick v. Brown, 36 Cal. 180.)

413. When a creditor sues after the statute has run upon the original contract, his cause of action is not founded on the original contract, but upon the new promise, the original contract, or the moral obligation arising thereupon, being a sufficient consideration for the new promise. (McCormick v. Brown, 36 Cal. 180.) Cited 39 Cal. 438; 79 Cal. 536.

414. The doctrine of numerous authorities that the new promise constitutes the real cause of action, and that the original contract is only the consideration for the promise, held to be unsound. The true view held to be, that the action is upon the original demand, and that the new promise is only evidence that the statute does not operate as a bar to its prosecution. (Smith v. Richmond, 19 Cal. 476.)

415. When the creditor sues after the statute of limitations has run upon the original contract, or after a discharge in insolvency, his cause of action is not the original contract, but it is the new promise. (Chabot v. Tucker, 39 Cal. 434.) Cited 56 Cal. 344; 70 Cal. 414, 416; 3 Mont. 271.

416. Where the new promise is made to the payee of a promissory note the indorsee, to whom the note is afterward transferred, may maintain an action upon it. He succeeds, in such cases, to the rights of the payee. (Smith v. Richmond, 19 Cal. 476.)

417. An action on a new promise to pay a judgment, so as to avoid the bar of the statute, must be brought within four years from the making of the new promise. (McCormick v. Brown, 36 Cal. 180.) Cited 5 Utah, 417.

418. If the signing of a memorandum by the creditor upon an overdue bond, stating a receipt of a portion of the debt, and extending the time and charging the terms of payment, and the assent to it by the debtor be viewed as a new and distinct contract for the payment of money, it would be a mere verbal contract, an action upon which would be barred by the lapse of two years from the time of payment fixed by its terms. (Pena v. Vance, 21 Cal. 142.)

419. On the 6th of October, 1879, the plaintiff, a creditor of the defendant, presented to him an account containing several items, one of which was indorsed as subject "to be investigated as to amount." On the same day the defendant made and signed a written indorsement on the account as follows: "On my return from New York I will settle the above account with P. Tuggle personally." On the 4th of October, 1881, he made and signed a second indorsement as follows: "This agreement renewed this day." Held, that the first indorsement was an absolute agreement to pay the undisputed items of the account, and that by the second indorsement the agreement to pay was renewed in terms sufficient to take the account out of the operation of the statute of limitations. (*Tuggle v. Minor*, 76 Cal. 96.)

420. It is bad pleading to aver in the complaint the discharge and the new promise. The former is matter of defense to be set up by defendant, and the latter is matter of replication, either by way of plea or evidence, as the system of pleading may be. (*Smith v. Richmond*, 19 Cal. 476.)

Cited 39 Cal. 438; 6 Mont. 385.

421. The complaint must show a subsisting cause of action; and when the original cause has been barred by the statute, or a discharge in insolvency, and a new promise is relied on, the new promise must be pleaded. (*Chabot v. Tucker*, 39 Cal. 434.)

422. In suits upon written instruments for the payment of money, if it appear from the complaint that the demand is barred, and plaintiff relies upon a new promise renewing or continuing the contract, such new promise must be alleged. (*Smith v. Richmond*, 19 Cal. 476.)

423. A complaint upon a promissory note, the collection of which is barred by the statute of limitations, contains a cause of action if it alleges that the defendant has, some time within four years of the day the suit was commenced, "in writing, acknowledged and promised to pay the note." Such allegation imports that the defendant signed his name to the writing. (*Porter v. Elam*, 25 Cal. 291.)

424. It is sufficient, where the complaint alleged an express promise to pay a debt which was barred by the statute, to prove an acknowledgment of the debt from which a promise to pay is implied. (*Farrell v. Palmer*, 36 Cal. 187.)

425. Where, on the trial of an action founded on a statutory acknowledgment or new promise to recover a debt which was barred by the statute, the plaintiff having proved the debt and an acknowledgment which might apply to it, held, that this was a prima facie case of identification for the plaintiff, and that the onus was then on the defendant to prove another debt to which such acknowledgment referred. (*Farrell v. Palmer*, 36 Cal. 187.)

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STATUTES.

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I. Enactment of Statute.

1. Passage and Proof of: Inquiring into Passage; Fraud in.

1. Section 15, article IV, of the constitution is to be construed as requiring every bill, before it shall become a law, to be read at length on three separate days in each house, unless, in case of urgency, two-thirds of the house where such bill is pending shall, by a vote of yeas and nays, dispense with this provision, either as to the manner of reading, or as to the reading on separate days. (Weill v. Kenfield, 54 Cal. 111.)
Cited 80 Cal. 213; distinguished 67 Cal. 632.

2. Upon an application for a writ of mandamus to compel the defendant, as controller of the state, to transfer a certain sum from the general to the school fund, in obedience to the statute of January 23, 1880, requiring him to do so, it appearing from the journal of the assembly that the bill had not been read in that house three times at length, and that the constitutional provision requiring it to be so read had not been dispensed with. Held, that the act was void; and the application denied. (Weill v. Kenfield, 54 Cal. 111.)

3. Under section 15 of article IV of the state constitution, providing that no bill shall "become a law unless the same be read on three separate days in each house, unless, in case of urgency, two-thirds of the house where such bill may be pending shall, by a vote of yeas or nays, dispense with this provision," a dispensing resolution adopted by a two-thirds vote of the senate, declaring that a number of specified bills "present cases of urgency"; and that the provision of the constitution "requiring that the bill be read on three separate days in each house is hereby dispensed with," is not objectionable upon the ground that it includes other bills as well as the one brought in question. (People ex rel. Searce v. County of Glenn, 100 Cal. 419.)

4. The constitution does not expressly or impliedly prohibit the senate from exercising its dispensing power with respect to two or more bills by one declaration of its purpose; and the legislature may exercise all legislative power not prohibited to it by the constitution. (People ex rel. Searce v. County of Glenn, 100 Cal. 419.)

5. The fact that several of the senators who voted to declare a bill a case of urgency, after-

ward voted against the bill on its final passage, is immaterial, and cannot be considered as indicating that such senators may have voted in the first instance through improper motives. (People ex rel. Searce v. County of Glenn, 100 Cal. 419.)

6. It is not essential to validity of statute that it should affirmatively appear from the journals of the senate and the assembly that every act required by the constitution to be done in the enactment of a law has been done; nor will it be presumed, in the absence of such a showing, that such acts were not done. (People v. Dunn, 80 Cal. 211.)

7. Acts of a legislative body are susceptible of proof either by records or parol proof, and cannot be presumed. (Vanderslice v. Hanks, 3 Cal. 47.)

8. The court may go behind the record evidence of a statute, and inquire whether it was passed or approved in accordance with the constitution. (Fowler v. Peirce, 2 Cal. 165.)

Cited 39 Cal. 202.

9. An act of the legislature, properly enrolled, authenticated, and deposited with the secretary of state, is a record which is conclusive evidence of the passage of the act, and that the act passed as enrolled. (Sherman v. Story, 30 Cal. 253.)

10. If an act is properly enrolled and authenticated, and is deposited with the secretary of state, it is conclusive evidence of the legislative will at the time of its passage, and courts will not look into the journals of the legislature to see whether or how the bill passed. (People v. Burt, 43 Cal. 560.)

11. Neither the journals of the legislature, nor the bill as originally introduced, nor the amendments attached to it, nor parol evidence, can be received in order to show that an act of the legislature, properly enrolled, authenticated, and deposited with the secretary of state, either did not become a law in accordance with the prescribed forms, or did not become a law as enrolled. (Sherman v. Story, 30 Cal. 253.)

Cited 34 Cal. 424; 37 Cal. 363; 39 Cal. 202; 43 Cal. 564; 69 Cal. 496; 1 Ariz. 282, 310, et seq; 5 Col. 528, 529; 10 Nev. 183, 186, 187, 196; 5 Utah, 601.

Judicial notice of. See Judicial Notice, 9, et seq.

Judicial notice of private acts. See Judicial Notice, 11.

Evidence aliunde not admissible to impeach. See Mandamus, 29.

12. If it is claimed that a statute is not correctly published, or if the fact of its passage is denied, the question is to be tried and determined by the court as one of law, and cannot be put in issue and tried as one of fact. (Sherman v. Story, 30 Cal. 253.)

13. An act of the legislature cannot be attacked on the ground of fraud. (Oroville etc. R. R. Co. v. Plumas County, 37 Cal. 354.)

2. Veto or Approval of Statute; Time of Return of.

14. The veto power is to be recognized only where clearly granted, and is not to be favored

by any strained construction. (*Jacobs v. board of Supervisors of San Francisco*, 100 Cal. 121.)

15. In approving a statute, the executive acts as a component part of the law-making power, and his power of approval ceases on the adjournment of the legislature. (*Fowler v. Peirce*, 2 Cal. 165.)

16. Where an act was presented to the governor for approval on the last day of the session, and reported to have been approved by him on that day, but in fact was not approved until the next day after the adjournment, held, that the act was void, and that parol evidence was admissible to show when the act was approved. (*Fowler v. Peirce*, 2 Cal. 165.) Cited 5 Utah, 600, 602; denied 30 Cal. 256; 10 Nev. 198.

17. An act cannot be approved after the adjournment of the legislature. (*Fowler v. Peirce*, 2 Cal. 165.)

18. An adjournment of either house of the legislature from day to day is not such an adjournment as would prevent the governor from returning a bill with his objections, within the ten days prescribed by the constitution. (*Harpending v. Haight*, 39 Cal. 189.)

19. In computing the ten days within which a bill may be returned by the governor to the house in which it originated, as provided by section 17, article IV, of the constitution, the day on which the bill is presented to the governor must be excluded from the computation. (*Iron Mountain Co. v. Haight*, 39 Cal. 540, cited 39 Cal. 662; *Garnett v. Bost*, 39 Cal. 662.)

20. The constitution provides that if any bill presented to the governor (having passed both houses of the legislature) shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return. (*Price v. Whitman*, 8 Cal. 412.) Cited 9 Cal. 522; distinguished 31 Cal. 245.

21. The ten days given by the constitution must be computed by excluding the day on which the bill is presented to the governor. (*Price v. Whitman*, 8 Cal. 412.) Cited 39 Cal. 542.

22. The decision in the *People ex rel. Hepburn v. Whitman*, 6 Cal. 659, was predicated upon an error in the printed copy of the constitution, the word "Sunday" being there used in the singular. (*Price v. Whitman*, 8 Cal. 412.)

23. The object of the words "Sunday excepted," in section 17, article IV, of the constitution, limiting the time within which the governor may return a bill to the legislature, without his approval, was to prevent the governor from being deprived of one of the ten days, in case the last day should fall on Sunday, when, it being a holiday, he would lose the opportunity of returning the bill with his objections on that day. (*People ex rel. Hepburn v. Whitman*, 6 Cal. 659.) Overruled 8 Cal. 415.

24. Another Sunday occurring between the delivery of a bill to the governor and its

return by him is to be counted as one of the ten days. (*People ex rel. Hepburn v. Whitman*, 6 Cal. 659.)

25. When a bill is returned with his objections, by the governor, to the house in which it originated after it has adjourned for the day on the last of the ten days within which he can make the return, and, because of failure to find the house in session, is redelivered to and retained by the governor, it does not constitute a return within the meaning of section 17, article IV, of the constitution. (*Harpending v. Haight*, 39 Cal. 189.)

26. The bill should be placed beyond the executive control, by delivery to the president, secretary, or other proper officer of the house. (*Harpending v. Haight*, 39 Cal. 189.)

II. When Take Effect.

27. Under section 323 of the Political Code an act of the legislature not in terms prescribing when it should take effect does not become a law until the sixtieth day after its passage. (*Santa Cruz Water Co. v. Kron*, 74 Cal. 222.)

28. Where statute is declared to take effect from and after its passage it takes effect at the very moment of its approval by the governor; and, for the purpose of determining the right to an office, it is competent to inquire at what particular point of time in the day an act was approved by the governor. *Bennett, J.*, dissenting. (*People ex rel. Campbell v. Clark*, 1 Cal. 406.) Cited 1 Cal. 416; 2 Cal. 170; 17 Or. 646.

At what time takes effect. See *Offices and Officers*, 162.

III. Acceptance of.

29. Where law is passed for special benefit of party, his acceptance of it will be presumed. (*Spring Valley Water Works v. San Francisco*, 22 Cal. 434.)

IV. Laws Dependent on Contingency; Submitting Statutes to Popular Will.

30. When the legislature passes a law it must pass entirely upon the question of its expediency; and it cannot say that a law shall be deemed inexpedient, provided that the people afterward, by a popular vote, declare it to be expedient. (*Ex parte Wall*, 48 Cal. 279.)

31. Although a statute may be conditional so that its taking effect may depend upon a subsequent event which may be named in it, yet this event must be one which shall produce such a change of circumstances that the lawmakers, in their own judgment, can declare it wise and expedient that the law shall take effect when the event shall occur. (*Ex parte Wall*, 48 Cal. 279.)

32. A statute to take effect upon a subsequent event must, when it comes from the hands of the legislature, be a law in present to take effect in futuro. On the question of the expediency of the law the legislature must exercise its own judgment, definitely and finally. (*Ex parte Wall*, 48 Cal. 279.)

Conditions in. See *Swamp and Overflowed Lands*, XVI.

Condition precedent to taking effect. See Counties, 22, 23.

Conditions subsequent in. See State Capital, 3.

Depending upon contingency. See Constitutional Law, 136.

33. The legislature has no power to refer a statute to the people, to decide by a popular vote whether it shall go into effect. (Ex parte Wall, 48 Cal. 279.)

Distinguished 49 Cal. 480, 483.

34. If a law is in existence making it a misdemeanor to retail liquors without a license the legislature must determine by a statute whether licenses shall be granted, and cannot refer the question of granting or refusing licenses to a popular vote. (Ex parte Wall, 43 Cal. 279.)

Cited 61 Cal. 64.

35. An act which submits to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county shall be annexed to it, and provides, that if a majority of the votes are for annexation, that the organization of the adjoining county shall be abandoned, and its territory shall be divided and annexed, in part to the county in which the vote was taken, and in part to another adjoining county, is not unconstitutional. (People ex rel. Love v. Nally, 49 Cal. 478.)

Cited 54 Cal. 97; 81 Cal. 494, 496; 10 Col. 558.

36. The legislature may pass a conditional statute, and make the taking effect of its provisions to depend upon some subsequent event, and may provide a time within which an act must be done to carry the provisions of the statute into effect, if done at all. Making certain provisions of the act to depend upon the vote of the people of a county does not delegate to the people the power to pass or repeal the act, the act being a valid statute from the time of its passage and approval, and the legislature itself providing that if the provisions of the act were not accepted within the period named they should not thereafter be carried into effect. (People ex rel. Graves v. McFadden, People ex rel. Graves v. County of Orange, People ex rel. Graves v. County of Orange et al., 81 Cal. 489.)

Views of electors in construing statute. See post, VIII, 4.

Statute fixing seats of justices cannot depend upon popular vote. See Courts, 38.

Statute depending on vote of people. See Constitutional Law, VIII, 1; Counties, 20, 21.

V. Ignorance of Parties Affected by.

37. The validity of a public act of the legislature is in no respect impaired by the knowledge or ignorance at the time of the action of the legislature in passing it on the part of the parties who may be affected by its operation. (Oakland v. Carpenter, 21 Cal. 642.)

VI. Effect of on State.

38. The state is not bound by general words of statute which would operate to trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it. (Mayrhofer v.

Board of Education of the City of San Diego, 89 Cal. 110.)

VII. Courts Cannot Supply Want of.

39. It is no part of function of court to supply a want of penal legislation. (Havemeyer v. Superior Court, 84 Cal. 327.)

40. Court can neither make nor amend statute, but must enforce it as enacted. (Mills v. La Verne Land Co., 97 Cal. 254.)

VIII. Construction of.

1. Codes, Priority of; Effect of on Pending Proceedings; Statutes Continued in Force.

Codes. See Codes.

41. The provisions of the Civil Code respecting the subjects to which it relates are controlling, and should be liberally construed; but, where the code is silent, the common law governs. (Estate of Apple, 66 Cal. 432.)

42. The word "construed," as used in section 5 of the Civil Code, providing that the code sections, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments," as applied to the common law means "regarded" or "considered," and not "interpreted." There is no such thing as construction of the common law. (Churchill v. Pacific Improvement Co., 96 Cal. 490.)

Cited 98 Cal. 33.

43. The words "Penal Code" mean the Penal Code of this state. (People v. Mortier, 58 Cal. 262.)

44. The provisions of the Penal Code are to be construed according to the fair import of their terms, with a view to effect their object and promote justice; and the rule that penal statutes are to be construed strictly does not apply to its provisions. (People v. Fowler, 88 Cal. 136.)

Rule of strict construction of penal statutes abolished by code. See post, VIII, 21.

Conflict between penal legislation and penal code. See post, VIII, 16.

Construction of code relating to rescission. See Rescission of Contracts, III, 1.

Common-law construction of the code. See Easements, 31.

Codes, harmony of. See Jury and Jurors, 61.

Code section relating to disqualification liberally construed. See Judges, 1.

Codes, passage of, effect of. See Criminal Law, 131.

Construction of code in relation to change of venue. See Venue, II, 2.

Code provisions relating to licenses, construction of. See Licenses, II, 2.

Construction of code relating to easements. See Easements, II, 1.

Code provisions relating to powers of justices, construction of. See Justices of the Peace, III.

Construction of section of Civil Code relating to riparian rights. See Watercourses, XIV, 2, e.

Construction of section relating to undertakings on appeal. See Appeals, 711.

Practice Act, construction of. See Pleading and Practice, IV.

Practice Act, to what actions applies. See Pleading and Practice, IV.

45. The laws passed at the session of 1871-72 must prevail over the codes which were adopted at the same session. (*Babcock v. Goodrich*, 47 Cal. 488.)

46. When, in pending actions, proceedings have been taken prior to the taking effect of the code, the sufficiency of such proceedings must be determined by the laws in force at the time and by no other rule. (*Caulfield v. Doe*, 45 Cal. 221.)
Cited 21 Nev. 451.

Vacation of judgments, construction of code. See Judgments, XIV, 2, f.

Code, effect of motion for new trial. See New Trial, V, 1.

Political Code, effect of on incumbent in office. See Offices and Officers, 181.

Effect of Political Code on existing municipalities. See Municipal Corporations, IV.

Effect of code on notice of motion for new trial. See New Trial, 283, 284.

Codes, amendments to. See post, X.

Re-enactment of statute in codes, construction of. See post, VIII, 11.

Penal Code, head-notes of chapters of. See post, VIII, 13.

Headings of chapters, effect of. See post, VIII, 13.

Conflicting or repugnant provisions of the code. See post, VIII, 16.

47. The volume of statutes continued in force, published by the code commissioners, has not received the legislative sanction, and is not, therefore, authority. (*Needham v. Thresher*, 49 Cal. 392.)

48. Section 5 of the Political Code furnishes the rule of construction of those provisions of the code which are continuations of existing statutes, rather than section 4481. (*People ex rel. Travers v. Freese*, 76 Cal. 633.)

49. Sections 18 and 19 of the Political Code having been passed April 1, 1872, may have a material bearing on sections 4478 and 4479 of that code. (*Ex parte Simpson*, 47 Cal. 127.)

Statutes continued in force. See Licenses, 17; Livery-stable Keepers, 2; Streets, 264.

Continued in force, statutes relating to forcible entry and unlawful detainer, whether are. See Forcible Entry and Unlawful Detainer, 4, 5.

Not continued in force, forcible detainer acts. See Forcible Entry and Unlawful Detainer, 5.

Continued in force, statute relating to corporations. See Religious Societies, 1.

Continued in force, statute relating to police court. See Courts, 15.

Continued in force, statute allowing percentage as costs. See Costs, 18, et seq.

Continued in force, act relating to costs in criminal case. See Costs, 25.

Continued in force, statute relating to salary of sheriff. See Sheriffs, 186.

Continued in force, amendment of Political Code does not affect enumeration of. See post, X.

Code does not repeal statute requiring security for costs. See Slander, 63.

Continued in force, act of May 17, 1861, relating to fees in San Francisco. See Offices and Officers, 161.

Continued in force, Possessory Act of 1852, effect of Political Code on. See Public Lands, 163.

Continued in force, acts in relation to fences. See Fences, 1, 2.

Continued in force, act relating to fire commissioners. See Fire Department.

Conflict of insolvent law with code. See Appeals, 250.

Act allowing reporter to attend grand jury repealed by code. See Jury and Jurors, 380.

Political Code does not repeal statute relating to reclamation assessment. See Swamp and Overflowed Lands, 256.

2. *Wisdom and Policy of Statutes; Legislative Discretion; Individual Hardship.*

50. It is not province of judiciary to pass upon wisdom and policy of legislation; and, when it does so, it usurps a power not conferred by the constitution. Per Field, J., dissenting. (*Ex parte Newman*, 9 Cal. 502.)

51. In the consideration of a statute, duly passed by the legislature, the supreme court will not entertain the question whether it be a wise or a foolish law. (*Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 147.)
Cited 92 Cal. 310.

52. If an act is unwise in its character courts have no power to remedy the grievance. (*People ex rel. Ferguson v. Supervisors of San Francisco*, 36 Cal. 595.)

53. In determining the question of power in the legislature to pass the Sunday law act the court cannot consider whether that power was wisely or unwisely exercised, or from pure or impure motives. Per Field, J., dissenting. (*Ex parte Newman*, 9 Cal. 502.)

54. The judiciary does not possess the right to supervise the exercise of legislative discretion in matters of mere expediency, and the assumption of such right would be usurpation. Per Field, J., dissenting. (*Ex parte Newman*, 9 Cal. 502.)

55. The consideration of the justice or policy of a statute, and its effect upon the general welfare of the state, is addressed to the discretion of the legislature, and, having been decided by the legislature, is not a proper subject of judicial inquiry. (*Billings v. Hall*, 7 Cal. 1.)

Legislative discretion not reviewed. See Highways, 25.

56. Hardship of rule in special cases is no solid argument against it. (*Chever v. Hayes*, 3 Cal. 471.)

Legislature must decide on expediency of statute. See ante, IV.

3. *Object, Intent, and Motives of Legislature; Language, Conclusiveness of.*

57. It is a cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it. (*People ex rel. Burr v. Dana*,

22 Cal. 11, cited 76 Cal. 116; *People ex rel. Attorney General v. Eichelroth*, 78 Cal. 141.)

58. In construing statutes the object to be accomplished by the act is to be ascertained, and its provisions considered, and so construed, if possible, that all its parts may have effect, and operate harmoniously to effectuate that object. (*Appeal of North Beach and Mission R. R. Co.*, 32 Cal. 499.) Cited 6 Nev. 222.

59. Statutes should be construed according to what appears to be the intention of the legislature. (*City and County of Sacramento v. Bird*, 15 Cal. 294.) Cited 75 Cal. 172; 76 Cal. 441.

60. Primary rule in the construction of statutes is to so read them as to give force and effect to the intent of the legislature. (*Calaveras County v. Brockway*, 30 Cal. 325.)

61. In the construction of a statute the intention of the legislature must govern, and this must be ascertained, not from a particular section, but from the whole statute. (*Smith v. Randall*, 6 Cal. 47.) Cited 70 Cal. 303; 22 Or. 344.

62. It is the duty of the courts to execute all laws according to their true intent and meaning; that intent, when collected from the whole and every part of the statute taken together, must prevail, even over the literal sense of the terms, and control the strict letter of the law, when the letter would lead to possible injustice, contradiction, and absurdity. (*Ex parte Ellis*, 11 Cal. 222.) Cited 1 Idaho, N. S., 351; 4 Utah, 321.

63. The intention of the legislature is to be gathered from the manifest purpose of the statute itself, and also from a consideration of all of its provisions. (*Board of Education of Sacramento v. Board of Trustees of Sacramento*, 96 Cal. 42.)

64. In determining whether an appropriation has been made for the payment of a particular claim, the court will not look merely at the form of words used, but will ascertain the intention of the legislature from the language of the act, and the provisions of other statutes relating to the same subject, and the nature of the claim for which the appropriation is made; and if it clearly appears therefrom that the legislature intended to pay a certain amount at a certain time, or in installments at certain times, and has designated the fund from which the money is to be paid, the appropriation is complete, and payment of the whole appropriation will be enforced, regardless of form in the wording of the appropriation act. (*Irean v. Colgan*, 96 Cal. 413.)

Intent is to be gathered from statute itself. See post, VIII, 4.

65. The motives of a member of the legislature in moving, or of the body of which he is a member, in passing a legislative act, is not a proper subject of judicial inquiry. (*Harpending v. Haight*, 39 Cal. 189.) Cited 1 Wyo. 93.

66. The motives of the legislature in passing a law will not be inquired into. (*People ex rel. Vermule v. Bigler*, 5 Cal. 23.) Cited 39 Cal. 202.

67. The motives which induce legislative action are not a subject of judicial inquiry, and the legislative act cannot be declared unconstitutional because, in the opinion of a court, it was or might have been the result of improper considerations. (*People ex rel. Searce v. County of Glenn*, 100 Cal. 419.)

68. In the consideration of a statute duly passed by the legislature the supreme court will not inquire into the motives of its authors. (*Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 147.) Cited 92 Cal. 310.

69. The reason and intention of the lawgiver will control the strict letter of the law in interpreting the same, when to adhere to the strict letter would lead to palpable injustice, contradiction, or absurdity. (*Knowles v. Yates*, 31 Cal. 82.) Cited 1 Idaho, N. S., 351; 4 Utah, 322.

Intent controls literal sense of terms, when. See ante, 62.

70. In the construction of statutes for the purpose of ascertaining the legislative intent regard is to be had, not so much to the exact phraseology in which that intent has been expressed, as to the general tenor and scope of the entire legislative scheme embodied in the statute. (*Palache v. Pacific Ins. Co.*, 42 Cal. 418.) Cited 78 Cal. 143.

71. It is a universal rule of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto. (*Tynan v. Walker*, 35 Cal. 634.) Cited 14 Col. 470; 3 Mont. 38, 196.

72. Although in the construction of statutes the intent of the legislature should be followed, yet where the language is free from ambiguity the court cannot depart from the meaning of the language employed, although the consequence would be to defeat the object of the act. (*City of Eureka v. Diaz*, 89 Cal. 467.)

73. When statute assumes to specify effects of certain provision courts will assume that all the effects intended by the lawmaker are stated. (*Perkins v. Thornburgh*, 10 Cal. 189.) Cited 9 Or. 101.

4. *Opinions of Electors or Legislators; Debates on Statutes.*

74. The intent or proper construction of an act of the legislature which took effect upon the contingency of receiving a majority of the votes of the electors of a municipal corporation is not to be determined by the views entertained of its provisions by the electors when they adopted it. (*French v. Teschemaker*, 24 Cal. 518.)

75. Opinions expressed by individual legislators upon the object and effect of particular provisions of an act under discussion are entitled to little weight in the construction of the act. The intention of the legislature must be sought in the language of the act, and the

object expressed or apparent on its face. (*Leese v. Clark*, 20 Cal. 387.)
Cited 28 Cal. 95.

76. The meaning of an act is to be ascertained, not from the debates which took place on its passage, but from the language of the act. (*McGarrahan v. Maxwell*, 28 Cal. 75.)

Construction, resorting to proceedings of convention. See *Constitutional Law*, IV, 1.

5. Avoiding Absurd Results and Upholding Substantial Rights.

Construction avoiding injustice or absurdity. See ante, 69.

77. A constitutional or statutory provision should be construed according to the intention of the law-making power, and not so as to lead to absurd or impractical results, or to compel a court to decree a thing substantially impossible, or which is in plain violation of fundamental principles of law or equity, unless the language absolutely requires such construction. (*Jacobs v. Board of Supervisors of San Francisco*, 100 Cal. 121.)

78. Statutes should be so construed as to avoid absurd results not within the evil to be remedied, and evidently not within the contemplation of the legislature. Per *Crockett, J.* (*People v. Turner*, 39 Cal. 370.)
Cited 5 Cal. 131.

79. Where words in a statute may be given a meaning which will justify their insertion in the statute without convicting the legislature of having enacted an absurdity they must be limited to such meaning; that is, if the apparent object and policy of the law is subverted by taking them in a qualified and restricted sense, while one of its principal objects is utterly defeated by giving them their largest possible significance, the former interpretation must be preferred. (*Fox v. Hale and Norcross S. M. Co.*, 97 Cal. 353.)

80. Language of statute should be so interpreted as to make it compatible with common sense and the dictates of justice. (*Cullerton v. Mead*, 22 Cal. 95.)

81. No construction of words is admissible which gives to them an absurd signification, if any other reasonable construction is possible. (*San Diego v. Granniss*, 77 Cal. 511.)
Cited 22 Or. 344.

Reasonable construction to be given to penal statutes. See post, VIII, 21.

82. Where a statute is ambiguous such a construction will be given to it as not to deprive a party of a substantial right. (*People v. Hodgdon*, 55 Cal. 72.)
Cited 78 Cal. 144.

83. When the meaning of the words is not clear the statute should be given such construction as will not deprive the person interested in its construction of a substantial right. (*People ex rel. Attorney General v. Eichelroth*, 78 Cal. 141.)

6. Giving Effect to Every Part.

84. A statute should be construed so as to give effect and meaning, if possible, to every clause and word contained in it. Per *Bennett, J.* (*Souter v. The Sea Witch*, 1 Cal.

162, cited 8 Or. 404; *San Francisco v. Hazen*, 5 Cal. 169, cited 18 Cal. 365; *People v. Waterman*, 31 Cal. 412, cited 46 Cal. 102; *People v. Southwell*, 46 Cal. 141.)

85. It is a rule of construction of statutes that some effect, if possible, must be given to every word, and certainly to every distinct provision of the act. (*Langenour v. French*, 34 Cal. 92.)

Cited 65 Cal. 343.

86. If practicable, effect should be given to all the words and provisions of the statute. (*Appeal of S. O. Houghton*, 42 Cal. 35.)

87. In the construction of a statute effect must be given, if possible, to every substantive provision of the statute consistent with its entire scope and object. (*Donlon v. Jewett*, 88 Cal. 530.)

88. A statute must be so construed as to give effect, if possible, to every portion of it, and without rejecting any part as surplusage, or treating it as a repetition of a provision already made. (*Gates v. Salmon*, 35 Cal. 576.)
Cited 22 Or. 344.

89. It is the duty of the court to construe every provision of a written instrument so as to give force and effect not only to every clause, but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the framers of the instrument, to be collected from its terms, or would lead to some other inconvenience or absurdity. (*Hyatt v. Allen*, 54 Cal. 353.)

90. In construing statutes, force and meaning should be given to every part, and courts will not, except when the language is so vague and indefinite as to be wholly destitute of meaning, reject any portion. (*Chever v. Hays*, 3 Cal. 471.)
Cited 6 Or. 404.

Statute construed so as to give effect to every part. See ante, 58.

Giving effect to every part of penal statute. See post, VIII, 21.

Provision inserted through inadvertence, disregarded. See post, VIII, 25.

7. Considering All Parts of Statute Together; Reconciling Inconsistencies.

91. All parts of statute are to be considered together, keeping in view the subject matter of legislation, in order to ascertain the legislative intent. Effect should be given to such clause when it can be done; but one clause may be enlarged or limited by other provisions upon the same subject. (*San Diego v. Granniss*, 77 Cal. 511.)
Cited 22 Cal. 344.

92. The sections of a statute in *pari materia* must be read together, and effect given to each and so construed as not to render nugatory the restrictions of any section. (*Gleason v. Spray*, 81 Cal. 217.)

93. Where two sections of a law relate to the same matter both are to be read together, in order to ascertain the intent of the legislature. (*Taylor v. Palmer*, 31 Cal. 240.)
Cited 35 Cal. 708; 51 Cal. 23, 501; 69 Cal. 384; 6 Nev. 222.

94. In construing a statute the sections must be taken together, and that interpretation should be placed upon the language, which will give the particular section utility and effect, make it compatible with common sense and the plainest principles of justice. (*Burnham v. Hays*, 3 Cal. 115.) Cited 22 Cal. 98.

95. The whole of a legislative act must be construed together, and interpreted according to the intention of the legislature apparent upon its face. (*Seabury v. Arthur*, 28 Cal. 142.)

96. In construing a particular section of a statute it should be considered together with the other sections, and its language so interpreted as to give to it utility and effect. (*Cullerton v. Mead*, 22 Cal. 95.) Cited 6 Nev. 222.

97. In construing a statute all parts of the act must be considered, in order to ascertain from the whole what was the real intent of the legislature. (*People ex rel. Ferguson v. Supervisors of San Francisco*, 36 Cal. 595.)

98. To determine the true interpretation of the terms of a doubtful or ambiguous section it is proper to read it in connection with others in the same act dealing with the same general subject. (*People v. White*, 34 Cal. 183.)

Intent is to be gathered from whole act. See ante, VIII, 3.

99. A statute must be so construed, if practicable, so as to reconcile apparent inconsistencies, if it can be done without torturing the language. (*People v. Southwell*, 46 Cal. 141.)

100. In the construction of a statute all its provisions must be considered together, and must be reconciled as far as possible, and particular provisions must be so construed as to promote and not to defeat the general purposes and policy of the law. (*Welch v. Williams*, 96 Cal. 365.)

Duty of court to reconcile inconsistencies. See post, VIII, 24.

Section of the code must be construed as a whole. See *Mechanics' Liens*, 156; *Offices and Officers*, 152.

Sections of code on same subject should be construed together. See *Schools*, 31.

Duty to reconcile inconsistent statutes. See post, 222.

Reconciling conflicting provisions of the code. See post, VIII, 16.

8. Statutes in *Pari Materia*; Laws Passed on Same Day.

101. Two statutes upon the same subject matter, passed at different times, which are in *pari materia*, must be read and construed as one act. (*McMinn v. Bliss*, 31 Cal. 122.) Cited 35 Cal. 708.

102. It is a well-settled rule of construction that statutes upon the same subject matter must be construed together. (*People ex rel. Fowler v. Wells*, 11 Cal. 329.)

Construction of statutes in *pari materia*. See *Homesteads*, 8; *Sheriffs*, 96.

Sections of statute in *pari materia*. See ante, VIII, 7.

General and special laws on same subject. See post, VIII, 18.

Sections of Political Code, construction of. See ante, 49.

103. Legislative acts passed at different times upon same subject matter are in *pari materia*, and must be read together. (*People ex rel. Harbor Commissioners v. Broadway Wharf Co.* 31 Cal. 33.) Cited 1 Idaho, N. S., 258.

104. When two laws are passed on the same day in relation to the same subject matter they are to be read together as if parts of the same act. (*People ex rel. Frick v. Jackson*, 30 Cal. 427.) Cited 1 Idaho, N. S., 357; 1 Oklahoma, 127.

105. Where there are two laws upon the same subject they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the latter act. (*Merrill v. Gorham*, 6 Cal. 41.) Cited 35 Cal. 708; 95 Cal. 148.

9. Prospective and Retrospective Operation of Statutes.

106. General rule is that all statutes are to be construed prospectively, and there is nothing in the act referred to to indicate a different construction. (*Bascomb v. Davis*, 56 Cal. 152.)

107. With the exception of cases within prohibitory clauses, in state constitutions or in the constitution of the United States, it is competent for a state legislature to give to a statute a retroactive effect. (*Von Schmidt v. Huntington*, 1 Cal. 55.)

108. No statute should be so construed as to give it a retrospective effect to divest the rights of individuals vested previous to its passage, or previous to the time the act took effect, unless such intention be expressed in terms. (*People ex rel. Thorne v. San Francisco*, 4 Cal. 127.) Cited 5 Cal. 402.

109. Statute should be so construed as to take effect upon future and not upon past transactions. (*Von Schmidt v. Huntington*, 1 Cal. 55.)

110. Statutes should not be so construed as to give them a retroactive operation unless it is clearly apparent that such was the intention. (*Gates v. Salmon*, 28 Cal. 320.)

111. A law relating to the subject matter of an order made by the lower court previous to its passage will not affect the decision of the supreme court on an appeal from the order. The decision in the appellate court must be whether the order was correct or erroneous at the time it was made. (*State v. McGlynn*, 20 Cal. 233.)

Code is not retroactive. See ante, VIII, 1.

112. The act of April 2, 1886, amending the sixty-eighth section of the Practice Act, authorizing court to grant relief from judgment or order, was retrospective in its operation. (*Bensley v. Ellis*, 39 Cal. 309.) Cited 63 Cal. 268.

Constitution is not retroactive. See Constitutional Law, IV, 4.

Retroactive laws. See Registration, I; Statute of Limitations, II.

Retrospective law, when void. See Constitutional Law, 331.

Affidavit, statute as to form of is not retrospective. See Public Lands, 401.

Amendment of statute of limitations, effect of. See Statute of Limitations, 8.

Appeal, statute allowing is not retroactive. See Appeals, 110, 111.

Bankrupt law is not retroactive. See Bankruptcy and Insolvency, 270.

Bankrupt law, debts contracted prior to whether discharged. See Bankruptcy and Insolvency, X, 6, a.

Cemeteries, Political Code relating to is not retroactive. See Cemeteries, 7.

Certificates of purchase, act relating to is retroactive. See Public Lands, 424.

County, statute allowing suit against. See Counties, 117.

Dismissal, statute relating to is not retroactive. See Dismissal, 49.

Evidence, statutes relating to reading documents without proof of execution. See Evidence, 127, 128.

Evidence, testimony of party after passage of statute but before it went into effect. See Witnesses, V, 8, c, A.

Evidence, statute prohibiting certain evidence in action against decedent. See Depositions, 77.

Execution, statute relating to issuance of after five years is not retrospective. See Executions, 26.

Homestead act is retrospective. See Homesteads, 9.

Homestead laws relating to descent. See Homesteads, XV, 1.

Interest, statute regulating. See Interest, 1.

Interest, statutes changing rate of. See Interest, 7.

Joint tenancy, statute abolishing is not retroactive. See Cotenancy, 4, 5.

Legal tender acts are not retrospective. See Payment, 45.

Legitimation, retroactive statutes relating to. See Legitimacy, 12.

Married women, statute relating to property of. See Husband and Wife, II, 4, a.

Mechanics' liens, statutes relating to. See Mechanics' Liens, XVI, 1.

Mortgages, statute relating to. See Mortgages, 174.

Mortgage, statute changing nature of. See Mortgages, 19.

Mortgages, law relating to presentation of, is not retrospective. See Estates of Deceased Persons, 187.

Powers, statute validating defective. See Husband and Wife, 396.

Practice Act is not retrospective. See Pleading and Practice, 7, 8.

Presumption against retrospective statutes. See Taxation, 472.

Probate statutes, whether are retroactive. See Estates of Decedents, 7, et seq.

Probate sales, statutes relating to. See Estates of Deceased Persons, 444.

Probate of wills, statutes relating to are not retroactive. See Wills, X, 1.

Property rights, statute relating to. See Husband and Wife, 303.

Remedy, laws affecting. See Constitutional Law, VIII, 8, d.

State lands, act for relief of purchasers, whether retrospective. See Public Lands, 616; XIX, 1.

Actual settlement, constitutional requirement as to is retroactive. See Public Lands, XIV, 10.

Redemption, statute allowing is not retroactive. See Executions, X, 1.

Streets, retroactive, statute regarding is not. See Streets, 396.

Specific contract act is retrospective. See Payment, 52.

Statute creating logger's lien is not retrospective. See Mechanics' Liens, 6.

Summons, statute relating to time of issuing. See Summons, 2.

Treasurer, act requiring to retain certain moneys is not retroactive. See Treasurers, 7.

Wills executed before passage of statute, probate of. See Wills, X, 1.

10. Words and Phrases; Construction of; Transposition of Words.

113. The words of a statute must be interpreted according to their common acceptance. (*Quigley v. Gorham*, 5 Cal. 418.)

114. When there is nothing in a statute to indicate that a word is used in a peculiar sense it must be taken in its ordinary and popular meaning. (*People ex rel. Attorney General v. Reis*, 76 Cal. 269.)

115. In construing statutes words are to be taken in their usual and popular sense, unless they have a well-understood, technical meaning. (*Appeal of S. O. Houghton*, 42 Cal. 35.)

116. When a term, not technical, is used in a statute it must, unless the legislature have affixed to it a special definition, be taken in its ordinary and general sense. (*Gross v. Fowler*, 21 Cal. 392.)

117. In construing laws words not technical will be presumed to have been used in the sense in which they are understood by those for whom the laws are made. (*Sprague v. Norway*, 31 Cal. 173.)

118. Where statutes use words and phrases of a well-known and definite meaning in the law they are to be expounded in the same sense in the statute. (*Harris v. Reynolds*, 13 Cal. 514.)

119. Where word having technical, as well as popular, meaning is used in the constitution or a statute the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense. (*Weill v. Kenfield*, 54 Cal. 111.) Cited 57 Cal. 605; 69 Cal. 491; 72 Cal. 465; 85 Cal. 247, 414.

120. Word repeatedly used in statute will bear the same meaning throughout the statute, unless it is apparent that another meaning is intended. (*Pitte v. Shipley*, 46 Cal. 154.) Cited 55 Cal. 565; 72 Cal. 466.

121. Where a word or clause is found repeatedly used in a statute it will be presumed to bear the same meaning throughout, unless there is something to show that another mean-

ing is intended. (*Hoag v. Howard*, 55 Cal. 564.)

Cited 72 Cal. 466.

122. When two acts are in *pari materia*, or one is an amendment of the other, it will be presumed that a word used in a certain sense in the first act was used in the same sense in the subsequent one. (*Robbins v. Omnibus R. R. Co.*, 32 Cal. 472.)

Cited 55 Cal. 565.

Words in amendatory act, construction of. See post, X.

Expressio unius exclusio alterius. See Bankruptcy and Insolvency, 190; New Trial, 18; Offices and Officers, 188; Streets, 352.

Reddendo singula singulis. See Taxation, 564.

123. In the construction of a statute, words or sentences may be transposed whenever it is necessary to do so, in order that every word may have a practical effect, according to its appropriate meaning. (*Eyre v. Harmon*, 92 Cal. 580.)

General words controlled by specific exceptions. See post, VIII, 24.

Mistake in use of word. See post, VIII, 25.

11. *Contemporaneous Construction; on Re-enactment of Statute; Stare Decisis.*

124. Courts will uphold, where it is possible, a contemporaneous interpretation of a statute under which interpretation rights of property have for many years been acquired. (*Matter of Will of Warfield*, 22 Cal. 51.)

Cited 9 Mont. 465.

125. In construing statutes and the constitution the rule is almost universal to adhere to the doctrine of *stare decisis*. (*Seale v. Mitchell*, 5 Cal. 401.)

Cited 8 Nev. 344; 10 Or. 66.

Construction of statutes. See *Stare Decisis*, 25.

126. The rule that the legislature, by re-enacting without material alteration a statute which has been judicially expounded by the highest court of the state, must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old, does not apply where the old statute was strictly construed, prior to the adoption of the code, because in derogation of the common law, and the re-enactment is made part of the code which abolishes that rule of strict construction, and provides for a liberal construction of its provisions, with a view to effect its objects and to promote justice. (*Blythe v. Ayres*, 96 Cal. 532.)

Cited 98 Cal. 388.

127. Where a law, antecedent to a revision of the statutes, is settled either by clear expressions in the statutes or adjudications upon them, the mere change in the phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention to work a change. (*Hyatt v. Allen*, 54 Cal. 353.)

Cited 55 Cal. 304.

128. The rules of statutory construction under the codes being different from those

applied to the Practice Act, a re-enactment in one of the codes of a provision contained in the Practice Act does not carry with it the construction given it previous to its re-enactment. A re-enactment only carries with it the construction previously given where the rules of statutory construction are the same at the date of both enactments. (*Dixon v. Pluns*, 98 Cal. 384.)

129. The act of 1853 as to the transfer of stock does not substantially alter that of 1850 in this respect, and its construction having been heretofore judicially established, public policy demands that it should be maintained. (*Weston v. Bear River etc. Co.*, 6 Cal. 425.)

Prior decisions under similar statutes, applicability. See *Mechanics' Liens*, 49.

Contemporaneous construction. See *Appeals*, 4, 16; *Constitutional Law*, IV, 5.

Construction of constitution. See *Stare Decisis*.

12. *Where Statute Susceptible of Two Constructions.*

130. If a statute is susceptible of two constructions, one of which is consistent and the other inconsistent with the restrictions of the constitution, it is the duty of the court to give it that construction which will make it harmonize with the constitution, and comport with the legitimate powers of the legislature. (*People v. Frisbie*, 28 Cal. 135.)

131. When an act of the legislature is ambiguous upon its face, and susceptible of different constructions, such construction as would declare it unconstitutional should be avoided when it can be fairly done. (*French v. Teschemaker*, 24 Cal. 518.)

Cited 36 Cal. 604, 626; 53 Cal. 179; 92 Cal. 558; 92 Cal. 585.

132. Where a law is capable of two constructions, that one must be adopted which will preserve the sense as well of the several parts as of the whole act. (*San Francisco v. Hazen*, 5 Cal. 169.)

Cited 18 Col. 365.

13. *Title of Act; Heads of Chapters; Division of Statutes into Sections.*

133. It is well settled that title of act is no part of law itself, although it may be referred to in cases of doubt to ascertain the intention of the legislature. (*Cohen v. Barrett*, 5 Cal. 195.)

134. The title of an act cannot be used to restrain or control any positive provision of the act, but, where the meaning of the body of the act is doubtful, the title may be resorted to as a means of ascertaining the intention of the legislature. (*Flynn v. Abbott*, 16 Cal. 358.)

Cited 19 Cal. 512; 36 Cal. 602.

135. The title of an act is never held to control the legislative intent. This intent is to be sought in the purview or body of the act; and, when the language in this part is clear and unambiguous, no other part can avail to contradict or control it. The title can be resorted to only in cases of ambiguity, and is then of slight value. Per *Field, J.*, dissenting. (*Ex parte Newman*, 9 Cal. 502.)

Cited 20 Cal. 582.

136. The rule that the title of an act does not control legislative intent is not in any degree changed by the twenty-fifth section of article IV of the constitution, which requires that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title." Per Field, J., dissenting. (Ex parte Newman, 9 Cal. 502.)

137. While the title of an act will not control the language of a statute in the body it may be referred to as tending to explain the intention of the act when the language is doubtful. (Barnes v. Jones, 51 Cal. 303, cited 60 Cal. 205, 74 Cal. 45, 100 Cal. 325; People ex rel. Ferguson v. Supervisors of San Francisco, 36 Cal. 595.)

138. When the language of an act is plain the title cannot be resorted to for the purpose of restraining that language. (In re Boston Mining and Milling Co., 51 Cal. 624.)

139. In construing statutes resort is sometimes had to the title, as tending to throw some light upon the intention of the legislature in very doubtful cases; but, in any case, it is entitled to but little weight, and is never allowed to enlarge or control the language in the body of the act. (Hagar v. Supervisors of Yolo County, 47 Cal. 222.)

140. If, upon the face of an act, the legislative intent is ambiguous, a judicial reference may be had to the title of the act to assist in determining its meaning. (Weed v. Maynard, 52 Cal. 459.)
Cited 74 Cal. 45.

141. While the title cannot be resorted to to control the body of a statute, yet, in doubtful cases, it may be referred to as an aid in construing doubtful clauses. (Harris v. Supervisors of San Francisco, 52 Cal. 554.)

142. Head-notes to chapters and titles in the Practice Act are entitled to more consideration in explaining the intention of the different sections, where the language is doubtful, than the title of the entire act. (Barnes v. Jones, 51 Cal. 303.)
Cited 60 Cal. 192; 75 Cal. 16; 100 Cal. 325.

143. Headings of chapters may be resorted to to determine as to the correct interpretation of the sections included in the chapter. (Ex parte Koser, 60 Cal. 177, 192.)

144. The notes at the heads of the chapters in the Penal Code are a portion of the chapter itself. (Ex parte Koser, 60 Cal. 177, 206.)
Cited 75 Cal. 16.

145. The subject matter of a title of the code should be ascertained, not so much from the head lines as from the contents. (People ex rel. Travers v. Freese, 76 Cal. 633.)

146. The distribution of an act into sections is purely artificial. The real point always is, whether the provisions are essentially and inseparably connected in substance. McKinstry, J. (People v. Parks, 58 Cal. 624.)

Title of act. See Constitutional Law, VIII, 2.

14. Where One Statute Refers to Another.

147. Legal effect of reference to another statute is the same as though the act referred to had been inserted in the act creating the office. (People v. Whipple, No. 2, 47 Cal. 592.)

148. Subsequent repeal of act so referred to does not defeat nor render void the act in which such reference is contained. (People v. Whipple, No. 2, 47 Cal. 592.)

149. The legislature, in the passage of a law, may refer to an act unconstitutional in itself to indicate its will in respect to a constitutional purpose. Where power has been misplaced by the legislature, and thus its act become unconstitutional and void, it may, by the passage of a constitutional law, transfer such powers to another tribunal, by reference to such act. (People v. Bircham, 12 Cal. 50.)

Statute declaring special act to be general. See post, VIII, 18.

Mistake in reference to another act. See post, VIII, 25.

15. Where Certain Provisions of Act are Inoperative.

150. On the 26th of March, 1878, an act was passed by the legislature entitled "An act in relation to certain officers of Plumas county, and to fix the compensation thereof." Portions of the act took effect immediately, and other portions were to take effect on the first Monday in March, 1880. These latter portions never took effect by reason of the adoption of our present constitution. Held, that the portions which took effect may operate independently of the residue of the act, and are still in force. (People v. Whiting, 64 Cal. 67.)

16. Conflicting or Repugnant Statutes.

151. When the provisions of the different codes conflict with each other such a construction must be given to them that both may, if possible, have effect. (Gonzales v. Wasson, 51 Cal. 295.)
Cited 62 Cal. 28.

152. The different sections of a chapter in any of the codes must be so construed as to reconcile all apparent conflicts. (Emeric v. Alvarado, 64 Cal. 529.)

153. If there are conflicting provisions in the different sections of a chapter the provisions of the section last in numerical order must prevail, unless such construction is inconsistent with the meaning of the chapter. (Emeric v. Alvarado, 64 Cal. 529.)

154. Section 4484 of the Political Code, providing that in the construction of conflicting sections of the same chapter or article of the codes the provisions of the section last in numerical order must prevail, does not govern in the construction of sections that were passed at different times. In such a case the section that was last passed must prevail. (People v. Dobbins, 73 Cal. 257.)

155. The subject matter of recording mortgages comes more properly under the article in the Civil Code prescribing rules for "mortgages of real property" than under the article prescribing rules for "mortgages in general," and, if there is a conflict between the two articles in relation to recording mortgages, the former must prevail. (Odd Fellows' Savings Bank v. Banton, 46 Cal. 603.)

156. Although section 16 of the State Reform School Act could have been enacted as an amendment to the Penal Code, yet the fact that it was not so made a part thereof does

not render that section void; and, if there be any conflict between the Penal Code and the Reform School Act, the latter must prevail. (*Ex parte Liddell*, 93 Cal. 633.)

157. When two laws upon cognate subject, passed at different times, are inconsistent with each other, the one first passed must yield to the latter. (*Estate of Wixom*, 85 Cal. 320.)

Cited 68 Cal. 304; 73 Cal. 506.

158. On May 1, 1851, the legislature passed two acts—one to regulate proceedings in criminal cases, the other to regulate fees in office—both fixing the fees of the clerk in criminal cases, and essentially different. Held, that the latter act must govern, as the subject of fees was the sole object of that act, and, the fixing of fees in the former act being a mere incident, the main purpose of the act being to regulate criminal proceedings. (*Dobbins v. Supervisors of Yuba County*, 5 Cal. 414.) Cited 32 Cal. 144.

159. Repugnancy in principles merely, between two acts of the legislature, forms no reason why both may not stand. (*Ex parte Smith*, 40 Cal. 419.)

Repugnancy between statutes. See *Taxation*, 67.

Conflicting sections, construction of. See *Game Laws*; *Homesteads*, 125.

Conflicting sections of code, which prevail. See *Offices and Officers*, 248.

Duty to reconcile inconsistent statutes. See post, 222.

General and special acts relating to duties of public boards. See post, VIII, 18.

Repugnant exception or proviso. See post, VIII, 24.

Repugnant statutes, repeal in case of. See post, IX.

17. *Powers Implied in Statute; Act Creating Right Without Remedy.*

160. Where a power is given by statute, every thing necessary to make it effectual or requisite to attain the end is implied; and where the law requires a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands. (*State of California v. Poulterer*, 16 Cal. 514.)

161. When a statute casts upon a party an obligation to pay money to particular persons, without providing a remedy for its recovery, an action of debt will lie. (*State of California v. Poulterer*, 16 Cal. 514.)

18. *General and Special Acts; Rule that Special Provision Controls General.*

162. An act which purports on its face to be, and is in fact, a special act, cannot be converted into a general act by a declaration of the legislature in another act that it shall be considered a general act. (*San Francisco v. Spring Valley Water Works*, 48 Cal. 493.) Cited 83 Cal. 404.

163. A private act of the legislature, where there is doubt in respect to its interpretation, is to be construed most beneficially to the public interests. (*Welsh v. Plumas County*, 94 Cal. 368.)

164. Where there is a general law prescribing and defining the powers, duties, and mode

of procedure of a public board, and a special law is passed relating to a particular matter coming within the general scope of the powers of the board, the two laws are to be read together; and the general law is applicable to the particular matter, except in so far as provision is made in the special law conferring powers, or prescribing duties or modes of procedure different from those mentioned in the general law. (*Talcott v. Harbor Commrs.*, 53 Cal. 199.)

165. It is a well-settled rule of construction that a general provision must be controlled by one that is special. (*People ex rel. Fowler v. Wells*, 11 Cal. 329.)

General and special statutes relating to cities. See *San Francisco*, 321.

General words are controlled by specific exceptions. See post, VIII, 24.

Ignorance of party affected by public act, effect of. See ante, V.

Acceptance of law passed for one's special benefit. See ante, III.

General laws, uniformity of. See *Constitutional Law*, VIII, 15.

General statute, effect of on contract made under special statute. See *Bonds*, 58.

Special laws. See *Constitutional Law*, VIII, 14.

Special act authorizing sale. See *Estates of Deceased Persons*, VII, 3; *Guardian and Ward*, V, 6, a.

Special act authorizing change of venue. See *Venue*, II, 3.

Creation of reclamation district by special act. See *Swamp and Overflowed Lands*, XVII, 3, c.

Water company cannot be created by special act. See *Water Companies*, 5.

19. *Statute Divesting One of Property.*

See *Eminent Domain*; *Highways*; *Streets*; *Taxation*.

166. In proceedings to divest individuals of their estates for public use statutes must be construed strictly in favor of individual right; yet in the exercise of the powers conferred, which are to be used for the public good, they should be construed liberally, so far as it is necessary to render their execution practicable. Per *Temple J.*, concurring. (*Chambers v. Satterlee*, 40 Cal. 497.)

167. Statutes prescribing modes by which party may be divested of his property without his consent must be strictly construed. (*Trumpler v. Bemerly*, 39 Cal. 490.)

Summary proceedings, statute strictly construed. See *Sheriffs*, 100.

20. *Statutes in Derogation or Affirmance of the Common Law.*

168. Statute, in derogation of common law, must be strictly construed. (*Turner v. Tuolumne County Water Co.*, 25 Cal. 397; *People v. Buster*, 11 Cal. 215.)

169. Statutes in derogation of the common law should be construed strictly, especially when they open a door to fraud. (*Hotaling v. Cronise*, 2 Cal. 60.)

170. Where a statute is in affirmance of the common law it is to be construed as was the

rule by that law. (*Baker v. Baker*, 13 Cal. 87.) Cited 90 Cal. 454.

Statute in derogation of common law is strictly construed. See Arbitration and Award, 60; Eminent Domain, 53, 80; Interest, 2; Judgments, 22; Mechanics' Liens, 4.

Statutes relating to legitimation are in derogation of common law, and to be strictly construed. See Legitimacy, 11, 12.

Statute authorizing suit against company, by name, is in derogation of common law, and to be strictly construed. See Parties, 32.

21. Penal Statutes.

171. A statute which provides for making one person individually liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable, is penal in its nature, and, like other statutes which create a forfeiture or impose a penalty, is to be strictly construed against the liability. (*Moore v. Lent*, 81 Cal. 502.)

Statute relating to embezzlement from estate, is not. See Embezzlement.

Statute relating to fire. See Fire.

Penalty, statute does not give, when. See Shipping, V.

Statute imposing forfeiture. See Mechanics' Liens, 302.

Statute giving penalty for failure to transmit message. See Telegraph Companies, 12.

Penalty for excessive charges. See Common Carriers, IV, 4, b.

172. Although penal clauses of statutes ought to be strictly construed, yet, when the intent and object of the law is plain, such object must not be defeated by an overnice construction. Common sense must be applied to the terms made use of, in order to avoid an absurdity, and no word is to be eliminated, if a sensible meaning can be given to it, unless the real object of the statute would be defeated by giving such word its meaning; but effect must be given to each word, when not to do so is to deprive the law of the vitality necessary to secure respect to its commands. (*Eyre v. Harmon*, 92 Cal. 580.)

Penalty, statute imposing, strictly construed. See Corporations, 539; Mechanics' Liens, 302; Registration, 58.

Liberal construction of penal statute. See Banks and Banking, 99.

173. The rule of the common law that penal statutes should receive a strict construction in favor of him upon whom a penalty was to be inflicted has been abrogated by the code, which has constituted itself, in this respect, its own interpreter. (*Ex parte Gutierrez*, 45 Cal. 429.)

174. The rule that penal statutes must be strictly construed has been abolished in this state by the Penal Code. (*People v. Soto*, 49 Cal. 68.)

Penal Code, construction of. See ante, VIII, 1.

Conflict between penal legislation and Penal Code. See ante, VIII, 20.

Subsequent act covering same offense. See post, IX.

Remedy under. See Auctions, 20.

Right to violate cannot be acquired by prescription. See Watercourses, VI.

22. Remedial Statutes; Curative Acts.

175. Where a right exists at common law, and a new remedy is given by statute, the latter is cumulative, and either remedy may be pursued. (*People v. Oraycroft*, 2 Cal. 243, cited 7 Cal. 129, 77 Cal. 543; *Ward v. Severance*, 7 Cal. 126.)

Effect of statute providing remedy. See Nuisances, V, 1.

Remedy, statute providing whether exclusive. See Pleading and Practice, 11.

Remedy provided by statute not exclusive, when. See Auctions, 20.

Statute giving remedy is cumulative. See Taxation, 595.

Creating power, duty, or remedy, when exclusive. See Auctions, 28.

Statute giving lien is not exclusive, when. See Fences, 10.

Remedy by injunction is not exclusive. See Injunctions, 127.

176. Where a new right is created by statute the party complaining of its violation is confined to his statutory remedy, so far as the courts of common law are concerned. (*Ward v. Severance*, 7 Cal. 126; *People v. Craycroft*, 2 Cal. 243, cited 7 Cal. 129; 77 Cal. 543.)

177. When a right or obligation is created, and a remedy provided by statute or valid ordinance, the remedy so provided must be exclusively pursued. It is only when the right exists at common law that the remedy provided by statute can be regarded as cumulative. (*Monterey County v. Abbott*, 77 Cal. 541.)

178. If a statute gives a particular remedy in conferring a new right, then the particular remedy must be pursued. (*Roberts v. Lan-decker*, 9 Cal. 262.)

179. Remedial statutes must be construed liberally, and where the meaning is doubtful it must be so construed as to extend the remedy. (*White v. Steam Tug Mary Ann*, 6 Cal. 462, cited 22 Cal. 98, 125; *Cullerton v. Mead*, 22 Cal. 95.)

180. Remedial statutes should be liberally construed in favor of the remedy, and rules of procedure are remedial in their nature. (*Buck v. City of Eureka*, 97 Cal. 135.)

181. An act of a remedial character should receive, having due regard to the language in which it is expressed, a liberal construction, which will bring within its scope every case which comes clearly within its spirit and policy. (*Wallace v. Moody*, 28 Cal. 387.)

182. A statute remedial in its object, if its meaning is doubtful, will be construed so as to suppress the mischief adverted to, and advance the remedy. (*Toomy v. Dunphy*, 86 Cal. 639.)

Statutes allowing redemption are remedial, and should be liberally construed. See Mortgages, 869.

Remedial, exemption statutes are liberally construed. See Exemptions, 2.

Remedial statutes liberally construed. See Estates of Deceased Persons, 157; Judgments, 633, 775.

183. Where a statute provides a remedy not

known to the common law, and by which no personal notice to the person proceeded against is required, the statute should receive a strict construction, and not be extended to cases which do not clearly fall within its language. *Per Bennett, J. (Souter v. The Sea Witch, 1 Cal. 162.)*

Construction of statute relating to appeals. See Appeals, II, 1.

New trial, construction of statute relating to. See New Trial, IV, 1.

Curative statutes relating to swamp land. See Swamp and Overflowed Lands, XIV.

Curative acts, validating void proceeding for street improvement. See Streets, XII, 8.

Curative. See Public Lands, 402; Registration, 32, et seq.; Taxation, VIII, 5.

Curative act, whether retroactive. See Public Lands, 652.

Statute curing defects in certificates of incorporation. See Corporations, 33.

23. Mandatory and Prohibitory; Validity of Forbidden Acts.

184. When object of law is to subserve some purpose in which public are interested courts will hold a provision to be mandatory or directory, as will best subserve that purpose. (*Calaveras County v. Brockway, 30 Cal. 325.*)

185. The rule is, that, when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. (*People ex rel. Jacobs v. Murray, 15 Cal. 221.*) Cited 30 Cal. 526.

186. Where a statute specifies the time at or within which an act is to be done it is usually held to be directory, unless time is of the essence of the thing to be done, or the act contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right. (*People ex rel. Supervisors of Solano County v. Lake County, 53 Cal. 487.*)

187. Although statutes which fix the time within which official acts are to be performed are often held to be merely directory as to the time so fixed, yet such a statute is never so construed when its language indicates the contrary intention as when the statute attaches a consequence to the failure to perform the act within the time limited. In such a case the consequence can be avoided only by a compliance with the statute. (*Perine v. Forbush, 97 Cal. 505.*)

188. Provisions in a statute in regard to the time within which an act is required to be done are generally to be construed as directory, but such a construction is improper where a consequence is attached to a failure to comply with the statute. (*Shaw v. Randall, 15 Cal. 384.*) Cited 56 Cal. 357; 2 Mont. 394.

189. Where time is prescribed to a public body in the exercise of a function in which the public is concerned, the time designated is merely directory, unless there are negative words restraining the exercise of the power to that time. (*Tuohy v. Chase, 30 Cal. 524.*) Cited 56 Cal. 357.

190. Where an act of the legislature contains

no provisions limiting its operation upon any contingency, and it is impossible to take the initial step in its execution within the time prescribed in the statute, held, that the provision in respect to the time of taking said step is directory merely. (*People ex rel. Supervisors of Solano County v. Lake County, 33 Cal. 487.*)

Cited 56 Cal. 357; 2 Mont. 394.

191. If an act both authorizes and empowers to contract for a map it will not be construed as mandatory. (*Bowers v. Sonoma County, 32 Cal. 66.*)

192. The act of the 28th of March, 1863, "to authorize the board of supervisors of Sonoma county to appropriate money for a map," is not mandatory on the part of the board, but leaves the matter to its judgment. (*Bowers v. Sonoma County, 32 Cal. 66.*) Cited 58 Cal. 278.

193. In construction of statutes relating to performance of public duty which does not affect any private rights or interests, but concerns the public alone, the language of the statute, although imperative in terms, must be regarded as directory rather than mandatory. (*Board of Education of Sacramento v. Board of Trustees of Sacramento, 96 Cal. 42.*)

194. Although it may appear that it was not intended to be mandatory from the first section, yet, if the other provisions of the act are wholly inconsistent with this hypothesis, the act will be held to be mandatory. (*People ex rel. Ferguson v. Supervisors of San Francisco, 36 Cal. 595.*)

195. When a statute says an act cannot be done unless performed in a certain mode the inhibition against performing it in any other way would seem to be in view of the word "cannot," meaning an absence of power, to be just as strong and complete as when the statute says that an act, unless done in a certain mode, shall not be valid for any purpose. (*Gleason v. Spray, 81 Cal. 217.*)

Ordinance imposing penalty prohibits act. See Ordinances, 103.

Directory, statute relating to change of districts. See Supervisors, 55.

Directory, requiring orders and decrees of probate court to be entered and signed. See Probate Courts, 18.

Directory, written decision, statute requiring is. See New Trial, 573.

Directory, statute fixing time is. See Appeals, 818, 819, 950, 951; Judgments, 94; Offices and Officers, 28; Taxation, 214, 382.

Directory, statute as to time of filing report is. See Reference, 46.

Directory, time of for filing papers, statute fixing is. See Filing, 1.

Directory, statute prescribing time for filing statement is. See Banks and Banking, 98.

Directory, statute requiring decision to be filed within certain time. See Appeals, 2970; Judges, 16, 17; New Trial, 45.

Directory, time of filing findings, statute fixing is. See Findings, 27.

Directory, statute requiring findings is not. See Findings, 125.

Directory, requirement as to time of filing

shorthand reporter's notes is. See Criminal Law, 616.

Directory, statute fixing time for return of jury is. See Jury and Jurors, 57.

Directory, time filing inventory, statute as to is. See Executors and Administrators, 114.

Directory, statute requiring recitals in sheriff's deed are. See Executions, 360.

Mandatory, statute prescribing contents of declaration. See Homesteads, 25.

Mandatory, statute providing what summons shall state. See Summons, 10.

Mandatory, statute as to time of issuance of summons. See Summons, 4.

Mandatory, statute providing for notice of trial. See Justices of the Peace, 72.

Mandatory, statute as to manner of swearing prisoner is not. See Witnesses, IV.

Mandatory, statute providing for family allowance. See Estates of Deceased Persons, 20.

Mandatory, statute relating to written instructions. See Criminal Law, 885.

Mandatory, statute providing for restitution on reversal. See Appeals, 3126.

Mandatory, statute as to time of qualification. See Offices and Officers, 51.

Mandatory, statute relating to acknowledgments. See Homesteads, 44.

Mandatory, statute requiring conveyances to be written. See Mines and Mining, 422.

Mandatory, statute requiring rescission within reasonable time. See Rescission of Contracts, 113.

Mandatory, statute relating to first payment of swamp land. See Swamp and Overflowed Lands, 136.

Mandatory, statute requiring actual settlement is. See Public Lands, 363.

Mandatory, street statute. See Streets, 361.

Mandatory, statute requiring signatures to petition to open street. See Streets, 70.

Mandatory, statute prescribing manner of street work. See Streets, 167.

Mandatory, statute as to time for performance of street contract is. See Streets, 341.

Mandatory statute providing for time of executing street contract is. See Streets, 346.

Mandatory, statute providing for letting of contract. See Supervisors, 59.

Mandatory, statute relating to notice of intent to purchase realty. See Supervisors, 64, 65.

Mandatory, statute authorizing payment of claim by city is not. See Municipal Corporations, XIII, 5.

Mandatory, requiring label on bottle is not. See Criminal Law, 1160.

Mandatory, statute empowering issuance of bonds. See Mandamus, 203.

Mandatory and directory provisions in adoption statute. See Parent and Child, 28, 34.

Mandatory, or directory, statutes relating to elections. See Elections, 3.

24. Exceptions and Provisos.

196. Where an act of the legislature recognizes the existence of a general law upon any subject, and attempts to create an exception, the exception is not repugnant to the general

law, or, if it be, it is only to the extent of the exception. (Ex parte Smith, 40 Cal. 419.) Cited 96 Cal. 432.

197. In construing statutes the rule is that general words are controlled by specific exceptions. (Lucas v. Payne, 7 Cal. 92.) Cited 11 Cal. 339.

198. The proviso to an act is to be read in the light of the subject matter of the act. (People ex rel. Pierce v. Morrill, 26 Cal. 336.)

199. The general rule is, that a proviso which is clearly repugnant to the body of an act is void. But, in construing statutes, it is the duty of the court to reconcile, if practicable, apparently conflicting provisions, so as to carry into effect the intention of the legislature as it appears from the whole act, and from contemporaneous legislation. (Pond v. Maddox, 38 Cal. 572.)

Cited 9 Or. 64; 2 Idaho, 1002.

Exception cannot be ingrafted on statute of limitations. See Statute of Limitations, 2. Exception in, effect of. See Highways, 21.

25. Mistakes in; Error in Punctuation.

200. Where there is evident mistake in use of word in a section of a statute, and it is apparent what was the word intended, it will be read as though the intended word was inserted. (Ex parte Hedley, 31 Cal. 108.) Cited 3 Utah, 353.

201. If a section in an amendatory or supplementary act refers to a section of the act amended or supplemented by number, and the section referred to does not express the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. (People v. King, 28 Cal. 265.) Cited 31 Cal. 114; 13 Col. 62; 3 Utah, 353.

202. If it clearly appears from all the sources of interpretation that a provision of a statute was inserted through inadvertence it will be disregarded. (Pond v. Maddox, 38 Cal. 572.)

Mistake in terms. See Trademarks, 15.

Clerical mispision in, what is. See Pleading and Practice, 287.

Typographical error in statutes. See Railroads, 4.

Variance, what immaterial. See Taxation, 498.

Mistake in printing in the constitution. See ante, 22.

203. The courts will not permit an erroneous punctuation of a statute, in printing it, to have the effect of giving it an absurd construction. (Randolph v. Bayne, 44 Cal. 366.)

IX. Repeal of Statute; Saving Clause in Statute.

204. As a general rule, acts of the legislature prohibiting the same offenses and injuries as former acts, but imposing different penalties or giving different remedies, repeal so far such former acts. (Fraser v. Alexander, 75 Cal. 147.) Cited 97 Cal. 184, 381; 1 N. Dak. 11, 18.

205. Act containing clause repealing all acts and parts of acts inconsistent with its provisions, but not repealing by name a previous

act on the same subject matter, leaves in force all such portions of the previous act as are not in conflict with its provisions. (*People ex rel Alexander v. Durick*, 20 Cal. 94.)

206. Where a statute contains a clause repealing all laws and parts of laws in conflict with its provisions, a previous act upon the same subject matter, the material provisions of which are repugnant to and irreconcilable with those of the new act, is repealed by it, unless the terms of the subsequent act show an intention to keep the previous one in force. (*People ex rel. Kirkpatrick v. Grippen*, 20 Cal. 677.)

Repeal by implication where later act inconsistent. See *Offices and Officers*, 250; *Supervisors*, V, 16.

207. Where subsequent statute repeals in direct terms certain sections of a former statute upon the same general subject it is equivalent to a declaration that the remaining sections shall be in force, there being no necessary repugnancy between such remaining sections and the subsequent statute. (*Crosby v. Patch*, 18 Cal. 438.) Cited 95 Cal. 148.

208. When an act expresses a repeal of former acts only so far as they are inconsistent with its provisions, such provision expresses and limits the extent of the repeal. (*Bank of British North America v. Cahn*, 79 Cal. 463.)

209. Whether a general statute repeals a special one by implication is a question of intention, to be gathered from the language used, and from the subject matter of legislation. (*McGivney v. Pierce*, 87 Cal. 124.)

210. The repeal of a law by implication is not favored. (*People v. San Francisco etc. R. R. Co.*, 28 Cal. 254, cited 68 Cal. 304, 10 Col. 153; *Scofield v. White*, 7 Cal. 400, cited 68 Cal. 304, 10 Col. 153; *In re Yick Wo*, 68 Cal. 294, cited 98 Cal. 432; *Home for Cure of Inebriates v. Reis*, 95 Cal. 142; *Capron v. Hitchcock*, 98 Cal. 428.)

Repeal by implication not favored. See *Taxation*, 166.

211. In order for a subsequent act to repeal a former it should appear from the last act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both. (*Capron v. Hitchcock*, 98 Cal. 428.)

212. Where it appears that an act of the legislature was intended by the legislature to be and was a substitute for a former act upon the same subject the latter act operates as a repeal of the former, although there be in the latter act no express words repealing the former act by name. (*Hanley v. Sixteen Horses, etc.*, 97 Cal. 182.)

213. A statute may be repealed by express words or by necessary implication. The latter takes place whenever, by subsequent legislation, it becomes apparent that the legislature did not intend the former act to remain in force. (*Christy v. Board of Supervisors Sacramento County*, 39 Cal. 3, cited 73 Cal. 506, 80 Cal. 270, 98 Cal. 432; *Pennie v. Reis*, 80 Cal. 266.)

214. Where two acts, passed at different times, are not in terms repugnant, yet, if it is clearly evident that the last was intended as a revision or substitute of the first, it will repeal the first to the extent in which its provisions are revised or substituted. (*Pierpont v. Crouch*, 10 Cal. 315.)

Cited 43 Cal. 564; 68 Cal. 304; 76 Cal. 116; 10 Col. 122; 10 Or. 473, 537; 20 Or. 347, 348.

215. An act of the legislature is repealed by a subsequent act when it appears from the last act that it was intended to take the place of or repeal the former. (*Ex parte Smith*, 40 Cal. 419.)

Cited 68 Cal. 304; 73 Cal. 363, 506; 98 Cal. 432.

216. Even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the later statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. (*City and County of Sacramento v. Bird*, 15 Cal. 294.)

Cited 19 Cal. 512; 75 Cal. 152; 76 Cal. 441; 19 Nev. 353; 2 Wyo. 412.

217. Whenever the intent of the legislature clearly appears to revise in a later act the entire subject matter of a former one the subsequent act operates as a repeal of the former one. (*Treadwell v. Yolo County*, 62 Cal. 563, 564.)

Cited 70 Cal. 192; 97 Cal. 184.

218. An act of the legislature is repealed by a subsequent act when the two acts are so inconsistent that effect cannot be given to both. (*Ex parte Smith*, 40 Cal. 419, cited 68 Cal. 304, 73 Cal. 363, 506, 98 Cal. 432; *Pennie v. Reis*, 80 Cal. 266.)

219. When an act is repugnant to a prior act it repeals the prior act without any repealing clause. (*People v. Burt*, 43 Cal. 560, cited 44 Cal. 432, 68 Cal. 304, 73 Cal. 506; *Pierpont v. Crouch*, 10 Cal. 315, cited 43 Cal. 564, 68 Cal. 304, 76 Cal. 116, 10 Col. 122, 10 Or. 473, 537, 20 Or. 347, 348.)

220. The repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when it does not, in terms, purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never to be deemed repealed by general legislation, except upon the most unequivocal manifestation of intent to that effect, by language showing that the attention of the legislature was called to the special act, and that the general act was intended to embrace the special cases; and the mere fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of the rule. (*Home for Cure of Inebriates v. Reis*, 95 Cal. 142.)

221. A second act will operate as a repeal of a former act only to the extent of repugnancy between them, and not merely because it may repeat some provisions of the first act and omit others or add new provisions, unless it plainly appears that it was intended as a substitute for the first act. (*Bank of British North America v. Cahn*, 79 Cal. 463.)

222. Where there is an apparent conflict

between two acts the court should reconcile them if possible; but, if this cannot be done, the last act must govern. (*In re Yick Wo*, 68 Cal. 294, cited 98 Cal. 432; *Scotfield v. White*, 7 Cal. 400, cited 68 Cal. 304, 10 Col. 153.)

223. No repeal by implication can result from a provision in a subsequent statute when that provision is itself devoid of constitutional force. (*McAllister v. Hamblin*, 83 Cal. 361.)

224. No repeal by implication can result from a subsequent unconstitutional statute, nor from a provision in such statute that all acts and parts of acts inconsistent therewith are repealed. (*County of Orange v. Harris*, 97 Cal. 600.)

225. Cases cited upon rules applicable to the repeal of statutes by implication. (*Crosby v. Patch*, 18 Cal. 438.)

226. Prior to February, 1866, by divers general and special legislative acts, the board of supervisors of Tehama county were authorized and required to levy upon the taxable property of the county, in addition to the state tax, divers rates of taxes "for county expenditures," "for interest fund," "wagon road fund," "contingent fund," "school fund," and "for road fund." On the 26th of February, 1866, the legislature passed a special act, which did not in terms repeal any former act, but directed said board "to levy, at the same time that other state and county taxes are levied, eighty cents upon each one hundred dollars' worth of the taxable property of said county, which tax . . . shall constitute the entire tax in said county for county purposes." Held, that except said act providing for the levy of a tax "for county purposes" which was by implication repealed, said former legislative acts were unaffected by the passage of said special act of February 26, 1866. (*People v. Gerke*, 37 Cal. 228.)

227. Repeal of act effects repeal of act amendatory of the act repealed. (*Hemstreet v. Wassum*, 49 Cal. 273.) Cited 71 Cal. 16, 17.

Repeal by implication. See Auctions, VI; Executors and Administrators, 49; Taxation, 531.

Repeal of ordinances by implication. See Ordinances, VI.

228. A repeal of a statute under which alone a right of action exists operates as an extinguishment of actions pending when the repeal takes effect, unless there is a subsequent law which enables the court to try and determine them. (*McMinn v. Bliss*, 31 Cal. 122.)

229. All the proceedings under the act to authorize the city of San Francisco to obtain water-works were annulled by the repeal of the act, and that therefore it would be neither necessary nor proper for the court to proceed further with the case. (*Lamb v. Schottler*, 54 Cal. 319.)

230. The repeal of a statute effectually annuls all proceedings had under the act repealed, unless the obligation of a contract would thereby be impaired, or a vested right destroyed. (*Lamb v. Schottler*, 54 Cal. 319.)

231. Where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made. (*Creighton v. Pragg*, 21 Cal. 115.) Cited 22 Cal. 554.

232. Permanent saving clause in general body of law, if clothed in apt language to express the purpose, is as efficient as a special clause expressly inserted in a particular statute, saving the operation of a repealed statute in its applicability to past criminal offenses. (*People v. McNulty*, 93 Cal. 427.)

Supplementary act passed after general repealing statute. See post, X.

Repeal of repealing act, effect of. See post, 246, 247.

Repeal of statute referred to in another act. See ante, VIII, 14.

Repeal by revision of former statutes. See Auctions, 16.

Repeal by re-enactment. See Criminal Law, 52.

Special law granting exclusive right, whether repeals general law. See Telegraph Companies, 17.

Unconstitutional law will not repeal statute by implication. See Taxation, 884.

Repeal of statute does not affect vested rights. See Public Lands, 168.

Effect of repeal of special statute which is an exception from general statute. See Municipal Corporations, 81.

Contract with state made under repealed statute. See Constitutional Law, 339.

Repeal of charter, effect of on contracts. See Municipal Corporations, XI, 5.

Repealing act, effect of on existing road districts. See Highways, 115.

Repeal of, effect of on crime. See Criminal Law, VI.

Tax deed, repeal of statute. See Taxation, XIII, 1.

Repeal of statute giving right of redemption. See Mortgages, 868.

Repeal, effect of on right to redeem. See Mortgages, 874.

Repeal of act authorizing issuance of railroad bonds, effect of. See Railroads, 25.

Repealed statute relating to forcible entry. See Forcible Entry and Unlawful Detainer, 5.

Repealed statute, tax under. See Taxation, VIII, 2.

Repeal of, effect on indictment or information. See Criminal Law, XIV, 2.

Effect of saving clause in repealing clause of act. See Bankruptcy and Insolvency, 7.

X. Amendment or Revival of Statutes; Supplementary Acts.

233. The form in which amendments of the code have generally been made, by declaring that particular sections shall be amended so as to read in a given way, was adopted for the purpose of adjusting them to the original enactments, so that when the system should, after repeated amendments, become complete the different parts might be put together

without further revision, and thus form a perfect code. The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts, or the changed portions, are not to be taken to have been the law at any time prior to the passage of the amended act. (*Central Pac. R. E. Co. v. Shackelford*, 63 Cal. 261.)
Cited 21 Nev. 306.

234. Amendments to the Political Code do not affect the acts or amendments to the acts enumerated in section 19 of said code. (*Wood v. Board of Election Commrs.*, 58 Cal. 561.)

235. The commencement of an action before the amendments took effect was not a "proceeding taken" within the meaning of a section which provides that no rights acquired or "proceedings taken" shall be impaired or affected. (*Tulley v. Tranor*, 53 Cal. 274.)

236. The court is not prepared to say that, if a subsequent act in effect changes or modifies an existing law, the subsequent act is unconstitutional, because the act changed or modified is not re-enacted and published at length as modified. (*Baum v. Raphael*, 57 Cal. 361.)

Court cannot amend a statute. See ante, VII.

237. If a section of an act is amended and published at length in a subsequent act, and the original section is again amended and published at length in a still later act, which repeals the first amendatory act, the last act is only an amendment of the original section, although it does not refer to the first amendatory act except in the repealing clause. (*Kimball v. Board of Supervisors*, 46 Cal. 19.)

238. A revised or amended act must be construed as a new and original piece of legislation, in view of all its parts, and giving to every part, if possible, some effect consistent with the whole, and as little as possible repugnant to other parts. (*Donlon v. Jewett*, 88 Cal. 580.)

239. Under the constitution of this state the amendment of a statute operates as an absolute repeal of the old statute or section so amended, even if the amendment takes nothing away from the old law, but merely adds a proviso in certain cases. (*Billings v. Harvey*, 6 Cal. 381.)

240. If it appears from the language of an amendatory act, and of the act which is amended, that by the words "board of underwriters," used in the former, the legislature meant "board of fire underwriters," the court will construe it as intended. (*In re Bulger*, *In re Merrill*, 45 Cal. 553.)

Words used in two acts presumed used in same sense. See ante, VIII, 10.

Amendment, effect of. See *Public Lands*, 618; *Railroads*, 14.

Amendment of, effect on crime. See *Criminal Law*, VI.

Amendatory act, how construed. See *Judges*, 31.

Amendment of homestead law, effect of. See *Homesteads*, II; IV, 1.

Amendment to code relating to damages in

conversion, retroactive operation of. See *Trover*, VIII.

Amendment to constitution, effect of. See *Constitutional Law*, V.

Amendment of statute requiring payment of taxes by adverse possessor is not retroactive. See *Adverse Possession*, II, 8.

Amendment of confirmatory statute. See *Public Lands*, XIX, 1.

Amendment of statute relating to street assessments. See *Streets*, XVI, 1.

Amendment of statute of limitations, effect of. See *Statute of Limitations*, III.

Change in statute relating to interest, effect of. See *Interest*, II.

241. Where a general repealing statute is passed, and on the next day a supplementary act is passed, excepting certain counties from the operation of the repeal, to a certain extent, held, that the case was a special one, and, there being no doubt of the true intention of the legislature, the supplemental act must be regarded as a part of the repealing act, and must be given the same effect as if passed on the same day. (*Manlove v. White*, 8 Cal. 376.)

242. So held, in the construction of the act of April 29, 1857, repealing the then existing law concerning ex-sheriffs as tax-collectors, and requiring them to turn over the assessment-rolls to their successors, taken in connection with the act of April 30th, excepting certain counties from the operation of the repealing law of the day previous. (*Manlove v. White*, 8 Cal. 376.)

Mistake in reference in amendatory or supplemental statute. See ante, VIII, 25.

243. Act which is repealed because inconsistent with a provision of the new constitution is not revived because the section with which it conflicts is afterward abrogated by amendment. (*Thomason v. Ruggles*, 69 Cal. 465, 470.)

244. Where a statute repeals or supersedes certain sections of a previous statute a mere declaration in a still subsequent statute that the repealing statute shall not repeal these sections is not a law reviving them or enacting them. There can be no law without a legislative intent that it become a law; and such intent must be manifested by language declaring the legislative will. (*State v. Conkling*, 19 Cal. 501.)

245. A general statute, controlled in some of its provisions by a subsequent special statute, is revived by the amendment of the latter, intended to give effect to the former; and though the first statute gave jurisdiction to a court which could not constitutionally exercise it, the act becomes effectual by an amendment, passed still later, transferring the jurisdiction to the proper body. (*People ex rel. Attorney General v. Phoenix*, 6 Cal. 92.)
Cited 11 Cal. 339.

246. The repeal of an act repealing a former act does not revive the former act, or give it any force or effect. To revive such former act it must be re-enacted. (*People v. Hunt*, 41 Cal. 435.)

247. If a general act creates an office in all the counties of the state, to be filled by elec-

tion once in two years, and a special act passed afterward takes one county away from the provisions of the act, and this special act is afterward repealed by an act which restores the office as to that county, the provisions of the general act are revived as to the office. (*People v. Hunt*, 41 Cal. 435.)

Cited 49 Cal. 628.

248. When a general act applicable to all the counties of the state is repealed as to a particular county, and a still later act amends a section of said general act so partially repealed, such amendment does not apply to or affect the said particular county as to which the said original act had been before repealed. (*People v. Tyler*, 36 Cal. 522.)

Re-enactment of statute, construction of. See ante, VIII, 11.

Supplemental act, how construed. See Irrigation Districts, 39.

XI. Pleading Statutory Rights.

249. Party claiming title to property by virtue of statute divesting a party of his property without his consent, as against the original owner, must allege and prove that all the provisions of the statute for the acquisition of such title have been strictly complied with. (*Trumpler v. Bemerly*, 39 Cal. 490.)

250. Where nonperformance of duty imposed by statute is relied upon as the gravamen of the action the conditions in view of which the duty is to be performed must be averred. (*Fontaine v. Southern Pac. R. R. Co.*, 54 Cal. 645.)

251. Rule that penal statute must be declared upon by party seeking recovery under it does not apply to pleadings in justices' courts. (*O'Callaghan v. Booth*, 6 Cal. 63.) Cited 58 Cal. 5.

Repeal of statute, effect of on amendatory act. See ante, 227.

STATUTES CONTINUED IN FORCE.

See Statutes, VIII, 1.

STAY.

Effect of motion for new trial as a stay. See New Trial, VI.

Bankruptcy as a stay. See Bankruptcy and Insolvency, VII, 1; Prohibition, 70.

On writ of restitution. See Ejectment, XXI, 4.

Granting or modifying in supreme court. See Appeals, VIII, 15.

On execution. See Executions, VI.

Execution, bond to stay, pending appeal. See Appeals, VIII, 16.

Mandamus to compel fixing of bond to stay execution. See Mandamus, II, 11, 1.

Bond to stay execution as bond on appeal. See Appeals, V, 8, d.

Appealability of orders staying proceedings. See Appeals, II, 16.

Effect of stay on statute of limitations. See Statute of Limitations, IX, 3.

Effect of on time to file statement. See New Trial, 417.

Order granting stay at chambers. See Pleading and Practice, 671, 672.

Staying proceedings until fees of jury and reporter paid. See Jury and Jurors, 266.

On award. See Arbitration and Award, 85.

On appeal to supreme court of United States. See Appeals, 3383.

Mandamus proceedings against treasurer, when stayed. See Mandamus, 147.

Right of landlord to ask stay against tenant. See Ejectment, 581.

Effect of on lien of judgment. See Judgments, 260.

Sale by sheriff pending stay of proceedings. See Sheriffs, 76.

STENOGRAPHERS.

See Shorthand Reporters.

STEPCHILDREN.

Support of. See Parent and Child, 4.

STIPULATIONS.

I. Who to Sign; Right of Party to Make.

II. Dispute as to; Consideration for.

III. Oral Stipulations.

IV. Entry and Filing of.

V. Abrogating Rules of Court; Effect of Stipulations on Powers of Court.

VI. Stipulations in Supreme Court; Assignment of Errors by.

VII. Taking Place of Denials in Answer.

VIII. Construction and Effect of; Estoppel Arising from.

IX. Effect of on Other Parties.

X. Power to Alter or Relieve Against; Disregard of; Effect of Mistake in.

Property, stipulation as to. See Marriage and Divorce, III, 7, f.

Depositions, stipulations as to. See Depositions, III.

Actions against officers, stipulations in. See Offices and Officers, VII, 8.

Verdict, stipulation as to form of. See Verdict, 15.

Amendment to answer, stipulation is not. See Appeals, 1105.

Stipulation as to record of board of equalization. See Certiorari, 181.

I. Who to Sign; Right of Party to Make.

1. A stipulation filed in the supreme court consenting to a judgment must be signed by the attorneys who are the attorneys of record for the parties in the court below, or by a party in person who did not appear by attorney. (*Estate of Arguello*, 50 Cal. 308.)

2. Where a party to an action has an attorney of record, a stipulation signed by the party in person, granting time to file statement, will be disregarded by the court. The attorney has the exclusive management and control of the case, and his temporary absence from the county does not affect the rule. (*Mott v. Foster*, 45 Cal. 72.)

II. Dispute as to; Consideration for.

3. If the fact of the stipulation be disputed it may be proper to refuse relief on ac-

count of the practical difficulty of investigations of that character. But it is otherwise where the fact is virtually admitted. (*Robertson v. Williams*, 81 Cal. 268.)

4. Not only can the consideration for making the stipulation be established by parol, but it can also be shown that the consideration has failed, and when so shown the stipulation cannot be invoked by the party through whom the failure has occurred. (*Raymond v. McMullen*, 90 Cal. 122.)

5. Where the attorney for the respondent made a stipulation giving the appellant a specified number of days after the determination, upon appeal, of another case involving the same questions, within which to file his transcript, and the sole consideration of the stipulation was the appellant's oral agreement to have the other case fully argued as soon as possible, to the end that a decision therein would serve to advise the parties as to their legal rights in the case in which the stipulation was made, the dismissal of the appeal in the other action by the appellant, before its presentation to the court, amounts to a failure of consideration, and the stipulation cannot be invoked as binding upon the respondent, who is entitled to have the appeal dismissed for failure to file the transcript. (*Raymond v. McMullen*, 90 Cal. 122.)

What does not amount to. See Findings, 25.

III. Oral Stipulations.

6. Attorney cannot bind his client by verbal stipulation, made during the progress of a trial, and not entered on the minutes, to waive his rights under an issue made in the pleadings. (*Merritt v. Wilcox*, 52 Cal. 238.) Cited 20 Nev. 422.

7. If, in an action to recover money, the complaint alleges and the answer denies that it was payable in gold coin the attorney for the defendant cannot bind his client by a verbal stipulation made during the progress of the trial, and not entered on the minutes, to allow the plaintiff, if he recover, to have judgment in gold coin. (*Merritt v. Wilcox*, 52 Cal. 238.)

8. A stipulation not in writing and filed with the clerk, nor entered in the minutes of the court at the time it was made, is not binding upon the parties, and cannot be enforced by the court. (*Borkheim v. North British etc. Ins. Co.*, 38 Cal. 623.) Cited 52 Cal. 241; 20 Nev. 421; distinguished 40 Cal. 126.

9. Verbal stipulations with reference to proceedings in pending actions cannot be regarded except so far as they are admitted by the parties against whom they are sought to be enforced. (*Reese v. Mahoney*, 21 Cal. 305, cited 95 Cal. 288, 20 Nev. 424; *Patterson v. Ely*, 19 Cal. 28, cited 21 Cal. 308, 95 Cal. 238, 20 Nev. 424.)

10. B. had several actions against different parties turning upon the same issues, and prosecuted and defended by the same attorneys, respectively. Counsel, with consent of B., stipulated verbally in open court that but one case should be tried, and the others should abide the result; but the stipulation

was not reduced to writing and filed with the clerk, nor entered in the minutes of the court. Held, that the stipulation was void, and could not be afterward enforced by a nunc pro tunc order, directing it to be entered in the minutes of the court. (*Borkheim v. North British etc. Ins. Co.*, 38 Cal. 623.)

11. Although as a general rule a stipulation of counsel cannot be enforced unless put in writing or entered in the minutes of the court, yet, where an oral agreement for an extension of time to answer or demur is admitted, and has been relied upon by the defendant, a judgment by default taken against him in violation of the terms of the stipulation should be set aside. (*Johnson v. Sweeney*, 95 Cal. 304.)

12. If the party against whom a verbal stipulation is invoked denies that such a stipulation was made the court will not hear the parties for the purpose of settling the dispute; but, where the facts relied upon by the moving party are not controverted, there is no reason for the application of the rule, and it is too late to repudiate the stipulation after it has been executed. (*Johnson v. Sweeney*, 95 Cal. 304.)

13. Oral statement or admission made by attorneys upon trial, and to the court, to obviate proof of a stipulated fact, may be acted upon by the court in giving its judgment, or in its instructions to the jury, though not entered upon the minutes of the court; nor need the minutes be amended to show the stipulation, but it may be shown in the statement or other record on motion for new trial. (*Greiss v. State Investment etc. Co.*, 93 Cal. 411.)

14. While oral stipulations are not binding, yet reliance upon the word of a reputable attorney may be excusable neglect, for which relief may be granted on the ground of surprise. (*Robertson v. Williams*, 81 Cal. 268.)

One receiving benefit of part of oral stipulation must bear burden. See post, 41.

Stipulation as to continuance must be written. See Continuance, 70.

Oral stipulation as to form of verdict. See Wills, 271.

Verbal, reliance upon. See Injunctions, 79.

IV. Entry and Filing of.

15. Section 283 of the Code of Civil Procedure, which provides that an attorney can bind his client in an action, by his agreement, "filed with the clerk, or entered upon the minutes of the court, and not otherwise," was not intended to enlarge or abridge the authority of the attorney, but only to prescribe the manner of its exercise, and does not require a construction that in no instance shall an agreement which the attorney may make in behalf of his client be binding, unless entered in the minutes of the court, or filed with the clerk. Its provisions refer to executory agreements, and not to those which have been wholly or in part executed. (*Smith v. Whittier*, 95 Cal. 279.)

16. The service and filing of a notice or motion for a new trial and a proposed bill of exceptions are steps in an action, within the meaning of section 283 of the Code of Civil

Procedure, providing that an attorney may bind his client in any of the steps of an action or proceeding by his written agreement filed with the clerk or entered on the minutes; and a stipulation extending the time of filing such papers is filed in time if it is on file, with the consent of the adverse attorney, when the court is called upon to act upon the matter affected by the stipulation. (*Simpson v. Budd*, 91 Cal. 488.)

17. A party signing a written stipulation waiving findings is estopped from objecting to the want thereof, although the stipulation was not filed until after the entry of judgment. (*Dougherty v. Friermuth*, 68 Cal. 240.)

18. The execution of a stipulation between the attorneys of the parties to a cause, that the testimony of a witness taken in another action should be read and used in the trial of the cause in which the stipulation was entered into, is a continuing consent on the part of the attorneys that the stipulation may be filed at any time thereafter, unless they may in some direct and express mode signify their withdrawal of such consent; and the death of the witness before such withdrawal renders the stipulation irrevocable; and the filing of the stipulation thereafter has the effect to operate and become binding upon the parties as from its date. (*Smith v. Whittier*, 95 Cal. 279.)

19. If the attorneys in an action have acted upon a written agreement to such an extent that it would be inequitable not to recognize its binding effect the court will not allow the agreement to be repudiated, upon the ground that it has not been filed with the clerk. (*Smith v. Whittier*, 95 Cal. 279.)

Oral stipulations, entry of in minutes. See ante, III.

Stipulation extending time, filing of. See New Trial, 335.

V. Abrogating Rules of Court; Effect of Stipulation on Powers of Court.

20. Parties have no unqualified right to stipulate for abrogation of rules prescribed by this court. (*Reynolds v. Lawrence*, 15 Cal. 359.)

21. If a decree of divorce is entered, and a stipulation of the parties made at the time that the wife shall receive a sum certain as her part of the common property, and shall have the custody of the infant child, and that such sum shall be in full for her allowance for the support of the child, such stipulation does not deprive the court from afterward, on her petition, making her an allowance for the support of such child. (*Wilson v. Wilson*, 45 Cal. 399.)

Enlarging office of prohibition by stipulation. See Prohibition, III, 1.

Consent to jurisdiction, effect of. See Jurisdiction, 25.

Stipulation to hear motion for new trial before settlement. See New Trial, 494.

Stipulation to try case in vacation. See Judgments, 563.

Stipulation that deposition taken in another action may be used. See Depositions, 59.

VI. Stipulations in Supreme Court; Assignment of Errors by.

22. In this case the court refused to consider an assignment of error made by respondent by stipulation. See opinion. (*Paul v. Magee*, 18 Cal. 698.)

Cited 14 Nev. 332.

23. A stipulation made in the supreme court may be considered on a motion to dismiss the appeal, although not embodied in the transcript. (*People ex rel. Dunn v. Burns*, 78 Cal. 645.)

Stipulations concerning appeal. See post, VIII.

Failure of consideration for stipulation extending time to file transcript. See ante, II.

Who to sign stipulation in supreme court. See ante, I.

Stipulation extending time to appeal. See Appeals, 417.

Stipulation is not part of judgment-roll. See Appeals, 1104.

Record on appeal, stipulations as to. See Appeals, VI, 8.

Stipulation that new trial statement may be used on appeal from judgment. See Appeals, 1606, 1607.

Stipulation extending time to file transcript. See Appeals, 1063, et seq.

Stipulation as to bond on appeal, effect of. See Appeals, 698, 699, 712, 713.

Stipulation to place cause on calendar, effect of. See Appeals, 1863.

Stipulation extending time to file brief. See Appeals, 3254.

Verbal stipulation extending time to file transcript. See Appeals, 1064.

VII. Taking Place of Denials in Answer.

24. A stipulation by the parties may take the place of denials in an answer. (*Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629.)

Stipulation taking place of replication to answer, power to relieve against. See post, 56.

VIII. Construction and Effect of; Estoppel Arising from.

25. If, in ejectment, where five years' adverse possession is pleaded, the parties stipulate that the plaintiff was never in possession, but the stipulation admits title to have been in the plaintiff, the stipulation will be construed as referring to actual possession. (*San Francisco v. Fulde*, 37 Cal. 349.)

26. Stipulation concerning location of one of lines of Mexican grant of land as surveyed under a decree confirming the grant will not be construed as admitting that the land was correctly surveyed, unless from the whole reading of the same it appears to have been the intention of the parties. (*People of San Jose v. Uridias*, 37 Cal. 339.)

27. If, in ejectment, the attorneys of the parties stipulate in writing that one of the defendants consents to a reference, and that plaintiff will within five days execute to said defendant a deed of a part of the land in controversy, such stipulation gives such defendant an equitable title to the land named in it,

although judgment in the action is for plaintiff. (*Killey v. Wilson*, 33 Cal. 690.)

28. If parties, before trial, agree on facts, and then stipulate that either party may, on the trial, add such documentary evidence as he sees proper, the stipulation will be construed to mean evidence pertinent to the issue, and which was in existence at the date of stipulation. (*Donner v. Palmer*, 51 Cal. 629.)

29. If the answer contains new matter, which, if true, would entitle the defendant to judgment, and the parties stipulate that "all, if any, new matter pleaded in avoidance . . . shall be taken as proven," the stipulation entitles the defendant to a judgment. (*Pond v. Davenport*, 45 Cal. 225.)

30. Where two causes alike in every material respect, and having the same attorneys on both sides, are pending in the same court, a stipulation that one of them shall abide the determination of the other, and that final judgment may be entered in accordance with such determination, does not lose its effect for the reason that a judgment rendered in the other case is reversed on the ground of error in overruling a demurrer to the complaint, the pleadings in that case being thereupon amended without making any substantial change in the issues and final judgment obtained on the merits. (*Gilmore v. American Central Ins. Co.*, 67 Cal. 366.)

31. A stipulation of the parties that the plaintiff take judgment for a sum named and costs, but that execution be stayed until the decision of a certain other case pending in another court, and that if said other case is decided for the defendant for a certain reason, the judgment be set aside, otherwise an execution to issue, authorizes a judgment absolute in terms to be entered for the plaintiff, which will not be set aside if such other case is decided for the defendant, unless it is so decided for the reason given. (*Keys v. Warner*, 45 Cal. 60.)

Cited 60 Cal. 620.

32. A stipulation between parties to an action as to the kind of judgment to be entered, whatever force it may have in regulating the judgment to be entered, does not impair the effect of the judgment which is entered, even if not entered in accordance with the stipulation. (*Semple v. Wright*, 32 Cal. 659.)

33. A stipulation that no execution shall issue until the determination of the appeal is not a waiver of an objection that the notice of appeal was not filed in season. (*Moulton v. Ellmaker*, 30 Cal. 527.)

34. A stipulation in the supreme court, that a cause be continued for the term, and that any motion may be made therein at the next term, by either party, which might have been made at the first term after the filing of the transcript, covers only the rights a party had at the time of the stipulation, and not those already lapsed by the laches of the party. (*Reynolds v. Lawrence*, 15 Cal. 359.)

35. Where counsel, in a cause pending in the supreme court, stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error,

and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation. (*Cahoon v. Levy*, 10 Cal. 216.)

36. The supreme court will not examine errors assigned on appeal, where, after the service of the notice of appeal, the parties stipulated that all errors in the record, referee's report, decree, and judgment were waived. (*Glotsback v. Foster*, 11 Cal. 37.)

37. If the attorney of the parties stipulate in the transcript that notice of appeal was filed in the court below, and served, the supreme court cannot receive evidence contradicting the stipulation, and will not dismiss the appeal on the ground that no notice was in fact filed. (*Bonds v. Hickman*, 29 Cal. 460.)

Cited 58 Cal. 186; 74 Cal. 535; 81 Cal. 183.

38. A stipulation, signed by the attorneys of the parties, that "the foregoing transcript is correct," does no more than take the place of the clerk's certificate that the papers to which it is annexed are true copies. (*Todd v. Winants*, 36 Cal. 129.)

39. In such case the respondent's objections to the sufficiency of the transcript are not waived by his failing to take exception thereto, according to rule 13 of this court. (*Todd v. Winants*, 36 Cal. 129.)

40. A stipulation signed by the parties "that the foregoing twenty-one pages constitute the transcript on appeal from the order, and contain true, full, and correct copies of the affidavits referred to in the bill of exceptions, judgment, order, notice, bill of exceptions," etc., does not preclude respondents from denying the correctness or sufficiency of the bill of exceptions. (*Wetherbee v. Carroll*, 33 Cal. 549.)

41. A party, who has procured a judgment to be entered in his favor by means of one part of a verbal stipulation is not at liberty to repudiate the other part; but, having received the benefit of the stipulation, must bear the burdens which it imposes on him. (*Himmelman v. Sullivan*, 40 Cal. 125.)

Cited 84 Cal. 275; 95 Cal. 288.

42. A stipulation that a demurrer to the complaint may be overruled, and the defendant allowed to answer within a certain time, does not estop the defendant from relying at any future stage of the case, under section 434 of the Code of Civil Procedure, on the alleged failure of the complaint to state sufficient facts to constitute a cause of action. (*Hitchcock v. Caruthers*, 82 Cal. 523.)

43. If, in an action of ejectment, a third party intervenes, and his petition to be allowed to intervene does not state facts sufficient to entitle him to do so, and, without making the objection, the plaintiff and intervenor agree upon the facts, and stipulate that the claim of the intervenor shall be determined upon the legal effect of the stipulated facts, the plaintiff cannot afterwards raise the objection that the case is not one in which an intervention can be made, or that the pleadings are insufficient for that purpose. (*Donner v. Palmer*, 51 Cal. 629.)

44. When it has been stipulated by counsel

that certain depositions may be read in evidence at the trial the parties are bound by the stipulation. (*Robinson v. Placerville etc. R. R. Co.*, 65 Cal. 263.)

45. If the parties in an action of ejectment agree to the facts, which facts are based on the presumption that at a certain time the title to the demanded premises was in a third person, and the court is asked to determine which has acquired the title of such third person, and the court decides on the facts, neither party will afterwards be heard to assert, for the purpose of avoiding the effect of the judgment, that such third person had no title. (*Donner v. Palmer*, 51 Cal. 630.)

46. If counsel stipulate in open court that the jury may assess damages in currency if they find for the plaintiff, they are estopped from raising an objection to the verdict on that ground. (*Dreyfous v. Adams*, 48 Cal. 131.)

47. Counsel, in the trial of a cause, cannot object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge as would, in his judgment, be sufficient to present all the questions raised by the pleadings. (*Marius v. Bicknell*, 10 Cal. 217.)

48. Where the parties in the court below stipulated that a motion for a new trial should be denied they cannot question, in this court, the correctness of an order denying such motion. (*Brotherton v. Hart*, 11 Cal. 405.) Cited 37 Cal. 158; 42 Cal. 518.

49. A stipulation that a new trial statement had been served in time, and might be presented for settlement without further notice, does not estop respondent to claim that the statement was not filed when the motion was submitted; nor does the judge's certificate of settlement of the statement show that it was filed. (*Mills v. Dearborn*, 82 Cal. 51.)

Stipulation waiving finding is an estoppel though not filed until after entry of judgment. See ante, IV.

Binding effect of stipulation where consideration has failed. See ante, II.

Extending time, estoppel from. See New Trial, 353.

Stipulation to remit part of damages is binding. See New Trial, 63.

Costs, stipulations as to, construction of. See Mortgages, 747.

Conclusiveness of. See Mandamus, 241.

Stipulation as to title as evidence. See Ejectment, 360.

Probate court may enforce. See Probate Courts, 17.

Stipulation precluding dismissal, effect of. See Dismissal, 86.

In suit to foreclose mechanics' liens, effect of on attorneys' fees. See Mechanics' Liens, 395, 396.

Stipulation for judgment, effect of. See Judgments, 725, 726.

Amending judgment so as to include. See Judgments, 233.

Judgment on. See Judgments, IV.

Motion for judgment on stipulation is not a trial. See New Trial, 8.

Judgment under, conclusiveness of. See Executors and Administrators, 442.

IX. Effect of on Other Parties.

50. Where the plaintiff brought suit in replevin as the mother of the real parties in interest, asserting no right in herself, and subsequently the children, by their guardian ad litem, filed a complaint setting up the same cause of action, the subsequent appearance was not an intervention, but merely a substitution; and a stipulation made by the first plaintiff will bind the second. (*Temple v. Alexander*, 53 Cal. 3.)

51. Is a stipulation, made by relator or his private attorney with the defendant in an action brought by the attorney general in the name of the people against a person for unlawfully usurping an office and to remove him therefrom, binding upon the people, query? (*People ex rel. Budd v. Holden*, 23 Cal. 123.)

Signed by original parties after transfer of interest. See Pleading and Practice, 664.

Binding effect of where attorneys substituted. See Attorney and Client, 145.

X. Power to Alter or Relieve Against; Disregard of; Effect of Mistake in.

52. Court has power to relieve party from effects of a stipulation which admits a fact which is not true. (*Richardson v. Musser*, 54 Cal. 196.)

Cited 82 Cal. 510; 10 Col. 145.

53. Court cannot alter or vary terms of written stipulation made by attorneys, or relieve them from its obvious consequence. (*Keys v. Warner*, 45 Cal. 60.)

54. If a stipulation entered into by the respective attorneys in an action is, in subsequent proceedings, virtually disregarded by both parties, the court will not, after it has been thus disregarded, enforce it. (*People ex rel. Budd v. Holden*, 23 Cal. 123.)

Judgment in violation of stipulation, restraining. See Injunctions, 53.

Findings contrary to. See Findings, X, 4.

Sale contrary to. See Injunctions, 82.

55. If an attorney stipulates, under a mistake of fact, that a notice of appeal has been filed, when no notice has been filed, the court below, upon a proper application, may relieve him from it, but the supreme court cannot. (*Bonds v. Hickman*, 29 Cal. 460.)

56. Under section 473 of the Code of Civil Procedure the court may, upon such terms as may be just, set aside a stipulation entered into between the attorneys in a pending case, admitting the truth of certain facts alleged in the answer, and dispensing with proof thereof, where it is shown that the stipulation was made without plaintiff's knowledge and under a mistake of plaintiff's attorney as to its legal effect, and that the stipulation admitted material averments which were not true, and that its effect would prevent a trial of the case upon its real merits. Such stipulation performs the function of an express replication to the answer, and is subject to be amended or set aside by a court to the same extent and under like circumstances as would

be a pleading having like effect. (Ward v. Clay, 82 Cal. 502.)

Mistake in entering into. See Appeals, 1285.

Made by mistake, setting aside. See Appeals, 1856.

STOCK AND EXCHANGE BOARD.

1. The defendant is a voluntary unincorporated association. Its constitution provides in effect for the creation of a trust fund from which, upon the death of a member, a payment of ten thousand dollars is directed to be made to such person or objects as he might have designated in writing, or, if no written disposition was made by him, then to certain specified persons. It further provides that the payment should be deemed an absolute donation to the payee, free from all other claim or control. Held, that such donation formed no part of the estate of a deceased member, and that his personal representatives could not maintain an action to recover it. (Swift v. San Francisco Stock and Exchange Board, 67 Cal. 567.)

2. The San Francisco Stock and Exchange Board is a voluntary association formed for the purpose of dealing in stocks, and buying and selling the same on commission. The Company of Associated Stock Brokers is a corporation composed exclusively of the members of the association, and was formed for the purpose of receiving donations with which to erect a building for the use of its members. This it has done. The members of the association and of the corporation are entitled to an equal share of its property, and the only qualifications for membership in the corporation are that each member shall be a member in good standing of the association, and shall sign the constitution and by-laws of the corporation. The right and title of each member to the property of the association, and the privilege of participating in the meetings of the board, is represented by what is called a "seat in the San Francisco Stock and Exchange Board." By the rules of the association, each member has the right to voluntarily dispose of his seat, but the purchaser, before he can participate in the proceedings of the board, must be elected a member thereof. Held, that the property, the legal title to which stands in the name of the Company of Associated Stock Brokers, is in equity the property of the members of the San Francisco Stock and Exchange Board, and that such a member has power to pledge or mortgage his seat, and that the lien thereby created may be foreclosed, and the seat sold subject to the conditions imposed by the rules of the association. (Clute v. Loveland, 68 Cal. 254.)

3. Where a member of the San Francisco Stock and Exchange Board has been suspended from his seat or membership in the board, and his right thereto sold to satisfy a lien thereon for debts contracted by him as a member, in accordance with the constitution and by-laws of the board, and having failed for six months to settle up the claims against him and seek restitution to membership, as provided by the by-laws, his membership

therein ceased and all his rights appertaining thereto were extinguished, and mandamus will not lie to compel his restoration to membership. (Rorke v. San Francisco Stock and Exchange Board, 99 Cal. 196.)

4. A rule of the board requiring the creditors of a member who fails to comply with his stock contracts to report his default within forty-eight hours refers to contracts for the purchase or sale of stocks in the board, and has no application to a case where stocks are carried for a broker by a fellow-broker for months in an open and running account, and a final settlement of the account is referred to a committee of arbitration under another rule of the board, and where there is no default until a failure to meet the balance ascertained to be due by the committee of arbitration, and it is sufficient report of default in such case where such committee reports the delinquency of the member within two days after their report of the amount of the indebtedness. (Rorke v. San Francisco Stock and Exchange Board, 99 Cal. 196.)

Seat is liable to execution. See Executions, 90, 91.

Reports of. See Evidence, III, 5.

STOCK AND STOCKHOLDERS.

See Corporations, IV.

Notice that one was stockholder. See Statute of Limitations, 278.

Contracts of stockholders of turnpike company. See Turnpike Companies, IV.

Agreement for sale of stock on margin. See Contracts, III, 2.

Shares of stock are property. See Criminal Law, 1492.

Pledge of stock by depositary. See Pledges, V.

Contract for transfer of stock, enforcement of. See Specific Performance, 80, et seq.

Contract between brokers to purchase and sell. See Statute of Frauds, 3.

STOCKTON.

1. Under the terms of the charter of the city of Stockton, approved March 2, 1889 (Stats. 1889, p. 577), it is the duty of the department of streets and wharves to see that the watercourses and channels are not obstructed by any thing which will cause the waters thereof to overflow and injure or destroy the public streets or property of the city, and no ordinance of the city council is necessary in order to authorize the department to remove such obstructions. (Weber v. Gill, 98 Cal. 462.)

2. The fact that the deposit sought to be removed from the slough is due to the acts of the United States government in improving the navigable portion of the stream below does not affect the right of the city to cause it to be removed. The city has the right to remove obstructions from a natural watercourse so as to preserve it in its natural form, without regard to the cause of such obstruction. (Weber v. Gill, 98 Cal. 462.)

3. The act of March 23, 1872 (Stats. 1871-72, p. 540), authorizing the city authorities of Stockton to widen and deepen the channel of

Mormon slough, and providing for condemnation proceedings therefor, was intended to provide against overflow, but does not prevent action under authority of the department of streets and wharves to remove a deposit of earth which has partially filled up the channel of the slough, and which, if allowed to remain, will tend to cause an overflow of the waters and an injury to property of the city, if there is no removal of land belonging to a private person, and no attempt to widen or deepen the channel. (*Weber v. Gill*, 98 Cal. 462.)

Organization and charter of. See Municipal Corporations, 46.

New charter, effect of on police and justices' courts. See Courts, 20.

Railway aid bonds, mandamus to compel payment of interest. See Railroads, 29.

Salary of justice becoming municipal judge. See Judges, 74.

Swamp lands within. See Swamp and Overflowed Lands, 147.

STOLEN GOODS.

Larceny. See Criminal Law, XXI, 36.

Sale of, liability of auctioneer. See Auctions, IV.

STOLEN INSTRUMENTS.

Rights of holders of stolen stock. See Corporations, IV, 5, d.

STOPOVER.

Right of. See Common Carriers, IV, 3, b.

STOPPAGE IN TRANSITU.

See Sales, XI.

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See Warehousemen.

Carriers, storage by. See Common Carriers, III, 6.

STRAITS OF CARQUINEZ.

See Watercourses, II, 3.

Are public highways. See Watercourses, II, 3.

Right of access to. See Watercourses, XIV, 1, b.

Riparian owner, right of access to. See Watercourses, XIV, 1, b.

STREAMS.

See Watercourses.

STREET RAILROADS.

See Railroads, X.

Penalty for excessive charges. See Common Carriers, IV, 4, b.

STREETS.

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III. Ownership and Possession of; Right of Way Over; Obstruction of.

IV. Duty to Repair or Keep Clean; Liability for Negligent Injuries in.

V. Sidewalks.

VI. Acceptance of.

VII. Abandonment, Vacation, and Discontinuance of.

VIII. Superintendents and Commissioners of Streets.

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2. *Materials to be Used.*
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 Particular streets, dedication of. See Dedication, VIII.
 Right to recover money paid on void street assessment. See Payment, 101, et seq.

I. Public Streets, What are and Evidence of.

1. East street is one of the public streets of city of San Francisco; and none the less so because the board of harbor commissioners are charged with the duty of keeping one-half thereof in repair. (*Barton v. McDonald*, 81 Cal. 285.)
2. In an action to enjoin the excavation of what is claimed by the plaintiff to be a private street or alleyway, made such by means conveyances under an alcalde grant for the private benefit of owners of lots who had purchased thereunder, where the only question at issue is, whether the land involved was or was not a public street, it is error to hold that it is conclusively proved to be a public street because laid down as such on a map of the city, and to refuse to allow the plaintiff to prove that there had been no dedication by the owner of the land to the public use, and no user thereof by the public as a street. (*Whelan v. Boyd*, 93 Cal. 500.)
 Cited 100 Cal. 308.

II. Boundaries of, Evidence of; Streets on Water-front, Extension of.

3. The initial point and base line of a survey of a town is not necessarily controlling over other ascertained points in the survey in ascertaining the actual location of streets or blocks; but the question as to whether such point or line is of greater or less importance than other ascertained points or lines depends upon circumstances, and their proximity and relation to the point to be located. (*Orefia v. City of Santa Barbara*, 91 Cal. 621.)
4. In determining line of street, measurements upon such street are of more value than measurements taken elsewhere; and if they or the places where they were cannot be located, the boundaries of the street as actually opened and used should be ascertained; and, if such location has been generally acquiesced in by the public, by lot-owners, and by the municipality, in the absence of more certain evidence, it will be conclusive. (*Orefia v. City of Santa Barbara*, 91 Cal. 621.)
5. A preliminary question asked of a witness as to whether he had learned from reputation, hearsay, or otherwise what was the location of the initial point of the survey of a public street, is not objectionable on the ground that hearsay evidence is called for; nor does the fact that further examination might have brought out inadmissible testimony make such preliminary question ob-

jectionable. (*Muller v. Southern Pac. etc. Ry. Co.*, 83 Cal. 240.)

6. In an action to recover damages for the taking of land by a railroad company, consisting of part of a city lot situated on a public street, evidence of common reputation or hearsay, existing before the controversy arose, as to the initial point of the survey of the street, to show the line of the street, is admissible. Common reputation or hearsay is admissible to establish a boundary line of general or public interest, provided it existed before the controversy arose. (*Muller v. Southern Pac. etc. Ry. Co.*, 83 Cal. 240.)

Location of, judicial notice as to. See Judicial Notice, 50, et seq.

7. Where a city is laid out with streets running to the water, such streets should be held to continue on to the high water, if the city front is filled in, or the space enlarged by accretion or otherwise. (*Wood v. San Francisco*, 4 Cal. 190.)

8. All the public streets of the city of San Francisco running into the water, as laid down on the official map of the city, were, by operation of the act of March 26, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public, and exempt from executions against the city. (*Wood v. San Francisco*, 4 Cal. 190.)
Cited 15 Cal. 587.

9. The act of March 26, 1851 (Stats. 1851, p. 307), commonly called the Beach and Water Lot Act of San Francisco, did not extend to the line of East street, from Clay to Jackson, through the slip property to the water line front as established by the act. The phrase in the first section of that act, "thence northerly on the eastern line of East street to its point of intersection with the northern side of Jackson street," was not designed to lay off and establish a street, or to protect the line of a street already existing; but was intended simply to fix the boundary so as to show what was conveyed by the act; and this was done by giving the course of the street as a single line protracted from East street to its intersection with Jackson. (*People ex rel. Jacobs v. Kruger*, 19 Cal. 411.)
Cited 22 Cal. 20.

10. And hence, where defendant, in September, 1851, on sale under judgment against the city, had purchased her title to a portion of the ground covered by said East street, between Clay and Jackson, and had subsequently purchased the state's interest in the same, these purchases being prior to any acts by the city declaring the street open as a public street, held, that defendant owns the property as against the city; that her ordinances laying out this street being passed subsequently to defendant's acquisition of the city title, have no effect upon defendant, because the proper proceedings were not taken to condemn the land to public use. (*People ex rel. Jacobs v. Kruger*, 19 Cal. 411.)

11. The fact that East street was dedicated on the old plan of the city, that is, the map or plan of 1850, is insufficient to extend the street as a public highway beyond its first

limits, to wit, from Folsom street to the southerly side of Market, and to the bay. (*People ex rel. Jacobs v. Kruger*, 19 Cal. 411.)

Extending into tide waters. See San Francisco, XI.

Boundary, street as. See Boundaries, II, 7.

Ordinance changing location of. See Ordinances, IV, 7, 1.

Beale street, construction of, decision as to. See Appeals, 2992.

III. Ownership and Possession of; Right of Way Over; Obstruction of.

Ownership of East street, between Clay and Jackson. See ante, 10.

12. As a general rule the fee of the streets, in a city dedicated to public use, is in the owners of the adjoining lands, on each side, to the center of the street. (*San Francisco v. Spring Valley Water Works*, 48 Cal. 493.)

13. Abutting owner has right of access to and egress from his land abutting on the street, which right is property of which he cannot be deprived, even for a public purpose, without compensation first made, and the right exists although the abutter has no estate in fee in the street, but has only an easement therein; and he is entitled to an injunction against a wrongful appropriation of the street. (*Schaufele v. Doyle*, 86 Cal. 107.)

14. A municipal corporation may maintain ejectment to recover possession of streets which it owns, and is entitled to possess, subject to the right of citizens to pass and repass as an open highway. (*San Francisco v. Sullivan*, 50 Cal. 603.)
Cited 65 Cal. 436; 3 Mont. 87.

15. Municipality has no control over highway, unless the right of control has been vested by the state in the municipality. (*Thomason v. Ruggles*, 69 Cal. 465, 472.)

16. City which has obtained patent to public land is not estopped from denying title of mere possessor of land across the line of an unopened street because prior to the patent it made a map recognizing the fact of such possession, and purchased part of the street from an adjoining possessor whose deed bounded the granted land by the land of the remaining possessor, and afterward collected taxes upon the land; nor does such recognition of the possession confer title upon the possessor. (*Mills v. City of Los Angeles*, 90 Cal. 522.)

17. Attempt by city of San Francisco to convert public easement to private use, or to defeat the right of way over a public street, is beyond the power of a corporation, and the legislature has no authority to interfere with the disposition of the land and premises upon which the easement is situated after title has passed from the state. (*Wood v. San Francisco*, 4 Cal. 190.)
Cited 9 Cal. 45.

18. Municipal corporation cannot convert public easement to private use, nor can the legislature interfere with the premises upon which the easement is situated after it has passed from the state. (*Minor v. San Francisco*, 9 Cal. 39.)

19. State has no proprietary interest in

streets of city dedicated to public use; and when it grants to a private corporation an easement over the streets, not common to the public at large, it merely grants, in its sovereign capacity, a franchise, and not any proprietary interest in the streets. (*San Francisco v. Spring Valley Water Works*, 48 Cal. 493.) Cited 51 Cal. 384.

Action to quiet title to street will not lie against street commissioner. See *Quieting Title*, 91.

Quieting title to land claimed as street, burden of proof. See *Quieting Title*, 136.

Nonsuit for failure to prove defendant's ownership. See *Nonsuit*, 13.

Owner may maintain ejectment. See *Ejectment*, 4.

Rights of purchasers bounding on streets, when barred. See *Specific Performance*, 200.

Title to street taken for railroad. See *Eminent Domain*, 143.

Adverse possession of. See *Adverse Possession*, III, 2.

20. The act of March 26, 1851, operated as a grant by which property holders along the line of Market street and the public are entitled to the free enjoyment of the same; and this right or privilege could not be resumed by the state, and was not resumed by the act of April 28, 1851, confirming the contract between the appellant and the sinking fund commissioners. (*Breed v. Cunningham*, 2 Cal. 381.)

21. Grant of easement in street, made by the legislature to corporation, is purely a grant of corporate power, and therefore cannot be made to a private corporation by special act. (*San Francisco v. Spring Valley Water Works*, 48 Cal. 493.)

Both railroad and teams are entitled to use of streets. See *Railroads*, VIII, 4.

Right of foot passenger to use street occupied by train. See *Railroads*, VIII, 3.

22. Whether driving piles in Front street, in the city of San Francisco (the street being laid out over the waters of the bay) is an obstruction to the free use of the street by the public is a question of fact for the jury; and, where that question was not so submitted, a new trial was granted. (*San Francisco v. Clark*, 1 Cal. 386.)

Distinguished 1 Cal. 454.

Railways in. See *Railroads*, X.

Gas company, right to lay pipes. See *Gas Companies*.

Use of portion of park as a street. See *Public Parks*, 5.

Ordinances prohibiting throwing of rubbish in street. See *Ordinances*, IV, 7, c.

Building on streets, right to reclaim. See *Buildings*.

Legalized obstruction in, revocation of right. See *Nuisance*, 15.

Street covered by water, nuisance in. See *Nuisance*, 55.

City may sue to prevent obstruction. See *Municipal Corporations*, 184, et seq.

Obstruction, enjoining. See *Injunctions*, II, 15.

Jury trial in action for obstructing. See *Jury and Jurors*, 21, 22.

Doctrine of estoppel, when invoked against public. See *Estoppel*, 12.

IV. Duty to Repair or Keep Clean; Liability for Negligent Injuries in.

23. The owner of land bordering upon public streets or highways is not bound to keep them in repair. (*Eustace v. Jahns*, 38 Cal. 3.)

24. The law does not impose upon the owner of a lot fronting upon a public street in San Francisco the duty of repairing defects in the portions of the street upon which his lot abuts. (*Eustace v. Jahns*, 38 Cal. 3.)

25. The legislature had the right to provide, in the act known as the Consolidation Act for the government of the city and county of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair. (*Hart v. Gaven*, 12 Cal. 476.)

26. Where the owner of a lot neglects for three days, after notice from the superintendent of public streets of said city, to repair the street in front of his lot, the superintendent has the right to make a contract for that purpose; and an action will lie in the name of the party performing the work, against the owner of the lot adjacent, for the amount. (*Hart v. Gaven*, 12 Cal. 476.) Cited 28 Cal. 352, 362; 2 Or. 158.

27. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as for the time made them dangerous. (*James v. San Francisco*, 6 Cal. 528.)

28. The act known as the Consolidation Act, passed in 1857, released the city and county of San Francisco from all liability for damages for injuries sustained by any person on its graded streets or public highways, in consequence of said streets or highways being out of repair. Section 64 of said act is not unconstitutional. (*Parsons v. City and County of San Francisco*, 23 Cal. 462.)

29. An act authorizing and empowering a board of supervisors of a city to keep its streets clean by employing men and carts for that purpose, and by using the labor of persons sentenced or committed to the house of correction, does not compel the board to adopt the system which it provides for. (*Weed v. Maynard*, 52 Cal. 459.)

30. If such act does not repeal a former act empowering said board to keep the streets clean in such mode and manner as it may deem best, the board, after its passage, may still exercise its discretion as to the mode and manner of cleaning. (*Weed v. Maynard*, 52 Cal. 459.)

31. Incorporated cities are not liable for injuries sustained by private individuals, caused by the neglect of the city officers in keeping its streets in repair, unless made so liable by the acts under which they are incorporated. (*Winbigler v. City of Los Angeles*, 45 Cal. 36.) Cited 61 Cal. 275; 67 Cal. 78; 78 Cal. 590, 591; 81 Cal. 620.

32. Incorporated cities are not liable for injuries sustained by private individuals

through the neglect of the officers charged with the duty of keeping its streets in repair. In this respect they are not distinguishable in principle from counties. (*Tranter v. City of Sacramento*, 81 Cal. 271.) Cited 78 Cal. 590, 591.

33. In the absence of a statutory provision imposing a liability a municipal corporation is not liable for personal injuries occasioned by the negligence of the officers of the corporation in leaving an excavation in the street without guards or light; and its responsibility does not depend upon the question whether the charter requires the streets to be kept in repair or simply leave it permissive. (*Arnold v. City of San Jose*, 81 Cal. 618.)

34. Contractor for repair of street who leaves open unguarded hole in the street without a light to warn the public of the danger, contrary to the provisions of the ordinance in that regard, is guilty of negligence. And it makes no difference whether he was authorized to make the repairs by competent authority or not. (*Barton v. McDonald*, 81 Cal. 265.)

35. To maintain action for causing by wrongful acts the death of or injury to a person two things must be shown: (1) An obstruction in the road by the fault of the defendant; (2) no want of ordinary care on the part of the plaintiff. (*Gay v. Winter*, 34 Cal. 153.)

36. Gravamen of the action is the negligence of the defendant, and plaintiff cannot recover where it appears that the negligence of the deceased or person injured contributed in any degree to the death or injury sustained. (*Gay v. Winter*, 34 Cal. 153.) Cited 37 Cal. 419; 48 Cal. 421; 20 Nev. 310; distinguished 52 Cal. 53.

Injuries in streets. See *San Francisco*, XI.

Duty of street railroad to repair. See *Railroads*, X, 7.

Taking up of granite blocks as consideration. See *Contracts*, 34.

Backing trains in street. See *Railroads*, VIII, 3.

Care required while riding or driving over. See *Negligence*, III, 4.

Injuries from driving cattle through streets. See *Negligence*, III, 5.

V. Sidewalks.

37. A person walking along the sidewalk of a street in a city, not near a crossing, has a right to assume that the place is safe. (*Barry v. Terkildsen*, 72 Cal. 254.)

38. Hole in sidewalk in front of one's premises is in the nature of a nuisance on account of the constant danger which it presents to passersby, and that owner is liable for the injury without proof that either he or his servants removed the trapdoor. (*Barry v. Terkildsen*, 72 Cal. 254.)

39. The action was brought to recover damages for personal injuries caused to the plaintiff by falling down a hole in the sidewalk of a populous street in the city and county of San Francisco, in front of the defendant's premises. The hole was used by the defendant, without any license from the city authori-

ties, for his own convenience, and had a wooden trapdoor. An ordinance of the city and county prohibited the use of wooden coverings for excavations in the sidewalks. At the time of the accident the plaintiff was rapidly walking along the sidewalk, when, her attention being momentarily called in another direction, she fell into the hole, which was then entirely uncovered and unprotected. The plaintiff had frequently passed along the sidewalk at that place, but had no knowledge of the existence of the hole. On the trial, the evidence failed to show who had removed the trapdoor. Held, that the plaintiff was not guilty of contributory negligence. (*Barry v. Terkildsen*, 72 Cal. 254.)

40. The fact that a few days before the accident the defendant employed a carpenter to repair the trapdoor, and that his negligence contributed to the accident, does not relieve the defendant from liability, although the carpenter was an independent contractor. (*Barry v. Terkildsen*, 72 Cal. 254.)

41. When a street has been accepted by the board of supervisors of the city and county of San Francisco, the expense of constructing and repairing the sidewalks must be paid by the city and county. (*Bonnet v. City and County of San Francisco*, 65 Cal. 230.) Cited 87 Cal. 94.

42. A contract for the construction of a sidewalk in a city is governed by section 1191 of the Code of Civil Procedure, and not by section 1183 of that code; and a contract for such work is not void because not in writing when the price exceeds one thousand dollars. (*Kreuzberger v. Wingfield*, 96 Cal. 251.)

Construction of order relating to acceptance. See post, VI.

Macadamizing and curbing or constructing sidewalks are different kinds of improvements. See post, 206, 207.

Pleading in action on assessment. See post, 632.

Acceptance of. See post, 43.

Ordinances prohibiting obstructing sidewalk. See *Ordinances*, IV, 7, o.

Obstruction of sidewalk as nuisance. See *Nuisances*, II, 3.

Falling through hole in sidewalk, intoxication as negligence. See *Negligence*, 125.

Right to keep stand on sidewalk is a mere license. See *Landlord and Tenant*, 251, 252.

VI. Acceptance of.

43. Section 22 of chapter IV of order 697 of the board of supervisors of the city and county of San Francisco provides that: "No street or portion of a street shall be accepted by the board of supervisors except upon the report of the superintendent of public streets and highways and the committee of the board of supervisors on streets, wharves, grades, and squares, showing that such street or portion of a street is sewered with brick and paved and curbed with stone." Conceding that for certain purposes the sidewalk is a portion of the street, this order was not intended to require the sidewalk as well as the roadway to be sewered with brick and paved and curbed with stone. (*Phelan v. City and County of San Francisco*, 62 Cal. 44.)

44. Each requirement of the order respecting the acceptance of streets has reference to the object to be accomplished, that is, the sewer to be of brick, the roadway paved, and the sidewalk curbed. (*Phelan v. City and County of San Francisco*, 62 Cal. 44.)

45. The board of supervisors in accepting the street determined that the respective objects had been accomplished. (*Phelan v. City and County of San Francisco*, 62 Cal. 44.)

46. The only obligation imposed upon the city and county of San Francisco by section 21 of the street law of 1862 (Stats. 1862, p. 391), if there be any, is to keep open and improved that portion of the street constructed and "accepted" in accordance therewith; and there is no obligation on the part of the city and county to pay assessments upon property for benefits derived from the opening and improvement of other portions of the same street. (*San Francisco v. Certain Real Estate*, 42 Cal. 513.) Cited 80 Cal. 8.

47. The twentieth section of the act for improving the streets of Oakland, which provides that when a street is constructed to the satisfaction of the council and marshal it shall be accepted, and that thereafter it shall be improved by the city, requires such acceptance of the street, to the full width of the street, when improved under regulations adopted by the council. Such regulations must specify, among other things, the character of the work to be done, before the street can be accepted. An acceptance of work done on a street is not sufficient to make the street an accepted street. (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

VII. Abandonment, Vacation, and Discontinuance of.

48. When land has been dedicated and accepted as a street, the subsequent adoption of an official map having a line drawn across the mouth of the street is not sufficient to divest the public of their rights. (*City of Eureka v. Armstrong*, 83 Cal. 623.)

49. Legislature has power to vacate street in city, and may delegate its power to the municipal authorities of the city. (*Brook v. Horton*, 68 Cal. 554.) Cited 10 Cal. 247.

50. Legislature may vacate portion of street, even if a person owns property fronting on another portion of the street which will incidentally be injured thereby. (*Polack v. San Francisco Orphan Asylum*, 48 Cal. 490.)

51. The legislature has power to vacate a street in a city, and it may delegate such power to the municipal authorities of a city; and, after such power has been delegated to the municipal authorities, the legislature may revoke it in part, as well as in whole, or, without any express revocation, may itself exercise it. (*Polack v. San Francisco Orphan Asylum*, 48 Cal. 490.) Cited 48 Cal. 529; 64 Cal. 502.

52. Municipal authorities of city cannot vacate street without consent of the legisla-

ture. (*Polack v. San Francisco Orphan Asylum*, 48 Cal. 490.) Cited 68 Cal. 558.

53. An alteration by competent authority of an existing road or way is a discontinuance of those portions of the way which do not come within the newly assigned limits, although no special order of discontinuance is made. (*Brook v. Horton*, 68 Cal. 554.)

54. The premises in controversy are situated in the city and county of San Francisco, between Channel street and Alabama street, and are a part of Mariposa street, as those streets were laid down on the map of 1856, known as the Van Ness ordinance map. On the 30th of January, 1866, and in October, 1870, the board of supervisors of the city and county, acting under authority conferred upon them by the acts of April, 1862, and of April, 1864, approved and adopted certain maps, known respectively as the city engineer's map and the Humphreys map, as the official maps of the city and county. On neither of these maps did the premises in controversy appear as a street. Held, that the adoption and approval of such maps operated to discontinue the premises as a street. (*Brook v. Horton*, 68 Cal. 554.) Cited 84 Cal. 638.

Order vacating order abandoning road, review of. See *Certiorari*, 123.

VIII. Superintendents and Commissioners of Streets.

55. Under the sixth section of the San Francisco Consolidation Act of 1856 it was intended that a superintendent of public streets and highways of that city and county should be elected at the general election in the fall of that year; and a person then elected held his office for the full term of two years. (*People ex rel. Bohen v. Hossefross*, 17 Cal. 137.)

56. Street commissioner is mere agent or servant of city, and his acts done in the performance of his duty in opening streets are the acts of the city. (*Leet v. Rider*, 48 Cal. 623.)

57. Although contracts are made on behalf of the city and county of San Francisco in the name of the superintendent of streets, he is but the agent of the corporation in that behalf; and, *pro hac vice*, his act is the act of the corporation. Per *Crockett, J.* (*Drew v. Smith*, 38 Cal. 326.)

58. The street commissioner of the city of San Francisco is empowered to use the necessary force to prevent an injury to the public streets of the city, and no action can be sustained against him, or those who act under his orders, for using such force. (*Clark v. McCarthy*, 1 Cal. 453.)

Repairing streets at expense of owner. See ante, IV.

59. To entitle party to recover as street commissioner of San Francisco he must show, not only that he had discharged his duties, but (1) that he had been lawfully elected; (2) had qualified himself to hold the office, by taking the oath and filing the bond, at the time and in the manner required by law. (*Payne v. San Francisco*, 3 Cal. 122.)

60. A joint resolution of the city councils, approved by the mayor, recognizing a party as street commissioner, will not enable him to recover for services rendered in that capacity, upon a quantum meruit where he had neglected to qualify. (*Payne v. San Francisco*, 3 Cal. 122.)

61. Under the act of March 2, 1878 (Stats. 1877-78, p. 139), and the Consolidation Act (secs. 95, 96), the salaries of deputies of the superintendents of streets in San Francisco—like other fixed salaries—must be paid out of the general fund, in preference to any and all other demands. (*Cashin v. Dunn*, 58 Cal. 581.)

62. The remedy given by section 11 of the street law of 1885 of appeal to the board of supervisors by any one injured in consequence of the official neglect of the superintendent of streets to see that the laws, ordinances, and regulations relative to the streets are carried into execution, is not exclusive, but the party injured may elect to bring an action against the sureties upon the official bond of the superintendent under the provisions of section 22 of the same act. (*Goodsell v. Ashworth*, 96 Cal. 397.)

IX. Opening Streets.

1. Power to Open.

63. Opening of streets in a city is clearly a municipal purpose. (*Sinton v. Ashbury*, 41 Cal. 525.)

64. Court has no jurisdiction to lay out or change a street unless the power to do so is conferred by the legislature, and, when this power is conferred, it is a special proceeding. (*De Witt v. Duncan*, 46 Cal. 342.)

65. Power to lay out and change streets is in its nature legislative, and not judicial, and the legislature may itself perform those acts, or it may select such agencies for that purpose as it deems proper. (*De Witt v. Duncan*, 46 Cal. 342.)

66. The legislature did not intend by the act of January 31, 1870, relative to the opening of streets in Oakland, to authorize the city council to proceed to open, extend, straighten, or widen any street, except in cases where the council were satisfied that the benefits to lands affected thereby, and to be assessed therefor, would exceed the damages to private property necessarily occasioned, and the expenses of the proceeding and work. (*Jacobus v. City of Oakland*, 42 Cal. 21.)

67. Charter of city of San Francisco of 1851 gave the city power to open streets and alleys, and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section 2, article V, of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury, to be used as the city sees fit. (*Seale v. San Francisco*, 16 Cal. 284.)

2. Petition for.

68. Under the Montgomery Avenue Act of April 1, 1872 (Stats. 1871-72, p. 911), the petition to the mayor of the majority of the owners in frontage of the property to be charged with the costs of improvement (required by section 5) was necessary to set the machinery of the statute in motion, and, until such a petition was filed, the board of public works had no authority to organize or to proceed. (*Mulligan v. Smith*, 59 Cal. 206.) Cited 79 Cal. 396, 398, 399; 87 Cal. 41, 42, 46; distinguished 87 Cal. 149, 150.

69. Petition signed by majority in frontage of owners of the property described in section 4 of the Montgomery Avenue Act of 1872 was necessary to give jurisdiction to the board of works to organize and proceed under the act, and to give the county court jurisdiction under its provisions. (*Kahn v. Board of Supervisors of San Francisco*, 79 Cal. 388.) Cited 87 Cal. 41, 42; 92 Cal. 334; distinguished 87 Cal. 46.

70. The requirement of the act of 1872 that the petition for the improvement of Montgomery avenue shall be signed by owners of a majority in frontage, whose names are named on the last preceding assessment-roll, is mandatory, and no signatures of persons whose names do not there appear can be regarded by the courts. Signatures by executors and administrators must be rejected as unauthorized. The signature of the president and secretary of a corporation must also be rejected, in the absence of proof of authority from the board of directors. (*Kahn v. Board of Supervisors of San Francisco*, 79 Cal. 388.)

71. The proceedings purport to have been taken under the act of March 28, 1878, "to provide for the opening of streets in the city of Oakland." The act requires the petition of five or more residents and freeholders to the city council to contain "inter alia," "a statement that in the opinion of the petitioners the public interests require that the improvement asked for (describing it generally) should be made." The averment in the petition of the city council to the county court is that the petition of the residents and freeholders to the council contained a statement that "in the opinion of the petitioners the improvement asked for should be made." Held, the statement contained in the petition is not the same in substance as that required by the statute, and for this reason the petition of the freeholders did not give power or jurisdiction to the council. (*In re Grove Street*, 61 Cal. 438.) Cited 19 Nev. 420.

72. Executors, administrators, and agents to whom as such no frontage was assessed on the assessment-roll, are not owners within the meaning and intent of the statute of April 1, 1872, for the opening of Montgomery avenue, and were not authorized to petition for the opening of the avenue. (*Mulligan v. Smith*, 59 Cal. 206, 225.)

73. Act of signing name of corporation to a petition for the opening of a street over its real property is one which falls within the managing powers of the board of trustees or directors, and authority to perform such acts

must come from them; the president and secretary as such have no authority to perform an act of that character. (*Mulligan v. Smith*, 59 Cal. 206, 225.)

74. If tenant in common signs petition for the opening of a street over the common lands which will lead to the assessment of the lands to pay the cost of opening the street, his signature affects only his own estate; he does not represent or bind the estate of his cotenant. (*Mulligan v. Smith*, 59 Cal. 206, 226.)

75. In an action of ejectment the plaintiff deraigned title under a tax deed executed upon a sale of the premises for the nonpayment of a Montgomery avenue assessment, and the facts were as stated in the opinions of the court. Held, that the petition required by the act was not signed by the owners of a majority in frontage of the property to be charged with the costs of the improvement; that the certificate of the mayor (under section 5 of the act) that the petition was sufficient, was not conclusive as an adjudication of the fact; that the judgment of the county court, in confirming the report of the board of public works—in the absence of any provision for notice to the parties interested—was not conclusive upon them as to the sufficiency of the petition; that the failure of the defendant to resort to legal remedies against the proceeding while in fieri did not constitute an equitable estoppel; and finally, that the assessment and all the proceedings were void. (*Mulligan v. Smith*, 59 Cal. 206.)

76. There is no substantial difference between absence of petition and petition lacking the essential averments. (*Turrill v. Grattan*, 52 Cal. 97.)

77. The decision of the county court as to its jurisdiction was not conclusive of the jurisdictional question of fact whether the petition for the improvement of Montgomery avenue was signed by a majority or only by a minority of the owners designated in the statute. (*Kahn v. Board of Supervisors of San Francisco*, 79 Cal. 388.)

78. It was not the intent of the statute of March 28, 1878, for opening streets in Oakland, that the city council should itself conclusively determine its own power, and the adoption by the council of the "final resolution of determination" to make the improvement did not conclusively adjudge that the petition of the freeholders was sufficient to give the council power to proceed upon it. (In re Grove Street, 61 Cal. 438.)

79. Evidence to show that petition for opening was not signed by owners of a majority in frontage of the lands assessable for the opening of the statute is admissible in ejectment on a tax deed executed in consummation of a sale for the nonpayment of an assessment levied under the act of April 1, 1872, for the opening of Montgomery avenue. (*Mulligan v. Smith*, 59 Cal. 206, 234.)

3. Notice of; Effect of Failure to Protest.

80. Legislature has right to say what notice shall be given in proceedings for the opening and widening of streets, so long as the notice required to be given is reasonable, and the

proceeding is not arbitrary, oppressive, or unjust. The notice provided for need not be a personal one, and the service thereof may be constructive. (*Davies v. Los Angeles*, 86 Cal. 37.)

81. The notice required to be given under the act of 1889 for the opening of streets for the assessment of lands benefited, taken in connection with the resolution of intention to which the notice refers for particulars, and which designates the property to be affected, is sufficiently definite to call to the attention of parties interested that the improvement is contemplated; and by a reference to the resolution, which becomes, by such reference, a part of the notice, is sufficient to apprise them that their property is included within the district, and will be affected by such proceeding. (*Davies v. Los Angeles*, 86 Cal. 37.)

82. The act of 1889, relating to the opening of streets, does not provide for taking property without due process of law, by reason of insufficient notice of proceedings under the statute, since it requires that notice must be given of every material step to be taken as against either the owners of land to be taken, or of lands to be assessed, and provides for an opportunity to be heard at each step of the proceedings; and the fact that the notice provided for may be given generally by posting, and that no personal notice to each of the parties interested is required, does not render the statute unconstitutional. (*Davies v. Los Angeles*, 86 Cal. 37.)

Cited 92 Cal. 324.

83. Failure of defendant to resort to legal remedies against the proceedings for the opening of Montgomery avenue under the act of April 1, 1872, while the proceedings are in fieri, do not constitute an equitable estoppel; it is the duty of those who were authorized to concede powers which might bind real property of the defendant to see that the provisions of the statute were complied with. (*Mulligan v. Smith*, 59 Cal. 206, 233.)

Opening, enjoining. See Injunctions, II, 15. Appeal from order enjoining trustees from opening, effect of expiration of term of officer on. See Appeals, IX, 2, g.

4. Commissioners, Appointment of Officer, Duties and Report.

84. The act of March 4, 1870, requiring the city and county of San Francisco to advance out of its treasury a sufficient sum to pay for the services of the commissioners and certain others employed on the proposed extension of Montgomery and Connecticut streets (Stats. 1869-70, p. 146) held to be clearly constitutional. (*Sinton v. Ashbury*, 41 Cal. 525.)

85. Act of 1889 (Stats. 1889, p. 70) is not in violation of section 13 of article XI of the constitution on the ground that it delegates to a special commission the power to perform municipal functions, as the commissioners are simply made the agents of the municipalities to assist them in opening the streets, and act under their direction, and their acts are not binding or effective until the same are approved and confirmed by the city council. (*Davies v. Los Angeles*, 86 Cal. 37.)

86. It is the duty of commissioners to ascer-

tain and report the damages to the owner of each specific parcel of land affected by the proposed work, which should include the value of lands taken for the street. (*Jacobus v. City of Oakland*, 42 Cal. 21.)

87. The act of February 1, 1870, in reference to the "Second street cut" in San Francisco (Stats. 1869-70, p. 41), in providing that the judgment of the county court, either confirming or setting aside the report of the commissioners, should be "final and conclusive," obviously contemplated that all objections to the report, founded upon the errors, misconduct, irregularities, or omissions of the commissioners, should be heard and determined by the county court, and that it should not thereafter be open to attack in a collateral action. (*San Francisco v. Certain Real Estate*, 42 Cal. 513.)

Commissioners on widening street. See post, X.

Ordinance abolishing office of street commission and substituting fees is valid. See Ordinances, 106.

5. Condemnation of Land, Compensation and Damages.

88. The use of land for public streets in an incorporated town is a public use. (*City of Santa Ana v. Harlin*, 99 Cal. 538.)

89. A petition by the city of Los Angeles for the condemnation of certain land for a street recited that the city council "duly passed and adopted an ordinance in writing," directing the proceeding, and "that it is now necessary to condemn said land for public use, agreeable to the provisions of said ordinance." Held, that this was a sufficient allegation of the necessity of taking the land for public use. (*City of Los Angeles v. Waldron*, 65 Cal. 283.)

90. The action of a city council in ordering the opening of a street, after the steps provided by statute have been taken, and the resolution and ordinance ordering the work have been regularly adopted, is final and conclusive of the necessity of the improvement, and the courts may not adjudicate the question of such necessity in an action or proceeding for condemnation of lands necessary to the improvement. (*City of Santa Ana v. Harlin*, 99 Cal. 538.)

91. In proceeding for writ of mandamus to compel defendants to sell or fix price of certain lots fronting on a new street opened through the Market plaza of the city of San Jose, under the act of March 4, 1878 (Stats. 1877-78, p. 163), held, that the statute did not enjoin upon the defendants a duty to sell the lots in question, but simply conferred upon them the power to sell or not to sell, as they should deem best for the interests of the city. (*Coopers v. Mayor and Common Council of the city of San Jose*, 55 Cal. 599.)

92. A lot of land in the harbor of San Francisco, lying within the line of streets as laid down and recognized by the city on its official map, and being in the actual possession of a person who claims to be the owner, cannot be taken from him and appropriated to the public use without paying him a just com-

pensation. Per Bennett, J. (*Gunter v. Geary*, 1 Cal. 462.)
Cited 7 Cal. 579; 29 Cal. 117.

93. The provisions in the act of 1889 for the opening of streets for the assessment by commissioners of the value of the property taken, and for a voluntary conveyance of the land taken at such valuation, if the amount thus fixed is satisfactory to the owner, and if not, for condemnation of the property as in other cases, cannot affect the validity of the statute, nor the liability of the owner of property benefited to pay the assessment made against him; nor can such owner raise any questions upon the subject of the condemnation of the lands taken, affecting only the rights of the city and the party whose property is sought to be taken. (*Davies v. Los Angeles*, 86 Cal. 37.)

94. The assessment for benefits that will result to the land assessed under the act of 1889 for the opening of streets is made upon the theory that the work is to be accomplished; and the provisions of the statute authorizing an assessment for benefits, and a sale and conveyance on delinquency, are not invalidated by the fact that the benefit to result to the property is left in uncertainty, because, under the statute, the work may never be accomplished, and no benefit could result upon such a contingency. (*Davies v. Los Angeles*, 86 Cal. 37.)

95. The amount to be assessed under the act of 1889 for the opening of streets depends upon the amount found by the commissioners to be necessary to meet the expenses of the improvement, and not upon the actual expenses as shown by the completion of the work, and, as the act provides for refunding any excess, the fact that it may subsequently appear that they erred in overestimating the amount cannot invalidate the assessment, or otherwise avail the owners of the property assessed, after the report of the commissioners has been made and confirmed by the city council. (*Davies v. Los Angeles*, 86 Cal. 37.)

96. Where the answer in the condemnation proceedings contains no allegations of any defect or irregularity in the proceedings of the council to open the street, there is no issue under which evidence thereof is admissible. (*City of Santa Ana v. Harlin*, 99 Cal. 538.)

97. Bonds to the city for the payment of the expense of opening the street are not admissible in evidence in a proceeding by the city to condemn lands for the opening of the street. The mere fact that individuals have subscribed money or given a bond to a city to contribute toward the expense of laying out a street will not vitiate the proceedings, or prove that the land was taken for the accommodation of private persons, and not for public uses. (*City of Santa Ana v. Harlin*, 99 Cal. 538.)

98. An answer in proceedings by the city of condemn a right of way for the opening of a street, setting forth that the action is instituted upon the motion and at the request and for the benefit of a railroad company, goes to the public character of the use and the necessity for its establishment, and may properly

be stricken out as insufficient. (*City of Santa Ana v. Harlin*, 99 Cal. 538.)

99. In an action for the condemnation of land for a street the complaint and the answer alleged that the defendant was owner of the land, and the jury, upon special issues submitted to them, assessed the defendant's damages at three hundred dollars, but also found that the land had been dedicated to the public use by the defendant as a street. Held, that the finding concerning dedication was not within the issues; and that the defendant was entitled to the damages issued by the jury; and held, further, that had the plaintiff alleged in his complaint the fact of dedication, as found by the jury, it would have alleged itself out of court. (*City of San Jose v. Fryschlag*, 56 Cal. 8.)

100. In an action to condemn a parcel of land for a public street evidence tending to show a former dedication by the owner, for the purpose of establishing the amount of damage or compensation, is not admissible. The question of dedication is not involved in such an action for any purpose. *City of San Jose v. Reed*, 65 Cal. 241.)

101. The legislature intended by the act of January 31, 1870, relative to the opening of streets in Oakland that the aggregate damages to private property, including the value of land taken for the street, and the expenses of the commissioners, should be paid for in money by assessment upon the several parcels of land benefited by the proposed improvement, in proportion to the benefits to accrue to each. (*Jacobus v. City of Oakland*, 42 Cal. 21.)

102. Whether cost of opening streets should be borne by contiguous property, or by all the property of the city, or a certain proportion by each, is a matter for legislative discretion. (*Sinton v. Ashbury*, 41 Cal. 525.)

103. The charter of Los Angeles (Stats. 1875-76, p. 709) provides that the damages incurred in extending a street shall be paid by the real estate fronting on either side of the extension, and of the original street, to a point to be fixed by the common council, and also by the real estate fronting on cross-streets, or streets forming a junction with such street improved, and within a hundred feet of the same. Under this provision, the council ordered an assessment for the extension of L. street to be made on the said street, "from A. street southerly to R. street"; but the assessment actually made included the property on the north line of R. street. Held, that the property on the north line of R. street was improperly included, and that this vitiated the whole assessment. (*Schumacker v. Toberman*, 56 Cal. 508.)

Damages. See post, X.

Mortgagee as party in suit to condemn land for street. See *Eminent Domain*, 105.

Land cannot be taken for without compensation. See *Mexican Lands*, 441, 458.

Appeal from report of commissioners, what considered on. See *Appeals*, 1958.

6. Bonds on.

104. The rights of the holders of Montgomery avenue bonds as to the question of

jurisdiction over the proceedings for the improvement of Montgomery avenue, under the act of 1872, are not different from those of taxpayers. The bondholder is bound to inquire as to the existence of the facts conferring jurisdiction to proceed under the law. A purchaser of municipal bonds is bound by the law under which they are issued, and the law informs him that the bonds impose no obligation unless issued according to the law. Mandamus will not be to compel the levy of a tax to pay municipal bonds, when it appears that the jurisdictional facts to authorize their issuance are wanting. (*Kahn v. Board of Supervisors of San Francisco*, 79 Cal. 388.)

105. If a street is opened in a city, and to pay for the land taken, and the damages to improvements thereon or adjacent thereto, and injured thereby, and all other expenses, bonds are issued; and to pay the same and the interest thereon an annual percentage is directed to be levied on the lots benefited thereby, which percentage is upon the enhanced value of the lots, as fixed by a board of public works, this imposition is an assessment, and not a tax. (*People ex rel. Doyle v. Austin*, 47 Cal. 353.)

106. In such case the interest to accrue on the bonds, and the discount suffered in converting them into cash, are incidental expenses, and the property benefited is only charged with the cost of the improvement. (*People ex rel. Doyle v. Austin*, 47 Cal. 353.)

Statute authorizing issuance of bonds, validity of. See post, 521.

Bonds for street improvement, any taxpayer may enjoin. See *Injunctions*, 280.

X. Width of Streets and Widening of.

107. The width of a street in the city and county of San Francisco is sufficiently designated on the official map by a number printed across the space denoting the street, without indicating what the number stood for, if the scale of the map shows that the number was intended to represent feet. (*Gafney v. San Francisco*, 72 Cal. 146.)

108. The act of March 23, 1876, providing for the widening of Dupont street in the city and county of San Francisco, and for the levy of an assessment on the property benefited thereby for the payment of the improvement, is not unconstitutional, either on the ground that it was an attempt by the state to exercise the power of assessment for local improvements within the limits of a municipality, or on the ground that it denies due process of law to the parties affected by the assessment. (*Lent v. Tillson*, 72 Cal. 404.)

109. The act of April 4, 1864, giving power to the board of supervisors of San Francisco to widen streets, etc., does not prescribe a rule for the apportionment of the expenses of the improvement for the owners of lots deemed benefited different from that prescribed for railroad corporations benefited, and it is not, therefore, in this respect unconstitutional. (*Appeal of North Beach etc. R. R. Co.*, 32 Cal. 499.)
Cited 57 Cal. 613.

110. Said rule for the apportionment of expenses is, in both cases, according to the ratio

of benefits received. (Appeal of North Beach etc. R. R. Co., 32 Cal. 499.)

111. In proceedings for the widening of a street, every requirement of the statute which may in any manner benefit the owner must be observed in order to give jurisdiction to the municipality. After the jurisdiction is once acquired, subsequent proceedings can be attacked for only such irregularities as affect substantial rights; but, for the purpose of acquiring jurisdiction, every requirement must be regarded as of equal necessity. (*Dehail v. Morford*, 95 Cal. 457.) Cited 97 Cal. 14.

112. The ordinance adopted by the city of Los Angeles, July 8, 1889, for the widening of First street from the west side of Los Angeles street to the west line of Alameda street, which provides that the exterior boundaries of the district of land to be benefited are "all lots and parcels of land fronting on each side of First street, from the west side of Los Angeles street to the west side of Alameda street," does not comply with the provisions of section 2 of the act of March 8, 1889 (Stats. 1889, p. 70), under which the proceedings for the widening were had, which declares that the city council shall pass a resolution "specifying the exterior boundaries" of the district of lands to be affected or benefited thereby; and a sale of lands for the purpose of satisfying an assessment under such ordinance will be restrained by injunction. (*Dehail v. Morford*, 95 Cal. 457.)

Widening, notice of. See ante, 80.

113. The fact that a property owner, whose land had been assessed for the widening of a street, appeared before the city council and filed objections to the improvement, and afterward protested against the report of the commissioners, did not operate as a waiver of his right to object to want of jurisdiction in the council over the subject matter of the improvement. (*Dehail v. Morford*, 95 Cal. 457.)

114. Where the city of San Francisco, by proper proceedings, had under the act of April 25, 1863, determined to widen a street therein, it was competent for it to acquire by condemnation the land necessary therefor in the manner prescribed in the Code of Civil Procedure. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.) Cited 99 Cal. 540.

115. The general street improvement act of 1883 is only applied to improvements upon existing streets, and does not authorize the city authorities to open or widen any street, nor to acquire land for that purpose; and that law is not inconsistent with the act of 1863 authorizing the supervisors of San Francisco to widen streets. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

116. Though the act of 1863 did not provide for the acquisition of land by condemnation proceedings, or otherwise than by agreement for compensation with the owners, it was not impliedly repealed by the act of 1864 authorizing condemnation proceedings, which expressly continued the act of 1863 in force. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

117. Section 18 of the act of 1889, as to the form of the complaint to an action to condemn land as respects the averment of necessity, is not unconstitutional, and the question whether the provision that "the resolution and ordinance ordering said work shall be conclusive evidence of necessity" does not arise upon appeal, where the record does not show that evidence was offered or rejected upon the issue of necessity. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

118. The sufficiency of the notices given by the commissioners, as required by the act of March 23, 1876, for the widening of Dupont street, of the organization of the board, and that the report of the board is open for inspection, must be determined in the light of all the provisions of the statute. When so interpreted, the notices are not insufficient to constitute due process of law, although they were not addressed to the persons whose property was affected by name, and although the property sought to be taken or affected was not specifically inscribed therein. (*Lent v. Tillson*, 72 Cal. 404.) Cited 86 Cal. 46, 58; 88 Cal. 340, 346.

119. The notice given by the board of commissioners for the widening of Dupont street, that the report was open for inspection, was a process by which all persons whose rights were affected by the proceedings had before the county court were brought into court, and was sufficient from that time on to charge them with notice of every thing done, and of any step taken therein, and to uphold the final order of the court. (*Lent v. Tillson*, 72 Cal. 404.) Cited 92 Cal. 334.

120. All presumptions, under the express provisions of the act of April 4, 1864 (Stats. 1864, p. 347), are in favor of the correctness of the action of the commissioners. It devolves on one objecting to the confirmation of their report to show error. (Appeal of North Beach etc. R. R. Co., 32 Cal. 499.)

121. Upon an appeal from a judgment of the county court confirming the report of commissioners apportioning expenses for widening a street among lotowners and railroad corporations, unless the record shows a different state of facts, the presumption, under the provisions of said act, is that such expenses were apportioned according to the benefits received by each. (Appeal of North Beach etc. R. R. Co., 32 Cal. 499.)

122. A specification in an objection to the confirmation of the report of the commissioners appointed to estimate benefits and assess damages to lotowners for widening Kearny street, in San Francisco, that "the commissioners have assessed some lots far beyond, and others much below the proper sum," is too general to admit proof that a lot in which the objector had no interest was assessed relatively too low in comparison with another lot in which the objector has no interest. (Appeal of Brooks, 32 Cal. 558.) Cited 42 Cal. 68.

Widening, report of commissioners not disturbed where evidence conflicting. See Appeals, 2600.

Commissioner to assess damages, compe-

tancy on question confirming report. See *Witnesses*, V, 8, c. I.

123. Judgment of county court confirming report of the board of public works on the proceedings to widen Montgomery avenue in reciting a jurisdiction which it had not, or a jurisdiction which it had, does not estop the defendant from questioning the jurisdiction and showing jurisdictional defects in proceedings by which it is proposed to deprive him of his property. (*Mulligan v. Smith*, 59 Cal. 206, 233.)

124. The opportunity to be heard before the county court, accorded by the statute of March 23, 1876, for the widening of Dupont street to any person interested who felt himself aggrieved by the action or determination of the board, as shown in their report, is sufficient to constitute due process of law. On such hearing, the court was authorized to determine all possible objections made to the report by the parties aggrieved, including any alleged betrayal of their trust by the commissioners, or any objections to the validity of the act, or to the passage of the necessary resolution by the board of supervisors, or to the giving of the required notices by the commissioners, and could by its final order modify the report in any respect so as to adjust the final determinations in regard to the assessments to the report as altered. (*Lent v. Tillson*, 72 Cal. 404.)

125. The ordinance of the city of Los Angeles, adopted July 8, 1889, for the widening of First street, in that city, did not confer upon the city any jurisdiction to make the improvement contemplated thereby, or authorize the commissioners appointed thereunder to determine the amount of money which the owners of land to be taken should accept for its conveyance to the city, and the owners cannot be compelled to accept that amount or make a conveyance of their land; and the ordinance cannot be used as the basis of any action for condemnation of the land sought to be included in the improvement. (*City of Los Angeles v. Dehail*, 97 Cal. 13.)

126. Objection that property benefited was not lawfully assessed for costs and expenses of the improvement is irrelevant when urged by parties whose property does not appear to have been assessed. In a proceeding to condemn property for the widening of a street, whether the money paid for condemning land was obtained through regular or irregular assessments upon the property of others does not affect the right to condemn lands not assessed. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

127. It is not erroneous for commissioners appointed to estimate the benefits that will result to property holders by the widening of a street to assess the same upon the hypothesis that all lots on the street will be benefited in the ratio of their values, provided there is evidence warranting such a conclusion. (*Appeal of Piper*, 32 Cal. 530.)

128. If commissioners appointed to assess damages and estimate benefits to lotowners for widening a street apportion the amount of money to be raised into two or more parts, one part on the property holders of the street

to be widened, and another part on the owners of property fronting on the cross streets determined to be benefited, and no complaint is made as to the correctness of this apportionment, the owners of lots on the street to be improved cannot complain of the manner in which the part apportioned to the cross streets is afterward apportioned among the property holders on those streets, and vice versa. (*Appeal of Piper*, 32 Cal. 530.) Cited 32 Cal. 560, 568; 5 Nev. 366; 8 Nev. 176.

129. The benefits resulting from the widening of a street accrue to the owner through his estate in the land, whether the estate be a fee or a leasehold, and not through the buildings thereon. The enhancement in value accrues to the land, not to the buildings. (*Appeal of Piper*, 32 Cal. 530.)

130. A statute authorizing the assessment of a portion of the expenses for widening a street in a city upon lots benefited, situate on cross streets adjacent to the street to be widened, is constitutional. (*Appeal of Piper*, 32 Cal. 530.)

131. A statute authorizing the board of supervisors of the city and county of San Francisco to determine what part of the city will be benefited by the widening of a street, and to assess the expense of the improvement upon the specific portion of the city thus determined to be peculiarly benefited, is constitutional. (*Appeal of Piper*, 32 Cal. 530.) Cited 54 Cal. 568.

132. The commissioners appointed to estimate benefits and assess damages for widening a street in San Francisco under the act of April 4, 1864, may properly assess the expenses to be borne by a lot which is under lease, to the owner of the fee, where the benefits all accrue to such owner, without apportioning any part of the same to the lessee. (*Appeal of Reese*, 32 Cal. 567.) Cited 42 Cal. 68.

133. In an action to restrain the tax-collector of the city of Los Angeles from enforcing an assessment levied on a certain lot for the purpose of paying the damages occasioned by the condemnation of land for widening and extending an adjacent street the city is not a necessary party defendant, for the reason that under its charter it is not liable in any event for the damages caused by the condemnation, and the assessment, if collected, would go into a special fund to be paid to the parties entitled thereto. (*Cohn v. Parcels*, 72 Cal. 367.)

134. Under the act of the legislature providing for the widening of Dupont street in the city and county of San Francisco (Stats. 1875-76, p. 439) money collected from taxation for the specific purpose of paying coupons attached to the bonds is payable only for their redemption, and cannot be used to pay damages awarded to property owners. (*Priet v. Reis*, 93 Cal. 85.)

135. The fact that part of the money collected from the sale of bonds which should have been used in the payment of damages to property owners was illegally used to pay the interest on the bonds, and that part of the money collected from taxes to pay inter-

est was used to redeem some of the bonds, does not, by operation of law, pass the money collected from taxation for the payment of coupons, to the damage fund, to replace that illegally taken therefrom. (*Priet v. Reis*, 93 Cal. 85.)

136. The determination of the commissioners, in the matter of widening Kearny street in San Francisco, as to who is the owner of a lot, or a building thereon, and entitled to the money to be paid for damages estimated, is not conclusive; but, where the right to the money is contested, the board of supervisors should pay the amount into the office of the county clerk, and leave the contest between the claimants to be settled by the courts in pursuance of the provisions of the statute. (Appeal of Lefevre, 32 Cal. 565.) Cited 42 Cal. 68.

137. Action under the fifteenth section of the act to widen Dupont street. Hunter, one of the defendants, was the owner of a lot, and plaintiffs had a leasehold interest therein. The Dupont street commissioners assessed the damages to Hunter. A warrant (No. 92) was drawn on the Dupont street fund in favor of Hunter, and was by him indorsed to one Tibbey, who was secretary of the board of commissioners. Afterward the board, ascertaining that there was a lease of the lot, and a doubt about the value and damages, drew another warrant (No. 114), the one in controversy, payable out of the same fund and for the same amount, and deposited it with the defendant Reynolds, as county clerk, and notified the defendant Hubert, as treasurer of the city and county. Afterward, Hubert, through a deputy, paid in full to Tibbey warrant No. 92. The court below held the payment was to Hunter, received by his authorized agent, and was in full satisfaction of the award and of warrant No. 114 and denied relief as against the defendants Hubert, treasurer, and Reynolds, county clerk. In this court, held, if the finding that warrant No. 92 was delivered to and left with Tibbey by defendant Hunter, "with power and authority from said Hunter to deliver the same to defendant Hubert, treasurer, and collect and receive from him the amount expressed therein," means that there was an actual agreement between Hunter and Tibbey, to the effect that the latter should collect the warrant, either for himself or Hunter, the evidence does not support the finding. The evidence clearly shows that the warrant was to be left with Tibbey, "to be placed in the hands of the county clerk" until such time as the dispute between Hunter and the plaintiffs should be determined. (*Priet v. Hubert*, 62 Cal. 9.)

138. Such payment to Tibbey of the money which should have been reserved for distribution in accordance with the decree herein was not a payment to Hunter; nor could the plaintiffs be deprived of their interest in warrant No. 114, or the proceeds thereof, by the circumstance that the treasurer had paid a like sum to another person upon another warrant in which the plaintiffs had no interest. (*Priet v. Hubert*, 62 Cal. 9.)

139. The payment by the treasurer, with full knowledge of the facts, to Tibbey of the

moneys which he himself had set apart for the payment of warrant No. 114, was made in violation of his official duty. (*Priet v. Hubert*, 62 Cal. 9.)

140. Section 15 of the act provides that a party in interest may, in a case like this, proceed against the treasurer by a bill in equity, all persons in interest, if known, being made parties. And it was the intent of the legislature that the decree of the court should adjudicate the conflicting claims and provide for a just and proper distribution between the claimants, and should conclusively determine the duty of the treasurer to pay to the parties adjudged to have an interest in the warrant the sum decreed to be the value of such interest. (*Priet v. Hubert*, 62 Cal. 9.)

Statute authorizing issuance of bonds, validity of. See post, 521.

141. Proceedings for the widening of a street in San Francisco, begun by an order for publication of notice of application therefor, made by the supervisors within eighteen months before the passage of the act of March 6, 1889, may be continued under that act, according to the terms of section 24 of that act. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

Dupont street bonds, illegal payment of. See Suretyship, 48, 49.

Sale for taxes to pay Dupont street bonds. See Injunctions, 9, 10.

XI. Grades and Grading.

1. Fixing Grades.

142. The power conferred on a board of supervisors to lay out, open, and grade streets in a city carries with it, by necessary implication, the power to establish the grade of such streets. (*Himmelmann v. Hoadley*, 44 Cal. 213.)

Distinguished 56 Cal. 369.

143. A statute fixing grades of certain streets in the city and county of San Francisco at their points of intersection fixes the grade at all intermediate points by connecting the named points by a straight line. (*Gafney v. City and County of San Francisco*, 72 Cal. 146.)

144. It is not necessary that the official grade of each street in the city of Napa be established separately. The board of trustees has power to establish the grade by a general ordinance, and this may be done without petition of property owners, provided no charge therefor is imposed upon them or upon the city. (*City of Napa v. Easterby*, 76 Cal. 222.)

145. The establishment of the official grade of two crossings of the same street, which are two blocks apart, does not establish the official grade of the intervening portion of the street. (*Dorland v. Bergson*, 78 Cal. 637.)

146. If proceedings to establish official grade of streets are void they may be disregarded and fresh proceedings commenced. (*City of Napa v. Easterby*, 76 Cal. 222.)

147. It did not require signatures of persons composing board of engineers to be attached to the maps and profiles prepared under the statutes of 1863-64, to establish the lines and

grades of streets in the city and county of San Francisco, in order that they should become valid. Their approval by the board of supervisors was sufficient for that purpose. (*Chambers v. Satterlee*, 40 Cal. 497.)

148. Construing, as must be done, all of the provisions of the charter of the city of Napa together, there appears the evident purpose that the adjacent property shall pay for the establishment of the grade, and that the power to establish the grade shall be employed only by an ordinance assessing the charge thereof upon the property fronting upon the street, or portions of the street where the grade is established, and that such grades would become established only when (at least) assessments had been levied upon the property liable to be assessed therefor. Held, as the case shows not only that such assessment was not ordered, but that, on the contrary, the person whose system of grading and sewerage was adopted as the official system was, contrary to the provisions of the charter, paid for his services out of the city treasury, it follows that the official grade has never been established. Per McKinstry, J., Morrison, C. J., and Thornton, J. (*City of Napa v. Easterby*, 61 Cal. 510.)

149. The finding of the court that the grade of the street on which was done the work for which the assessment mentioned in the complaint was made had been and was duly established, etc., is not sustained by the evidence. (*City of Napa v. Easterby*, 61 Cal. 510.)

150. A certificate of the county surveyor of the city and county of San Francisco, to the effect that he "has examined the work of curbs and macadam" done on a certain street, "and finds curbs on official grade and line," is insufficient to prove the establishment of the official grade of the street. (*Dorland v. Bergson*, 78 Cal. 637.)

151. An order of a board of supervisors, establishing the location, width, and grade of streets, if passed without authority, is rendered valid by being subsequently confirmed by the legislature. (*Himmelman v. Hoadley*, 44 Cal. 213.)

2. Change of Grade; Commissioners, Appointment and Report; Damages.

152. The act of the 1st of April, 1878, changing the grade of Bay street, in the city and county of San Francisco, was not in violation of any constitutional provision in force at the time of its passage, although its effect was to modify pro tanto the general statutes relating to street grades and improvements in San Francisco, and no provision was made for compensation to the owners of adjacent lots. (*Jennings v. Le Roy*, 63 Cal. 397.) Cited 75 Cal. 536; 93 Cal. 166.

153. As, under the statute of March 28, 1868, for the change of grade of streets in San Francisco (Stats. 1867-68, p. 463), the county court, before it is authorized to hear objections to the proceedings, must be notified "that the board of supervisors have confirmed the report" of the commissioners; and as, if they reject it, it must fail, and without their approval the proceedings must halt,

it follows that the supervisors have an unqualified veto power over the proceedings in this respect—the proceedings being in reality their own, and none the less so because carried on through the instrumentality of the county court. (*People ex rel. MacPherson v. San Francisco*, 43 Cal. 91.)

154. By the act of April 3, 1876, providing for the change of grade of certain portions of Montgomery avenue, it was provided that the county court should appoint three disinterested citizens, freeholders in the city and county of San Francisco, to assess benefits and damages to such lots of land as might, in their opinion, be more benefited than damaged. Held, that the act was impracticable, and could not be carried into effect; that, in the absence of any defined assessment district, every freeholder in the city and county had an interest to decide that his own real property was not benefited by the change of grade, and that it was therefore impracticable to appoint disinterested commissioners, as required by the act. (*Montgomery Avenue case*, 54 Cal. 579.)

155. Under the statute of March 28, 1868, authorizing the supervisors of San Francisco to modify or change the grade of streets (Stats. 1867-68, p. 463), the final judgment to be rendered by the county court must be one rendered in conformity with the report of the commissioners on file; and when it is ascertained that there are errors in the report, they must first be eradicated from it before the court can proceed to final judgment; nor can any report become the basis of final judgment except it shall first have received the approval and sanction of the supervisors. (*People ex rel. MacPherson v. San Francisco*, 43 Cal. 91.)

156. Under the statute for the change of grade of streets in San Francisco (Stats. 1867-68, p. 463), the report of the commissioners, upon which the judgment of the county court is to be rendered, as therein provided, must be one which, as a whole and in all its parts and details, and, if modified, with all its modifications, has received the approval and confirmation of the board of supervisors. (*People ex rel. MacPherson v. San Francisco*, 43 Cal. 91.)

157. The acts of 1868 and 1870, to modify the grades of streets in San Francisco, in declaring that the judgment of the county court on the second report of the commissioners shall be "final and conclusive," means that there shall be no appeal from the judgment, and that it shall not be reviewed by the county court, except by motion for a new trial. (*Appeal of Houghton*, 42 Cal. 35.) Distinguished 79 Cal. 108.

158. Where the proceedings are free from fraud, and have been regularly conducted, the change of grade is absolutely fixed by the act of the board of supervisors in adopting the report of the commissioners. (*Matter of Beale Street*, 39 Cal. 495.)

159. Under the act of March 28, 1868, concerning the change of street grades in San Francisco, it was the purpose of the legislature to confine the award of damages to those who should petition for their allowance as

provided by said act. (*Matter of Beale Street*, 39 Cal. 495.)

160. The commissioners, under the above act, have no authority to award damages in excess of the amount claimed in the petition. (*Matter of Beale Street*, 39 Cal. 495.)

161. The county court has no authority to inquire into the question of mere valuation, that being fixed by the action of the commissioners, in conjunction with the committee of the board of supervisors; no fraud being alleged, the authority of the county court is confined to errors of jurisdiction and irregularities appearing on the face of the proceedings. (*Matter of Beale Street*, 39 Cal. 495.) Cited 43 Cal. 99.

162. The only remedy for property owners who have suffered damage, under the acts of 1868 and 1870, relative to modifying grades of streets in San Francisco, is by application to the legislature for relief. (*Appeal of Houghton*, 42 Cal. 85.)

Proceedings to modify grade, appealability of. See Appeals, I, 3, g.

3. Grading.

a. Power to Order and Jurisdiction Over.

163. Under the act of 1859 the board of supervisors of San Francisco have power to provide for the grading of all located streets, whether new or old, and as well of those lying east of Larkin street as to the west of it. (*Houston v. McKenna*, 22 Cal. 550.)

164. Whenever the condition of a street is such as, in the estimation of the board of supervisors, it is proper that the burden of regrading the same should be borne by the entire block, the board has authority to order the improvement, even though a similar expense has previously been borne by the property owners for the original grading. (*McVerry v. Boyd*, 89 Cal. 304.)

165. The San Francisco street act of 1878 was merely supplementary to the act of 1872, which was left intact as regards the authority of the street superintendent to make a contract for the grading of one block, and the jurisdiction of the board of supervisors to have the work performed. Nor is such contract void because authorizing only part of the improvement authorized by the act of 1878 of eight blocks in one contract. That act does not require that such work should be let as an entirety, but gives the board of supervisors discretionary power to order what part thereof should be graded in one or more contracts. (*Ede v. Cogswell*, 79 Cal. 278.) Cited 93 Cal. 161, 166.

166. The fact that the portion of the street sought to be improved had been divided into two separate parts by a cross-street, which had been previously graded, does not invalidate the assessment, as the whole of the street might have been graded, and the blocks divided by cross-streets included in one petition and assessment. (*Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40.)

b. Statute Prescribing Manner of Work.

167. If an act commands a municipal body to proceed and grade a certain street, pre-

scribing the way and manner of doing the same, and the grade to be adopted, and leaving nothing to the discretion of the municipal body except certain incidents to the main work, courts will not construe the act as not mandatory because these incidents are left to the discretion of the body. (*People ex rel. Ferguson v. Supervisors of San Francisco*, 36 Cal. 595.)

c. Petition for.

168. The board of supervisors of the city and county of San Francisco has jurisdiction to order a street to be graded in any part of the city, without a petition first presented for that purpose, except when it is proposed to partially improve or grade a street west of Larkin street, without reference to its official width or grade. (*Dyer v. North*, 44 Cal. 157.)

169. The board of supervisors of the city and county of San Francisco have no jurisdiction to give notice of an intention to order or to order grading done on any street mentioned in the third section of the act of 1872, page 805, in the absence of a petition signed by the owners of a majority of the frontage of the land made liable for the grading, except public property. (*Turrill v. Grattan*, 52 Cal. 97.)

Cited 87 Cal. 42.

170. An assessment for grading the crossing of two streets in the city and county of San Francisco, held to be invalid for want of jurisdiction in the board of supervisors to order the work without a petition from the property owners or a recommendation by the superintendent of streets. (*Gateley v. Leviston*, 63 Cal. 365.)

171. It appearing that two or more blocks on each side of street have been graded in San Francisco, and that the work of further grading upon the same street had been recommended by the superintendent of streets, and the resolution of intention of the supervisors to do the work had been duly passed and published, it is not necessary to jurisdiction that there should be a petition by the owners. (*Spaulding v. Wesson*, 84 Cal. 141.)

172. The board of supervisors of the city and county of San Francisco, upon the recommendation of the superintendent of streets, were authorized by the act of April 1, 1872, to order a block of streets to be graded, without a petition therefor from the property owners, whenever two or more adjacent blocks had been graded on each side of the ungraded one. The grading for which the assessment in question was levied was done under an order so made, upon the determination by the city officials that an adjacent block had been graded about twenty years previously. In the action to foreclose the assessment the evidence showed that the present grade of the adjacent block varied in places from the official grade, the variation ranging from a few inches to a foot and three-quarters. Held, that the evidence was insufficient to overcome the presumption that the block had been graded. (*Fanning v. Bohme*, 76 Cal. 149.)

173. Under section 4 of the act of April 1, 1872 (Stats. 1871-72, pp. 805, 806), all street

works referred to in the act may be ordered by the board of supervisors without a petition, except grading, but as to grading a petition is always required, except in the case where the street has been graded, or graded and macadamized, or graded and paved, for the distance of two or more blocks upon each side thereof of any one or more blocks or crossings of a street which is not improved. The proviso "that when one-half or more of the grading, etc., of any one street lying between two main street crossings has been already performed, the board of supervisors may order the remainder of such grading, etc., notwithstanding the objection of any or all of the property owners," does not dispense with the necessity of a petition. (*Dyer v. Miller*, 58 Cal. 585.)
Cited 63 Cal. 366.

174. The rule that whenever the jurisdiction of a court not of record depends on a fact which the court is required to ascertain and settle by its decision, such decision, if the court has jurisdiction of the parties, is conclusive and not subject to any collateral attack, applies to the judicial action of a board of supervisors upon a petition for the grading of a street in deciding that a majority of the frontage of lots on the street where the work was proposed to be done was represented in the petition for the work. (*Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40.)

Evidence that petitioner was not owner of more than one half the frontage. See post, 677.

d. Resolution of Intention.

175. Under the statute regulating street improvements in San Francisco the board of supervisors adopted a resolution of intention to grade Clay street from Taylor to Jones and from Jones to Leavenworth streets, and the crossing of Clay and Jones streets, and subsequently ordered said work to be done, and the clerk advertised for proposals for its performance, notifying bidders to put in separate bids for each block and said crossing. The board awarded a contract for the whole work. The only contract entered into by the superintendent of streets, etc., with the successful bidder, was for the grading of one block only—that from Jones and Leavenworth streets. Held, (1) that the resolution of intention and its publication constituted the sole authority of the board to proceed, in the statute mode, to order said work to be done, and that thereby no authority was conferred to act upon any other or different work; (2) that the work designated in the resolution of intention constituted one distinct and entire subject matter; (3) that the resolution of award constituted the sole authority to the superintendent, who acted ministerially only in making a contract under it, and that the contract, by reason of variance between its terms and the resolution of award, was unauthorized and void; and (4) that a contract duly authorized under said act, and executed according to its requirements, is indispensable to the validity of any assessment upon property to pay for street improvements. (*Dougherty v. Hitchcock*, 35 Cal. 512.)

Cited 50 Cal. 556; 89 Cal. 321; 96 Cal. 193; 98 Cal. 430.

176. A resolution of the board of supervisors of the city and county of San Francisco of intention to grade a street must be presented to the president of the board for his approval; and if not so presented, no lien can be enforced on the lots adjacent to the street for assessments for grading the same. (*Creighton v. Manson*, 27 Cal. 613, cited 30 Cal. 179, 180, 42 Cal. 448, overruled 31 Cal. 243; *Thompson v. Hoge*, 30 Cal. 179.)

177. A resolution of the board of supervisors of the city and county of San Francisco declaratory of intention to grade a street must be presented to the president of the board for his approval. (*Thompson v. Hoge*, 30 Cal. 179.)

178. Since the amendment of the Consolidation Act, approved April 25, 1862, it has not been necessary for the mayor of the city and county of San Francisco to sign a resolution of the board of supervisors declaratory of their intention to improve a public street, in order to render it valid. (*Hendrick v. Crowley*, 31 Cal. 471.)

e. Liability of City.

179. Under the act of April 1, 1878, providing that the city and county of San Francisco should be liable for grading Bay street, in front of the United States reservation, upon the refusal of the government of the United States to pay therefor, a refusal to pay, made by the general in command of the forces on the reservation, by the assistant treasurer of the United States, and by the secretary of war, is sufficient to fix the liability of the city and county. (*Onderdonk v. San Francisco*, 75 Cal. 534.)

180. A municipal corporation is not liable for damages caused by the prevention of the flow of surface water from the lot of a private owner, by reason of a raising of a street to the grade established by law, where such surface water does not run in a natural channel across the lot. (*Corcoran v. City of Benicia*, 96 Cal. 1.)

181. The nuisance is on the lot, and not in the street, and the only remedy to prevent the accumulation of the water is by the owner's raising the lot to a level with the street, which the city is not bound to do, and not by an action against the city to abate the nuisance and for damages. (*Corcoran v. City of Benicia*, 96 Cal. 1.)

182. A city is not authorized to place any obstruction across the channel of a natural watercourse without taking the necessary precautions for the escape of the water flowing therein, and if the water is backed upon private property by means of an embankment erected in the grading of a street, and it does not provide for the escape of the water by means of a permanent sewer, or some other channel of escape in lieu thereof, it is liable to an action by the owner of the property flooded to abate the obstruction as a nuisance and to recover the damages thereby sustained. (*Richardson v. Eureka*, 96 Cal. 443.)

183. In an action against the city for damages caused by such backwater the question

whether the plaster in plaintiff's building, which had been caused to settle six or seven inches, would be in the same condition after as before the building settled is not a proper subject for expert evidence. (*Richardson v. Eureka*, 96 Cal. 443.)

Liability of city for injuries from grading. See post, XV, 6.

XII. Improvements.

1. Jurisdiction Over and Delegation of.

184. The power to determine upon the expediency of a proposed improvement, or whether the same will be beneficial, rests with the legislature, or such local authorities as have been charged with the duty of determining the policy of the government in those matters. In the determination of such a question, the parties affected by the proposed improvement have no constitutional right to be heard before the assessment is made, and cannot object to the assessment on the ground that the improvement is not beneficial, unless it manifestly appears that the legislature abused its discretion in the matter, or that no such benefit can or could reasonably have been expected to result. (*Lent v. Tillson*, 72 Cal. 404.) Cited 79 Cal. 401; 80 Cal. 16; 92 Cal. 326, 343.

185. The municipal government of a city, in causing street improvements to be made, acts under the authority conferred upon it by the legislature, and is subject to all the constitutional limitations and restraints imposed on the legislature, and has no other or greater power than is and lawfully may be conferred on it by the legislative act. (*Oreighton v. Manson*, 27 Cal. 613.) Distinguished 76 Cal. 228.

186. Under the provisions of sections 3 and 8 of the act of 1862 (Stats. 1862, p. 291), the jurisdiction is vested in the board of supervisors to determine whether the whole or a portion, and if a portion what portion, of a street improvement shall be done as a single improvement. It is necessary to a proper execution of this important power, and to protect the interest of property owners, that such determination should be distinctly and clearly expressed, so as to enable those interested to act intelligently. When so expressed, the subsequent proceedings of the board must be in strict pursuance thereof as their sole authority, and, if not so pursued, such subsequent proceedings will be void. Per Mr. Chief Justice Sawyer. (*Dougherty v. Hitchcock*, 35 Cal. 512.) Cited 53 Cal. 250; 96 Cal. 193; 98 Cal. 430.

Macadamizing portions of a street. See post, 201.

187. The board of supervisors of San Francisco possesses all the authority in respect to the improvement of streets which is not conferred expressly, or by necessary implication, upon some of the officers mentioned in the statute. (*Donnelly v. Tillman*, 47 Cal. 40; *Donnelly v. Marks*, 47 Cal. 187, cited 61 Cal. 517.)

188. The board of supervisors of the city and county of San Francisco, in respect to

street improvements, have whatever power is conferred by the statutes on that subject, and no other. The power which they possess must be exercised in the mode prescribed by said statutes, and in no other. "The mode in such cases constitutes the measure of the power." (*Nicolson Pavement Co. v. Painter*, 35 Cal. 699.)

Cited 15 Nev. 44.

189. The evident policy of the general law upon the subject of street improvements in San Francisco, as passed in 1862, and amended in 1863 (Stats. 1862, p. 391, 1863, p. 525), is to secure and protect the persons who are made to pay the cost of the improvement from official mismanagement and wanton or reckless exercise of power, by advising them of what is proposed to be done, by enabling them to do the work themselves, if they so elect, and especially by securing the performance of the work by responsible persons, and upon the lowest terms. This policy cannot be defeated by the board of supervisors by setting aside the measures which have been provided for its enforcement. (*Nicolson Pavement Co. v. Painter*, 35 Cal. 699.)

190. The board of supervisors has no power, in making street improvements, so far as conferred by said statutes of 1862 and 1863, to do any kind of work which, for any cause, cannot be let or contracted for in the mode prescribed in said statutes, or which the owners of the frontage are legally prohibited from performing. (*Nicolson Pavement Co. v. Painter*, 35 Cal. 699.)

191. The legislative charter of the city and county of San Francisco confers the entire control, supervision, and management of all the public streets, thoroughfares, etc., within its corporate limits, upon the board of supervisors and superintendent of public streets and highways. (*Eustace v. Jahns*, 33 Cal. 3.)

192. It was the intention of the statute authorizing street improvements in the city and county of San Francisco, to leave open for judicial inquiry all questions of a jurisdictional character, and to submit all other questions to the decision of the board of supervisors. (*Chambers v. Satterlee*, 40 Cal. 497.)

193. The board of supervisors of the city and county of San Francisco acquire jurisdiction of the subject matter of improving a street in the city of San Francisco after the expiration of the notice of intention to improve. (*Dougherty v. Miller*, 36 Cal. 83.)

194. The board of supervisors of San Francisco cannot delegate the power to determine where work is necessary on a street. (*People v. Clark*, 47 Cal. 456.)

Delegation, leaving determination of place of work to superintendent. See post, 245.

2. Statutes Governing: Proceedings are *In- vitum*.

195. The acts of March 6, 1883, and of March 18, 1885, are general laws, within the meaning of section 6 of article XI of the constitution, affecting all municipal corporations in the state, and were within the power of the legislature to enact. The latter act has been and is now in force in the city and county of San Francisco since the date of its

passage. (Thomason v. Ashworth, 73 Cal. 73.)

Cited 73 Cal. 507, 623; 76 Cal. 454; 85 Cal. 346, 347; 96 Cal. 405.

Act of 1885, whether a general law. See post, 270, 275.

Street law of 1885, constitutionality of. See post, 271, et seq.

196. Section 5 of act of March 18, 1885, relating to street improvements, did not supersede or repeal section 628 of the Municipal Corporation Act of March 13, 1883. (Capron v. Hitchcock, 98 Cal. 427.)

197. Proceedings by which the citizen is to be divested of his property in invitum must be strictly pursued. (City of Stockton v. Whitmore, 50 Cal. 554.)
Cited 96 Cal. 192.

198. In proceedings where the property of a citizen is to be taken, every requirement of the statute having the least semblance of benefit to the owner must be complied with, and when the form of the statutory proceeding is prescribed, its observance becomes essential to the validity of the proceedings. (Shipman v. Forbes, 97 Cal. 572.)

199. In an action to recover an assessment levied on a lot for grading a street in a city, the lotowner may show and rely on as a defense any substantial error in the proceedings which could not have been remedied by an appeal to the council. (City of Stockton v. Creanor, 45 Cal. 648.)

3. Macadamizing, Planking, and Paving.

200. The word "macadamize" means to cover a street or road by the process introduced by Macadam, which consists of the use of small stones of a uniform size, consolidated and leveled by heavy rollers; and is entirely distinct from the construction of rock gutterways formed by laying flat stones even on their upper surfaces and filling the interstices with clean, hard rock, finely broken and screened. (Partridge v. Lucas, 99 Cal. 519.)

201. Under the statutes of 1864 and 1870, authorizing the city council of the city of Oakland to order the whole or any portion of the streets of the municipality macadamized, the city council has power to let the work of macadamizing separate portions of a street in one contract. (Alameda Macadamizing Co. v. Williams, 70 Cal. 534.)

202. The board of supervisors of the city and county of San Francisco can authorize a contract to be made for macadamizing a street after a contract for grading has been entered into and before the grading has been done. (Dyer v. Hudson, 65 Cal. 374.)
Cited 72 Cal. 151.

203. Under the statute of April 4, 1870, a petition signed by a majority of the property owners is not necessary to authorize the board of supervisors to contract for macadamizing a street in the city and county of San Francisco, although it is essential to authorize the work of grading; and a contract for macadamizing is not rendered invalid because the resolution and order of the board of supervisors for such work embraced the work of grading also, and no petition for the grading had been

made by the property owners. (Gafney v. City and County of San Francisco, 72 Cal. 146.)

204. A contract to macadamize a street in San Francisco, made with the superintendent of streets, binds the party to use such materials as are required by the superintendent, if it provides that the work shall be performed according to specifications annexed and such specifications made by the superintendent name the material to be used. (Emery v. San Francisco Gas Co., 28 Cal. 345.)
Cited 31 Cal. 246; 32 Cal. 276, 279; 72 Cal. 151; 99 Cal. 522.

205. Supervisors have authority, when a street is ordered to be macadamized, to require the construction of rock gutterways. (Burk v. Altschul, 66 Cal. 533.)
Cited 99 Cal. 521.

206. Macadamizing the streets and curbing the sidewalks are made by statute distinct kinds of improvement in Oakland, and the former does not include the latter. (Beaudry v. Valdez, 32 Cal. 289.)
Cited 50 Cal. 70; 99 Cal. 520.

207. Macadamizing of street and construction of sidewalks are different kinds of work in San Francisco, and when a street is ordered to be macadamized, it meant that the roadway only is to be improved. (Himmelmann v. Satterlee, 50 Cal. 68.)
Cited 52 Cal. 441; 99 Cal. 520; 13 Or. 103.

208. A resolution of intention to curb and macadamize a street does not include the sidewalk. (Dyer v. Ohase, 52 Cal. 440.)
Cited 69 Cal. 641; 97 Cal. 312; 99 Cal. 523.

209. When the grade and width of a street in San Francisco have been officially established, it is competent for the board of supervisors to order the street to be planked, although it may not have been graded. (Knowles v. Seale, 64 Cal. 377.)

210. Under the Consolidation Act of 1856, for San Francisco, and the act of 1859 amendatory thereof, the board of supervisors have no power to order a contract for planking, paving, piling, or repaving a street which has been once paved, piled, etc., except in the instance given in section 53 as amended by section 10 of the act of 1859. (Blanchard v. Beideman, 18 Cal. 261.)

211. In other cases not within this exception, where the planking or paving of a street or sidewalk needs local repairs, the supervisors cannot authorize a contract to be made by the superintendent of streets for such repairs; but the proceeding must be by notice to the owner, etc., of the property, according to section 56 as amended by section 12 of the act of 1859. (Blanchard v. Beideman, 18 Cal. 261.)

4. Resolution of Intention and Notice.

212. The twenty-eighth section of the act to authorize the improvement of the streets in the city of Oakland, which provides that the council shall have full power to improve Broadway street in such manner as it may deem proper, does not dispense with the necessity of the passage of a resolution of intention, and its publication, before an im-

provement can be made on Broadway. (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

213. The plaintiff, in an action to recover an assessment for improving a street in San Francisco, cannot recover, except upon the presumption that a notice of intention to improve, containing a proper designation of the work to be done, was given, and that the contracts afterward awarded substantially conformed to the description of the proposed work as given in the notice. (*People v. Clark*, 47 Cal. 456.)
Cited 47 Cal. 458, 604; 53 Cal. 45.

214. In an action for the foreclosure of a street assessment, held, that the printed signature of the clerk to the resolution of intention was sufficient. (*Williams v. McDonald*, 58 Cal. 527.)
Cited 76 Cal. 611.

215. Under the provisions of section 3 of the act of 1862, the mayor of the city and county of San Francisco is not required to sign a resolution of the board of supervisors declaring their intention to improve a public street. (*Cochran v. Collins*, 29 Cal. 129.)
Cited 31 Cal. 244, 473.

216. A resolution of the board of supervisors of San Francisco declaratory of their intention to perform work on a street, adopted since the amendments to the Consolidation Act made in 1862, need not be presented to the mayor for his approval. (*Taylor v. Palmer*, 31 Cal. 240.)
Cited 31 Cal. 473; 32 Cal. 275, 487; 54 Cal. 569; 97 Cal. 111.

217. The resolution of the city council of Oakland to improve the public streets and to accept bids to perform the work need not be approved by the mayor. (*Beaudry v. Valdez*, 32 Cal. 269.)
Cited 99 Cal. 520.

218. Where the resolution of intention to do street work in San Francisco and the resolution ordering the work were regularly passed by the board of supervisors, and the resolution approving the award was passed by a three-fourths vote of the board, the resolutions are sufficient, and the approval of the mayor is not requisite. (*McDonald v. Dodge*, 97 Cal. 112.)

219. Act authorizing street improvements, which does not provide for notice of the proceedings to the parties to be assessed for the expense, is unconstitutional and void. (*Boorman v. Santa Barbara*, 65 Cal. 313.)
Cited 72 Cal. 416; 86 Cal. 46.

220. The provision of the statute which authorizes the board of supervisors to order street work to be done after notice of their intention to order the work has been published for ten days requires the notice to be given by the board itself, and the publication required can only be made by their authority. Per *Temple, J.*, concurring. (*Chambers v. Satterlee*, 40 Cal. 497.)

221. The failure of the board of supervisors to publish for the length of time required by law a resolution of intention to do specified street work renders an assessment for such work void, and a sheriff's deed given under a foreclosure of the lien is invalid and vests no

title in the purchaser. (*Brady v. Burke*, 90 Cal. 1.)

222. The question reserved, whether the board of supervisors of San Francisco should order the publication of a resolution of intention to improve a street, or whether it may be published without such order. (*Dyer v. North*, 44 Cal. 157.)
Cited 46 Cal. 67; 63 Cal. 366.

223. A resolution of intention to improve a street in San Francisco, under the act of April 4, 1870, must be published five days, exclusive of Sundays. (*People v. McCain*, 51 Cal. 360.)
Cited 57 Cal. 332.

224. A resolution of intention to improve a street in San Francisco, under the act of April 4, 1870, must be published five days, exclusive of Sundays or nonjudicial days; and if the last day of a publication of five days falls on Sunday the board does not acquire jurisdiction. (*San Francisco v. McCain*, 50 Cal. 210.)
Cited 51 Cal. 361; 54 Cal. 487; 57 Cal. 332; 17 Or. 571.

225. A resolution of the board of supervisors of San Francisco, declaratory of their intention to perform work on a street, need be published only ten days, Sundays included. (*Miles v. McDermott*, 31 Cal. 271.)

226. Sundays are included in the count of the "ten days" which a resolution of the board of supervisors of San Francisco, declaratory of an intention to perform work on a street, is required to be published. (*Taylor v. Palmer*, 31 Cal. 240.)
Cited 31 Cal. 272; 34 Cal. 283; 97 Cal. 111.

227. A resolution of the board of supervisors, directing a publication of a notice of intention for street work for ten days from and after a particular date, the publication of which was not in fact commenced until two days after the time fixed in the resolution, but was then made for the legal period of ten days, was a substantial compliance with the provisions of the law. (*Chambers v. Satterlee*, 40 Cal. 497.)
Cited 54 Cal. 487; 57 Cal. 519; 61 Cal. 517; doubted 44 Cal. 160; distinguished 56 Cal. 369.

228. Where, under the statute, a notice of intention to make street improvements, etc., in San Francisco was required to be published daily (Sundays excepted) for ten days in the newspaper having the contract for the city and county printing, which paper is required to be printed and circulated in said city, and where such a notice was only printed in such paper for eight out of ten consecutive days (the remaining two days not being Sundays) but on said two days no issues were made by said paper, held, that the notice by publication was insufficient and void. (*Haskell v. Bartlett*, 34 Cal. 281.)
Cited 54 Cal. 487.

229. Where such newspaper, having the contract for said city and county printing, issued daily two editions, to wit, a morning edition, which was circulated in said city and the country, and an evening edition, which was circulated in the country only, held, that the publication of notice of street improvement in the evening edition of said paper only

was insufficient and void. (*Haskell v. Bartlett*, 34 Cal. 281.)

230. In section 3 of the act to provide for work upon streets within municipalities (Stats. 1885, p. 147), as amended by the act of March 14, 1889 (Stats. 1889, p. 157), which provides that the resolution of intention to do street work "shall be published and posted" in the manner prescribed in section 34 of the act, the word "and" is used in the sense of "or," and the statute is to be construed as requiring publication, if there is a paper published in the city, and posting in the manner prescribed in section 34, if no paper is printed in the city. A complaint in an action upon a street assessment, which alleges that the resolution was published for the required period in a daily paper printed in the city and designated by the city council for that purpose, is not defective because not also alleging that the resolution was posted. (*Washburn v. Lyons*, 97 Cal. 314.)

231. An allegation in the complaint that after the resolution of intention had been passed by the board of trustees for the grading and graveling of two blocks upon the same street, the street commissioner "caused to be conspicuously posted along said contemplated work more than three notices of resolution at less than three hundred feet in distance apart," shows a sufficient compliance with the statute in regard to the posting of the notices; and the fact that the work included a street crossing does not render it necessary that notice be also posted in front of each quarter block liable to be assessed. (*Miller v. Mayo*, 88 Cal. 568.)

232. A notice of street work published by the superintendent of streets, containing the whole of the resolution for the improvement and stating the date and fact of its passage, is not rendered defective because of an omission to refer to the resolution for further particulars. (*Schmidt v. Market St. etc. R. R. Co.*, 90 Cal. 37.)

233. In order to get jurisdiction to order street work done in San Francisco, the board of supervisors must describe the work in the resolution of intention. (*Brady v. King*, 53 Cal. 44, cited 76 Cal. 311; *People v. McCune*, 57 Cal. 153, cited 68 Cal. 430.)

234. A resolution passed by the board of supervisors of San Francisco, declaring their intention to improve a street, need not contain a complete plan and specifications of the proposed improvement. The resolution of intention need not describe the work with any more exactness than it is described in the law itself. (*Harney v. Heller*, 47 Cal. 15.) Cited 57 Cal. 300.

235. A resolution of the board of supervisors of San Francisco, declaring an intention to improve a street, may include a declaration of intention to both grade and macadamize. Such resolution sufficiently describes the work to be done if it declares that the street will be graded and macadamized from one designated point to another. (*Emery v. San Francisco Gas Co.*, 28 Cal. 345.) Cited 65 Cal. 375; 99 Cal. 522.

236. A resolution of intention, which provides that the crossing of McAllister and Polk streets be planked, and that the angular corners thereof be reconstructed, sufficiently describes the work. (*Deady v. Townsend*, 57 Cal. 298.)

237. A resolution of intention under the act of April, 1872, describing the work to be done, is not rendered uncertain by the provision, "except that portion required by law to be kept in order by the railroad company having its tracks thereon." (*Whiting v. Townsend*, 57 Cal. 515.)

238. The board of supervisors of the city and county of San Francisco must specify in a resolution of intention to perform work on a street the work to be done. It is not sufficient to declare its intention to cause certain repairs to be made "where necessary." (*Randolph v. Gawley*, 47 Cal. 458.)

239. If a resolution of intention to improve a street in San Francisco provides that the street shall be improved where necessary, the board of supervisors acquires no jurisdiction, and the assessment is void. (*People v. Ladd*, 47 Cal. 603.)

Cited 51 Cal. 563; 53 Cal. 45.

240. A resolution of intention to improve a street in San Francisco, which provided for constructing sidewalks where not already constructed, and for reconstructing them where necessary, does not give the board jurisdiction to perform the work. (*Himmelman v. McCreery*, 51 Cal. 562.)

Resolution of intent to macadamize does not include sidewalk. See ante, 207, 208.

Notice, what should be. See ante, 189.

Variance between resolution and contract. See post, XIV, 8.

Resolution of intention to macadamize does not include curbing. See post, XIV, 8.

Jurisdiction attaches after expiration of notice. See ante, 193.

Ordinance giving notice of street improvement as a contract. See Ordinances, III.

Records concerning publication of notices of street work, evidence contradicting. See Evidence, 383, 384.

5. Uniformity in Mode of; Making Diagrams and Estimates.

241. The legislature, in providing for the improvement of the streets of a city, may adopt one mode for a part of the streets and a different mode for the remainder, and may authorize the levy of an assessment per front foot to pay for either mode of improvement. (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

242. The adoption of a resolution by the city council of Stockton, directing the publication of advertisements inviting proposals for street work, to be done "in accordance with the plans and specifications therefor now on file in the office of the city clerk," is equivalent to the adoption of such plans and specifications, and is tantamount to a prior direction to the city surveyor to make a survey, diagram, estimates, and specifications. (*City of Stockton v. Skinner*, 53 Cal. 85.)

6. Order for Work, Form of, Validity, and Conclusiveness; Leaving Amount to Discretion of Superintendent.

243. An order that street work be done is not an "ordinance" within the meaning of the charter, and need not follow the form, "The board of trustees of the city of Napa do hereby ordain," etc., and need not be published. (*City of Napa v. Easterby*, 76 Cal. 222.)

244. An order to improve a public street, made by the board of supervisors of San Francisco, after having acquired jurisdiction, is in the nature of a judgment. (*Dougherty v. Foley*, 32 Cal. 402.)

245. The place where work is to be done, in improving a street in San Francisco, must be determined by the judgment of the board of supervisors in the resolution of intention. The board cannot leave the selection of the place where work is to be performed between any two points to the superintendent of streets, or any other person. (*Richardson v. Heydenfeldt*, 46 Cal. 68.)
Cited 47 Cal. 457, 458, 604; 51 Cal. 563; 53 Cal. 45; 58 Cal. 644; 71 Cal. 634.

246. Under the twenty-eighth section of the act to authorize the improvement of streets in Oakland after a resolution of intention to improve Broadway street has been passed by the council, and published, so that jurisdiction is acquired, the council may order such portion of the proposed work to be done as it may deem proper, or may leave the amount of work to be done on the crossings and culverts to the determination of the street superintendent. (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

247. Ordinance for improvement passed before expiration of time for presentation of protest is not thereby invalid. (*Burnett v. Sacramento City*, 12 Cal. 76.)

248. The statute only inhibits the council from proceeding with the improvements in case of such protest, and it was competent for them to pass the ordinance in advance of the time, provided they did not attempt to enforce it until afterwards. (*Burnett v. Sacramento City*, 12 Cal. 76.)

7. Improving More than One Street in Single Proceeding.

249. An act authorizing the common council of a city to lay out, open, or improve a street, upon the petition of property owners representing a majority of the frontage upon the proposed improvement, does not authorize the council to take steps in one proceeding to open or improve more than one street. (*Boorman v. Santa Barbara*, 65 Cal. 313.)

8. Legalizing Void Proceedings.

250. In reference to proceedings of statutory creation for the improvement of certain streets in San Francisco, held, that it was competent for the legislature, by subsequent enactment, to cure any defects or omissions in the proceedings of the board of supervisors or superintendent of streets. (*San Francisco v. Certain Real Estate*, 42 Cal. 513.)
Cited 51 Cal. 35, 36.

251. The amendatory act of February 1, 1870, ratifying and confirming all the orders and resolutions of the board of supervisors in reference to the "Second street cut" in San Francisco, and the proceedings of the superintendent of streets, and the contract and all the acts and doings of the contractor under it (Stats. 1869-70, p. 41), cured an omission of the supervisors to publish notice as required by the original act authorizing the improvement. (Stats. 1867-68, p. 595.) (*San Francisco v. Certain Real Estate*, 42 Cal. 513.)

XIII. Remonstrance Against Improvements; Effect of Acquiescence.

252. Section 3 of the act of March 18, 1885, (Stats. 1885, p. 147), which provides for a petition of remonstrance to the city council by any one who may feel aggrieved or may have objections to the proceedings of the council in relation to the street work to be done, and that the decision of the council shall be conclusive thereon, was intended to apply only to acts and proceedings within the power of the council, and does not apply in case of a void contract which forms a limitation upon the power of the council. (*Capron v. Hitchcock*, 98 Cal. 427.)

253. Where the charter of the city of Sacramento authorized the common council to levy a special assessment for grading and improving the streets of the city, and provided that when the council thought it expedient to open, alter, or improve any street, they should give notice, etc., and if one-third of all the owners in value of the adjacent property protest against the proposed improvement within ten days after the last publication, it shall not be made, and a protest was presented more than ten days after the last publication of such notice, held, that such protest was not presented in time, and was therefore ineffectual; further, held, that it must appear that one-third of the owners in value of the adjacent property united in it. (*Burnett v. Sacramento City*, 12 Cal. 76.)

254. If a remonstrance to a street improvement in San Francisco is filed with the board of supervisors, and it is referred to a committee, and the board, before the committee reports, and without any action directly on the petition, directs the work to be done, it is practically a passing upon and a decision against the remonstrance. (*Harney v. Heller*, 47 Cal. 15.)

255. The action was brought to foreclose an assessment for the macadamizing of a street in the city of Oakland. An issue was raised by the pleadings as to whether a majority of the property owners on the line of the street protested against the proposed work. On the trial, the court excluded the written protest offered in evidence by the defendant, but the plaintiff admitted the names of the protesters, and the number of front feet owned by each on the line of the work. Findings were waived, and judgments rendered in favor of the plaintiff. Held, that it would be presumed that a majority of the property owners on the line of the work did not protest. (*Alameda Macadamizing Co. v. Williams*, 70 Cal. 534.)

256. The legislature has power to provide that the tacit acquiescence of the parties interested in a street improvement, and their failure to challenge the proceedings therefor while in process, will estop them from questioning the regularity of the proceedings after they are completed. (*Lent v. Tillson*, 72 Cal. 404.)

257. An owner of land on a street who fails to file the remonstrance required by the act waives all objections to the form and granting of the petition, and the decision of the board in ordering the grading to be done is conclusive as against a collateral attack in an action to recover the assessment. (*Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40.)

258. Parties who do not remonstrate against a proposed street improvement in San Francisco cannot claim the benefit of a remonstrance filed by other parties. (*Harney v. Heller*, 47 Cal. 15.)

Order for work before expiration of time for protest. See ante, XII, 6.

Failure to protest after notice of improvement, effect of. See Ordinances, 46.

XIV. Contracts for Opening, Grading, or Improving.

1. *New Constitution, Effect on Contracts or Statutes; Amendment Dispensing With Previous Levy.*

259. Contract for street improvement made before constitution of 1879 went into effect was not impaired or affected by its provisions, and the granting of an extension of time for the performance of such contract before the time of performance had elapsed by its original terms is not a new contract. (*Oakland Paving Co. v. Barstow*, 79 Cal. 45, cited 79 Cal. 282; *Ede v. Cogswell*, 79 Cal. 278.)

Constitution does not affect statute entering into and forming part of contract. See post, 360.

260. A valid contract for street improvement made before January, 1880, was not impaired or affected by the constitution of 1879, and the granting of an extension of time for the performance of such contract does not constitute a new contract for street improvement within the constitutional prohibition contained in section 10 of article XI of that constitution. (*Ede v. Cogswell*, 79 Cal. 278; *Oakland Paving Co. v. Barstow*, 79 Cal. 45, cited 79 Cal. 28.)

261. Section 19 of article XI of the constitution of 1879, regarding street improvements, operates on all contracts for street work, whether entered into under laws existing when the section went into effect or under statutes subsequently enacted. (*Oakland Paving Co. v. Hilton*, 69 Cal. 479, 484.)

262. The street law of San Francisco, being part of the charter, was not repealed by the adoption of the present constitution, but will continue in force so long as the city and county continue under its existing organization. (*Donahue v. Graham*, 61 Cal. 276.) Cited 61 Cal. 324; 73 Cal. 80.

263. The act of April 25, 1863, authorizing the board of supervisors of the city and

county of San Francisco to widen streets and to provide compensation therefor, is still in force and unrepealed. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

264. The act of 1863 must be regarded as amendatory of the Consolidation Act, and consequently not repealed by any provision of the Political Code, section 4372 of which expressly continued in force all acts consolidating cities and counties and acts amendatory of or supplementing such acts. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

265. The act of 1863 was not repealed by section 14 of article I of the state constitution, nor was it repugnant to section 19 of article XI of the constitution of 1879. (*City and County of San Francisco v. Kiernan*, 98 Cal. 614.)

266. Section 19 of article XI of the constitution of 1879, regarding street improvements, was self-executing and required no legislation to enforce it. (*Oakland Paving Co. v. Hilton*, 69 Cal. 479; *McDonald v. Patterson*, 54 Cal. 245.)

267. Section 19 of article XI of the constitution is not a provision which requires legislation to enforce it; and the provision of the act of April 1, 1872, relating to street improvements in San Francisco, which authorize the superintendent of streets to execute contracts for such improvements—in advance of the levy and collection of the assessment—are inconsistent with the section referred to, and ceased to be operative on the first day of January, 1880. (*McDonald v. Patterson*, 54 Cal. 245, cited 54 Cal. 360, 56 Cal. 654, 57 Cal. 608, 69 Cal. 469, 473, 482, 483, 485, 73 Cal. 75, distinguished 60 Cal. 81, 90 Cal. 161; *Thomason v. Ashworth*, 73 Cal. 73, cited 96 Cal. 405.)

268. The provisions of the act of April 1, 1872, relating to street improvements in San Francisco, which authorize the superintendent of streets to execute contracts for such improvements in advance of the levy and collection of the assessment, are inconsistent with section 19 of article XI of the constitution (which is self-executing), and therefore ceased to be operative on the first day of January, 1880. (*Donahue v. Graham*, 61 Cal. 276.) Cited 69 Cal. 473, 479, 483, 485; 73 Cal. 75, 80, 81.

269. The act of April 1, 1872, providing for the improvement of streets in the city and county of San Francisco, in so far as it authorized a contract for street improvements to be entered into in advance of the assessment and collection of the money to be paid for the work done under it, was repealed by section 19 of article XI of the constitution of 1879, and was afterwards entirely repealed by the act of March 6, 1883, providing for the improvement of streets, lanes, alleys, courts, places, and sidewalks, and the construction of sewers within municipalities. This latter act was repealed by the act of March 18, 1885, on the same subject. (*Thomason v. Ashworth*, 73 Cal. 73.)

270. The act of April 1, 1872, relating to street improvements in San Francisco, was not repealed by the constitution; the act of March 18, 1885, was not a general law within

the meaning of section 6 of article XI of the constitution, and the judgment should be affirmed for insufficiency in the petition. *McKinstry, J., and Sharpstein, J.* (Thomason v. Ruggles, 69 Cal. 465.)

271. The act of April 1, 1872, was repealed by section 19 of article XI of the constitution; the amendment of 1884 was not constitutionally adopted, because it had not been entered at large on the journals of the legislature, and consequently the act of March 18, 1885, was invalid, and the act of March 6, 1883, was in force in the municipalities of the state. *McKee, J.* (Thomason v. Ruggles, 69 Cal. 465.)

272. Section 19 of article XI of the constitution of 1879 regarding street improvements repealed that part of the act of April 1, 1864, authorizing the city council of Oakland to improve streets, which permits a contract to be made in advance of the assessment. (Oakland Paving Co. v. Hilton, 69 Cal. 479, 485.)

273. The act of April 1, 1872, so far as it authorized the doing of street work without a previous levy and collection of an assessment, was repealed by section 19 of article XI of the constitution, and was not revived by the amendment of November 4, 1884, dispensing with the necessity of such previous levy and collection of the assessment. (Thomason v. Ruggles, 69 Cal. 465.)

274. The amendment was constitutionally adopted, and the act of March 18, 1885, providing for street work in municipalities, and repealing the act of March 6, 1883, was a general law within the meaning of the constitution, and was in force in the city and county of San Francisco. (Thomason v. Ruggles, 69 Cal. 465.)

275. *Oakland Paving Co. v. Tompkins*, 72 Cal. 5, affirmed on the point that section 19 of article XI of the constitution of 1879, providing that no contract for street work should be made until after the assessment therefor had been levied, collected, and paid into the city treasury, was repealed by the constitutional amendment proposed by the legislature in 1883, and adopted by the people at the general election in 1884. (Thomason v. Ashworth, 73 Cal. 73.)

276. Street law of 1885, in so far as it permitted street contracts before the collection of the money, is unconstitutional, as the amendment to section 19, article XI, of the constitution under which it was passed was never legally adopted. (Oakland Paving Co. v. Hilton, 69 Cal. 479, 515.)

Street act is valid. See Constitutional Law, 236.

2. Inviting Bids or Proposals; Validity of Bid; Fraud in.

277. An order of the board of supervisors of the city and county of San Francisco authorizing the clerk of the board to advertise for proposals to do street work is sufficient, although it do not mention sealed proposals nor specify the time or place of giving notice. (Himmelman v. Byrne, 41 Cal. 500.)

278. A resolution of the board of supervisors of San Francisco, authorizing their clerk to advertise for proposals to do certain work

mentioned in the resolution, on a street therein named, is sufficient authority to said clerk to advertise five days for proposals, in the mode provided by law, as well as to post notices in the office of the superintendent of streets. (Shepard v. Colton, 44 Cal. 628.) Cited 47 Cal. 40, 190.

279. The erroneous use of the word "regraded" instead of "graded," in the notice inviting sealed proposals for the grading of a street, does not vitiate the notice. (Brady v. Feisel, 53 Cal. 49.)

280. Under the act of March 27, 1872, "to reincorporate the city of Stockton," notices inviting sealed proposals to do street work must refer to a diagram and specifications of the proposed work. (City of Stockton v. Clark, 53 Cal. 82.)

281. When the resolution of intention to improve a street in San Francisco requires the street to be graded to the official grade, and two notices are published inviting sealed proposals, and the record only contains the first notice which requires the street to be graded one foot below the official grade, and is not published five days, and the award is made under the second notice, and judgment was for the plaintiff, the presumption is that the second notice was in accordance with the resolution of intention, and was published for the requisite time. (Himmelman v. Carpenter, 47 Cal. 42.) Cited 47 Cal. 50.

282. A notice inviting sealed proposals for taking a contract for improving a public street in San Francisco must be posted in the office of the superintendent of public streets five days, and must be posted before 9 o'clock A. M. of the first day, and remain till after 4 o'clock P. M. of the fifth day. (Brooks v. Satterlee, 49 Cal. 289; Himmelman v. Cahn, 49 Cal. 285, cited 49 Cal. 289, 54 Cal. 309, 69 Cal. 640.)

283. The act of April 4, 1864, required that a notice inviting certain proposals should be published daily (Sundays excepted) in a daily newspaper for five days. Held, that a publication commencing Wednesday, March 4th, and ending Sunday, March 8th, was insufficient. The last publication should have been on the 9th. (Alameda Macadamizing Co. v. Huff, 57 Cal. 331.)

284. The posting of the notice inviting proposals for the execution of work, in the office of the superintendent of streets, for a period of three days instead of five, as required by law, is a violation of the statute in a matter affecting the substantial rights of persons interested, and is such a defect as renders all the subsequent proceedings void. (Hewes v. Reis, 40 Cal. 255.)

Cited 45 Cal. 277; 54 Cal. 487; 76 Cal. 136; 89 Cal. 310.

285. If an ordinance of a city, providing for grading a street containing several blocks, requires that bidders shall bid on each block separately, a bid to grade the entire street at so much per cubic yard is an error which enables a lotowner to defeat the collection of an assessment. (City of Stockton v. Creanor, 45 Cal. 643.)

286. Under the act of April 1, 1872 (Stats.

1871-72, p. 822), referred to, the owner of property to be assessed for street improvement is entitled to have the work done by the lowest responsible bidder, upon a fair bidding, unaffected by any act, device, or machination of the bidder to whom the contract may be awarded, or any person in collusion with him. Accordingly, where it appeared that the successful bidder for a contract for street work had previously made a private contract with owners of the land to be assessed that he would do the work at a specified rate in lieu of the rate to be awarded in the contract, held, that this was a fraud upon the other owners, and vitiated the assessment, and rendered it a nullity. (*Brady v. Bartlett*, 56 Cal. 350.)

287. Held, further, that this defense was admissible under the act referred to. (*Brady v. Bartlett*, 56 Cal. 350.)

3. Awarding Contracts and Notice of.

288. If the charter of a city authorizes the council to cause the streets to be graded and to let contracts for that purpose, and provides that the council may reject all bids, a committee of the council cannot accept a bid or award a contract to grade a street. (*City of Stockton v. Creanor*, 45 Cal. 648.) Cited 71 Cal. 634.

289. If, in a proceeding to improve a street in San Francisco, the board of supervisors do not make an order for the publication of the notice of the award of the contract, all the proceedings subsequent to the award, including the assessment, are void. (*Reis v. Graff*, 51 Cal. 86.) Cited 51 Cal. 92; 61 Cal. 517.

290. In an action for the recovery of an assessment for the improvement of a street in San Francisco, it is necessary for the plaintiff to prove, if the same is denied, that notice of the award of the contract to the plaintiff for the improvement was published for five days, pursuant to an order of the board of supervisors. (*Shepard v. Colton*, 44 Cal. 628.)

291. The notice of an award of a contract for improving a street in San Francisco must be published by order of the board of supervisors. The clerk of the board cannot publish it without being authorized so to do by the board. (*Himmelman v. Satterlee*, 49 Cal. 387.) Cited 61 Cal. 517; 99 Cal. 520.

292. The board of supervisors of San Francisco must make an order that the notice of the award of a contract for improving a street be published. A publication of the notice without such order is void. (*Donnelly v. Tillman*, 47 Cal. 40, cited 49 Cal. 151, 387, 51 Cal. 90, 61 Cal. 517; *Donnelly v. Marks*, 47 Cal. 187, cited 51 Cal. 90, 61 Cal. 517.)

4. Entering Into; Form of; Election of Owners to do the Work; Bond of Contractor.

293. A contract to grade a street in San Francisco need not follow the precise language of the statute, or contain a condition in express terms that "the materials used shall be such as are required by the superintendent of streets." If by fair and reasonable construction it can be held to contain such condition,

the call of the statute is answered. (*Taylor v. Palmer*, 31 Cal. 240.)

294. In entering into a written contract for the performance of street work, ordered by resolution of the board of supervisors, the superintendent of streets becomes, pro hac vice, the special agent of the board, with authority to execute the contract which has been awarded, and no other or different contract. Per *Crockett, J.*, concurring. (*Chambers v. Satterlee*, 40 Cal. 497.)

295. Although contracts are made on behalf of the city and county of San Francisco in the name of the superintendent of streets, he is but the agent of the corporation in that behalf; and, pro hac vice, his act is the act of the corporation. By *Crockett, J.* (*Drew v. Smith*, 38 Cal. 325.)

296. After a contract for street improvement has been completed and the work accepted, a property owner cannot, in an action to foreclose the assessment lien, question the sufficiency of a power of attorney given by one person to another to enter into the contract with the superintendent of streets. (*McVerry v. Boyd*, 89 Cal. 304.)

297. In an action upon a street assessment in San Francisco (under the act of April 1, 1872), the defense was, that the superintendent of streets entered into the contract before the expiration of five days from the first publication of the award, the period within which, under the sixth section of the act, the property owners might elect to do the work. Held, that the premature action of the superintendent was one that affected his power or jurisdiction, and was void. (*Burke v. Turney*, 54 Cal. 486.) Cited 89 Cal. 321; 90 Cal. 614, 616; 98 Cal. 430.

298. Under section 5 of the act of March 18, 1885, authorizing street improvements, which provides that after the contract has been awarded, notice of the award shall be posted for five days, and that within ten days after the first posting the owners of the major part of the frontage upon the street to be improved may elect to take the work and enter into a contract to do the work at the price awarded, but if they fail so to elect the superintendent of streets must enter into a written contract with the original bidder, the superintendent has no authority to contract with the original bidder until ten days after the first posting of the notice, and a contract so entered into before the expiration of the ten days is without authority and void and cannot be the basis of a valid assessment. (*Manning v. Den*, 90 Cal. 610.) Cited 98 Cal. 430, 431.

299. Under the charter of the city of Oakland the superintendent of streets has the final determination of the facts as to whether the owners, or their agents, of three-fourths of the frontage on the street where work is to be done elected to do the work ordered on the street on which they front, and after he has entered into a contract with such persons he cannot be compelled by a writ of mandamus to enter into a contract for the work with the contractor to whom the city council awarded the work. (*Fairchild v. Wall*, 93 Cal. 401.)

300. A complaint in an action upon a street assessment, which shows that the contract which is the basis of the assessment was not entered into within fifteen days after the first posting of the notice of the award to the contractor, as required by the act of March 18, 1885 (Stats. 1885, p. 147), but which contains no averment that the delay in entering into the contract was not caused by the neglect, failure, or refusal of the contractor, is fatally defective. (*Libbey v. Elsworth*, 97 Cal. 316, cited 97 Cal. 315; *Perine v. Forbush*, 97 Cal. 305, cited 97 Cal. 317, 99 Cal. 523.)

301. The clause in the sixth section of the act of 1862, amending the Consolidation Act relating to San Francisco, allowing the owners of the major part of the frontage of lots liable to be assessed for street improvements to take a contract at the price awarded without having put in a bid, means, in those cases where a small street terminates in a principal street, the owners of the major part of the frontage on the principal street. (*Cochran v. Collins*, 29 Cal. 129.)

302. A property owner cannot, in an action to foreclose a lien for a street assessment, object to the correctness of the assessment by reason of the omission on the part of the superintendent of streets to approve the bond of the contractor. (*Miller v. Mayo*, 88 Cal. 568.)
Cited 89 Cal. 309.

303. A requirement in a contract for street improvement under the provisions of the act of March, 1885 (Stats. 1885, p. 147), that the contractor shall give a bond with sureties conditioned "for keeping the streets so improved in thorough repair for the term of five years from the completion of the contract," vitiates an assessment for the work done under the contract. The act contains no grant of authority to the city council for keeping a street in repair, and needed repairs must be made only at the expense of the owners of the frontage where the repairs are required, at the time of such repairs; and the expense of keeping the street in repair cannot be assessed in advance against all the owners of frontage along the line, nor can the city council require them to pay for the expense of a guaranty that the work would be so well done as not to require repairs for five years. (*Brown v. Jenks*, 98 Cal. 10.)

Objection to validity of street contract cannot be first raised on appeal. See Appeals, 2414, et seq.

Contract by interested trustee is void. See Offices and Officers, VII, 6.

Limiting hours of work in street contracts. See Public Works.

5. Specifications.

304. If a contract to do work provides that the work shall be done according to certain specifications which are annexed to it, the specifications are a part of the contract. (*Taylor v. Palmer*, 31 Cal. 240.)

305. If, in improving a street in a city, the specifications require work not mentioned in the resolution of intention, it does not vitiate the assessment if such additional work is not

mentioned in the contract, and it does not appear that it was done, or that any charge was made for it. (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

306. In improving the street of a city, if the resolution of intention calls for "additional macadamizing," the specifications may provide for lifting the rock on the roadway, and relaying a part with new rock, and this is "additional macadamizing." (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

6. Contract for Patented Pavement.

307. Whatever power the board of supervisors of San Francisco has in relation to the Nicolson pavement is derived from the statute relating thereto (Stats. 1865-66, p. 720), under which the power can be exercised only upon the petition thereof of a majority of the owners, or their agents, in frontage, upon the condition that the pavement shall not cost to exceed twenty-eight cents in coin per square foot. Where the board advertised for proposals and awarded a contract for the construction of said pavement in said city without having received said petition, held, that the contract was void. (*Nicolson Pavement Co. v. Painter*, 35 Cal. 699.)
Cited 57 Cal. 474.

308. Where said board, while assuming to act under the statutes of 1862 and 1863, advertised for proposals to put down on a street in said city the Nicolson pavement, which had been patented under the laws of the United States, and awarded a contract therefor to R., who owned the exclusive right to put down said pavement in said city, and who alone put in a bid for said contract, held, that the board exceeded its authority, and the contract was void. (*Nicolson Pavement Co. v. Painter*, 35 Cal. 699.)

309. Proposals for bids to make certain street improvements in the city of San Francisco, consisting of more than one kind of work, were made by the board of supervisors, and let to R., who was the sole bidder therefor, as one job. One of said kinds of work was to put down the Nicolson pavement, the exclusive right to construct which in said city was at the time owned by the plaintiff, R's assignee, under letters patent of the United States. Held, that because this course had the effect to preclude all persons other than the owner of said patent right from bidding, and the property owners from taking the contract for any portion of said work, the contract as let was void. (*Nicolson Pavement Co. v. Fay*, 35 Cal. 695.)
Cited 57 Cal. 474.

7. Failure to Comply With Statute; Provisions as to Street Railroad; Fraud in.

310. Under the act of April 4, 1870, a contract for street work in the city and county of San Francisco is invalid, if the statutory requirements essential to vest the board of supervisors with jurisdiction to order the work have not been complied with. (*Daly v. City and County of San Francisco*, 72 Cal. 154.)
Cited 98 Cal. 430.

311. After the board has acquired jurisdiction to act, by due publication of the resolu-

tion of intention, they must still exercise their power in the mode prescribed by law. Per Temple, J., concurring. (*Chambers v. Satterlee*, 40 Cal. 497.)

312. Where a contract for street work provided for the doing of all the work specified in the resolution of intention, the fact that it contained a provision to the effect that there should be no assessment upon the adjoining property for improving part of the street occupied by a railway company, and that the contractor would accept payment from the street railway company for the portion of the work done upon the part of the street occupied by the company, does not render the contract void. (*Perine v. Forbush*, 97 Cal. 305.)

313. If the person who contracts with the street superintendent in San Francisco to improve a street, before the contract is made, makes a private contract with a part of the owners of the lots liable to be assessed for the improvement to do their work for less than the price allowed by the contract, this private contract is in fraud of the law under which the streets are improved; but the fraud is no defense in an action by the contractor to recover the assessment, and must be taken advantage of by remonstrance to or appeal to the board of supervisors. (*Nolan v. Reese*, 32 Cal. 484.)

Cited 39 Cal. 392; 40 Cal. 520; 44 Cal. 227, 279; 56 Cal. 363; 80 Cal. 11.

314. If the contractor to improve streets in San Francisco makes a private fraudulent contract with a part of the owners, it is no defense in an action brought by the contractor against another lotowner to recover his assessment. If such fraud is not discovered in time to appeal to the board of supervisors, relief can only be obtained by a direct attack on the contract. (*Himmelmänn v. Hoadley*, 44 Cal. 213.)

Cited 96 Cal. 193.

8. Variance Between Contract and Award or Resolution; Divisibility of Contract.

315. Award by board of contract is measure of power of superintendent of streets as to the time for the completion of the work, which is of the essence of the contract; and if the contract entered into by the street superintendent does not follow the award, but grants more time for the completion of the work than is specified in the award, it is not the contract he was authorized to make, and is therefore invalid; and an assessment based upon such void contract is also void, and cannot be enforced. (*Brock v. Luning*, 89 Cal. 316.)

Cited 97 Cal. 310, 313.

316. A resolution declaring an intention to improve a street in San Francisco is not vitiated because it states an intention to grade and macadamize from Mission to Howard street, while the contract executed under the resolution calls for grading and macadamizing that portion of the street "except where done." (*Emery v. San Francisco Gas Co.*, 28 Cal. 345.)

Cited 32 Cal. 276, 279; 47 Cal. 17; 57 Cal. 300; 65 Cal. 375; 99 Cal. 522.

317. If the contract to improve a street in Oakland includes a kind of work not named in the resolution of intention, the contractor can recover for such work as is named in the resolution if it can be separated from the other and estimated. (*Beaudry v. Valdez*, 32 Cal. 269.)

Cited 99 Cal. 520.

318. A contract in Oakland to improve a public street is valid only for such improvements as are named in the resolution of intention to improve passed by the common council. If such resolution declares only an intention to macadamize, the contract should not be let for both macadamizing and curbing the sidewalk. (*Beaudry v. Valdez*, 32 Cal. 269.)

Cited 35 Cal. 696.

319. Under a resolution of intention to macadamize and curb a street, the board of supervisors of San Francisco do not acquire jurisdiction to order work to be performed on a sidewalk; and if the notice for sealed proposals calls for work also to be done on the sidewalks, the contract following the notice is void unless the work done on the sidewalks can be separated from that done on the roadway. (*Himmelmänn v. Satterlee*, 50 Cal. 68.)

320. In the city of Stockton, if the council adopt a resolution of intention to improve a street, or part of a street, it has no jurisdiction to improve only a portion of the street embraced in the resolution. (*City of Stockton v. Whitmore*, 50 Cal. 554.)

Cited 99 Cal. 520.

321. The passage and publication of a resolution of intention to do street work are acts by which the board acquires jurisdiction to make such improvements as they describe in the resolution, and they cannot lawfully cause work other than that which is so described to be performed, or enter into any valid contract therefor. (*Partridge v. Lucas*, 99 Cal. 519.)

322. A resolution of intention to do street work declaring it to be the intention of the board of trustees of the town to "macadamize" a street, does not give the board jurisdiction to contract for the construction of rock gutterways in the street to be macadamized. (*Partridge v. Lucas*, 99 Cal. 519.)

323. A contract entered into by the superintendent of streets, under a resolution of the board of supervisors, ordering a street to be graded to the official grade, but which provided, in addition, that the roadway should be graded one foot below the official grade, is divisible in its nature, and is valid to the extent that it is authorized by the resolution of the board. Per *Crockett, J.*, concurring. (*Chambers v. Satterlee*, 40 Cal. 497.)

Contract must accord with the resolution. See ante, 213.

9. Owner as Party to.

324. Owner of property adjacent to street is not party to a contract for the improvement of the same, made between a third party and the superintendent of streets. (*Dyer v. Barstow*, 50 Cal. 652.)

325. The owner of property adjacent to a street, and which is assessed for a street im-

provement, is first brought into relations with the proceedings when the assessment is issued. (*Dyer v. Barstow*, 50 Cal. 652.)

Owner as party to the contract. See post, 403, 404.

Owner is not party. See post, 347.

10. Remedy by Appeal in Case of Irregular or Void Contract.

326. In case of an appeal to supervisors, provided for by law, where the proceedings are sufficient to give them a right to hear it, such right necessarily includes the power to determine it. (*Barber v. San Francisco*, 42 Cal. 630.)

327. If the city of Oakland contracts with a corporation, through its president, for the improvement of a street, and the president has not full authority from the corporation to make it, the remedy of the lotowner is by appeal to the city council. (*Oakland Paving Co. v. Rier*, 52 Cal. 270.)

328. The remedy for any objection by a landowner to the letting of a second contract for the grading of a street for an increased price, while a previous contract was in force, is by an appeal to the board of supervisors, under section 12 of the act of April 1, 1872, and not by defense to an action to recover the assessment under the second contract. (*Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40.)

329. Property owner whose property has been assessed under void contract for street work is not a party "aggrieved," and is not entitled to appeal from the action of the street superintendent in letting the contract. (*Brock v. Luning*, 89 Cal. 316.) Cited 97 Cal. 310, 313.

330. Where a contract for street work, entered into by the superintendent of streets, is not in compliance with the resolution of the board of supervisors, by which it is authorized, the remedy for the aggrieved party is by appeal to the board, and failing to avail himself of that remedy, he cannot afterward set up such irregularity as a defense to an action to recover the amount of the assessment. (*Chambers v. Satterlee*, 40 Cal. 497.) Cited 80 Cal. 11; 93 Cal. 188.

331. Void contract does not become valid by failure to appeal to the board of supervisors. (*Burke v. Turney*, 54 Cal. 486.) Cited 98 Cal. 430.

332. Where the action of the superintendent of streets in awarding a contract is void, the failure of the property owner to appeal, under section 12 of the law of 1872, to the board of supervisors, would not render the void contract valid; nor would the failure of the contractor to appeal create a grievance on the part of the property owner, or estop him from complaining of a void assessment based upon the contract. (*Brock v. Luning*, 89 Cal. 316.)

333. Defect in the contract is not cured by the failure of the lotowners to appeal for its correction to the board of supervisors, where, had an appeal been taken, the defect could not have been remedied by the board. (*Dougherty v. Hitchcock*, 35 Cal. 512.)

Cited 40 Cal. 524, 530; 54 Cal. 571; 90 Cal. 616; 96 Cal. 193; 98 Cal. 430.

Fraud in, duty to appeal. See ante, XIV, 7.

11. Assignment.

334. A contract to perform work on a street in San Francisco may be assigned, and the assignee, if he fulfills the conditions of the same, can enforce it; and, if such contract has been assigned, and the assignee performs the contract, the warrant, when issued for the work, may be delivered to the original contractor, who may make demand for its payment. (*Taylor v. Palmer*, 31 Cal. 240.)

335. Certain property owners took a contract for improving a street in the city and county of San Francisco adjoining their respective lots, and after the work was done and the assessment made by the proper officers, assigned, for value received, all their right, title, and interest in the contract, and in the assessment, warrant, and diagram, and all the moneys due and to become due thereon. Held, that such assignors were estopped to deny the validity of the contract and assessment in an action by the assignee to enforce the same. (*Callender v. Patterson*, 66 Cal. 356.)

336. If the street superintendent of a city enters into a written contract with a party to improve the streets of a city, which is void for want of authority to make it, and the other contracting party makes a written assignment on the back thereof of "the articles of agreement on the other side thereof written, and all moneys hereafter due, payable, or to be paid therefrom, and the full benefit, profit, and advantage thereof," it is not a mere assignment of the written contract, but transfers to the assignee the right to collect, demand, and receive all moneys due or to become due for the work specified in the contract, even if recovered on a quantum meruit, or for work and labor. (*Wetmore v. San Francisco*, 44 Cal. 294.)

337. A contract for street work may be assigned by the contractor, whether the officers of the municipality consent to the assignment or not, and if the assignee completes the work within the time allowed therefor, he may foreclose the lien of a street assessment for the work. (*Anderson v. De Urioste*, 96 Cal. 404.)

338. If A owns a lot on a street to be improved, and takes the contract, and then assigns to B, who performs the contract, B may sue A for the assessment against his lot. (*Hendrick v. Crowley*, 31 Cal. 471.)

339. Fact that mayor of Oakland, before his election, had become assignee of a contract for the improvement of a street, as security for a debt due him by the contractor, does not affect the validity of the contract or of the assessment for the work, nor incapacitate him from countersigning the warrant for the collection of the assessment. (*Beaudry v. Valdez*, 32 Cal. 269.)

Extension of time. See post, XV, 3.

12. Subsequent Legislation does not Affect.

340. The action was brought to recover a balance alleged to be due on a contract for

street work done in the city of San Jose. The contract provided that payment for the work should be made in a certain manner, in accordance with the act of March 17, 1874, incorporating the city. Subsequent to the execution of the contract, the legislature passed an act amending the charter of the city, and directing that payment of the contract price should be made to laborers and materialmen to whom the contractor might be indebted for labor or materials employed or furnished in performance of the contract, to the extent of their claims. Held, that the act did not apply to the contract with the plaintiff, and that the defendant was not entitled to credit for payments made in conformity therewith without the consent of the plaintiff. (*McGee v. City of San Jose*, 68 Cal. 91.)

XV. Performance.

1. Time of Performance.

341. The provision of section 6 of the act of March 18, 1885 (Stats. 1885, p. 147), providing that the superintendent of streets shall fix the time for the commencement and completion of the work under all contracts entered into by him, is mandatory, and a contract not in accordance with its terms is invalid. (*Libbey v. Elsworth*, 97 Cal. 316.)

342. After the board of supervisors of San Francisco have taken steps to acquire jurisdiction, and have ordered a public street of said city to be improved, and have let the contract, if the contractor fails to enter upon the performance of the work within the time fixed in his contract to perform, the board may readvertise for bids and relet the contract without taking steps to acquire jurisdiction as in the first instance. (*Dougherty v. Foley*, 32 Cal. 402.)
Cited 34 Cal. 247; 40 Cal. 519.

343. Appellant contended that time had elapsed within which a street contractor was to commence the work; it was held, the court below having found that the contract was performed on the part of the contractor, and there being evidence to sustain the finding, the point was not well taken. (*Brady v. Page*, 59 Cal. 52.)
Cited 90 Cal. 5.

Extension of time. See post, XV, 3.

2. Materials to be Used.

344. The use of patented material in fulfilling municipal contract for improving a street in San Francisco does not avoid an assessment thereunder in a case where it is not shown that the contract either required or prohibited the use of patented materials. (*Dunne v. Altschul*, 57 Cal. 472.)

345. Assuming that the use of patented materials was unauthorized under such contract, the circumstance that materials marked as patented were used raises no presumption that they were patented in a case where the superintendent of streets certifies that the work was properly done. (*Dunne v. Altschul*, 57 Cal. 472.)

Materials to be used. See ante, 204.

Contract for patented pavement. See ante, XIV, 6.

3. Failure to Complete Contract in Time; Extension of Time.

346. The provision of section 5 of the act of March 18, 1885 (Stats. 1885, p. 147), which fixes the time within which contracts for street improvements shall be executed, is mandatory, and not merely directory. (*Perine v. Forbush*, 97 Cal. 305.)

347. The failure of a street contractor to complete the work within the time named in the contract with the city is not excused, as against a lotowner who is sued to foreclose the lien of a street assessment, by the neglect of the city to furnish implements for the work as provided in the specifications of the contract for the work. The lotowner is not bound by such contract, and his liability arises out of no agreement, express or implied, with the street contractor; but he can question the regularity of the proceeding resulting in the assessment in the same manner and upon the same principles as the validity of a tax may be questioned. (*Heft v. Payne*, 97 Cal. 108.)

348. Owner of lot is not estopped from contesting foreclosure of lien upon the lot, upon the ground that work was not completed in time, by reason of having appealed from a first assessment and warrant upon the ground that the work was not satisfactorily done, and having expressly waived all objections upon such appeal to the failure of the contractor to complete the work in time, and having represented and promised that when the work was performed to the satisfaction of the council, no further objections would be made, and that the assessment would be paid, in reliance upon which the contractor completed the work to the satisfaction of the council, and obtained the new assessment sought to be foreclosed. (*Heft v. Payne*, 97 Cal. 108.)

349. The plaintiffs, after failing to complete certain street work within the time limited in their contract with the city, and after a refusal of the council to extend the time, proceeded with and completed the work. Held, the work was not done in accordance with any contract with the council; and payment for work so performed could not be enforced by assessment under the charter. Performance of the work for which payment is sought under a valid contract with the city is one of the prerequisites to the exercise of the power of assessment. (*Mappa v. Council of the City of Los Angeles*, 61 Cal. 309.)

350. The provisions of the statutes of 1871-72, page 809, providing for extensions of time of contracts for street work, entered into and became a part of a contract made thereunder, and are not affected by the provisions of section 19 of article XI of the new constitution. Such section applies only to contracts made after the taking effect of the constitution. (*Ede v. Knight*, 93 Cal. 159.)

351. Since the amendments to the Consolidation Act passed in 1863, the board of supervisors of San Francisco may extend the time within which a contract to perform work on a street is to be performed. (*Taylor v. Palmer*, 31 Cal. 240.)

Cited 53 Cal. 620; 97 Cal. 111; doubted 54 Cal. 57.

352. Section 6 of the Oakland street law (Stats. 1863-64, p. 133), which provides that the "marshal shall fix the time for the commencement of the work under all contracts entered into by him, which work shall be prosecuted with due diligence from day to day thereafter to completion, and may extend the time so fixed from time to time, under the direction of the city council," does not limit the power to extend time merely to the time fixed for the commencement of the work; and it would be straining the maxim, *Expressio unius, etc.*, to make it require such limitation of power, especially when the grant to the marshal and council, by other provisions of the charter of the most plenary general powers over street work, clearly includes the power to extend the time for completion of contracts for such work. (Oakland Paving Co. v. Barstow, 79 Cal. 45.)

353. The street superintendent of San Francisco, under the Consolidation Act, has power to enlarge the time for completion of a contract for street improvements made by him, and if any property owner feels aggrieved by such action he must appeal to the board of supervisors, or he will be deemed to have acquiesced therein. (Conlin v. Seamen, 22 Cal. 546, cited 22 Cal. 552, 79 Cal. 47, 49; Houston v. McKenna, 22 Cal. 550, cited 79 Cal. 47, 49.)

354. Under the act of 1872 (Stats. 1872, p. 807), an extension of time for the performance of a contract for a street improvement in the city and county of San Francisco must be granted within the life of the contract in order to be valid. (McVerry v. Boyd, 89 Cal. 304.)

Cited 93 Cal. 162.

355. Where the contract time for the completion of the work of grading a street in the city and county of San Francisco has been extended by the board of supervisors, and the extension has expired without the work being completed, the board has no power to further extend the time for its completion. (Dougherty v. Coffin, 69 Cal. 454.)

Cited 80 Cal. 5; 81 Cal. 163; 89 Cal. 319; 97 Cal. 111.

356. Under the act of 1872, neither the board of supervisors of the city and county of San Francisco nor the superintendent of streets possesses the power to grant extensions of time for the performance of work under a street contract after the expiration of the time limited in the contract, and an order granting such extension is void. (Brock v. Luning, 89 Cal. 316.)

357. Any extension of time for the performance of a contract for a street improvement in San Francisco made after the expiration of the time limited in the contract, whether by order of the board of supervisors or by the superintendent of streets, is absolutely void, not only as respects assessments upon abutting property owners, but also as respects the liability of the city and county to pay for the improvement. The statute makes time of the essence of contracts for street work in all cases. (Raisch v. City and County of San Francisco, 80 Cal. 1.)

Cited 89 Cal. 306, 319, 320; 90 Cal. 7; 97 Cal. 111.

358. The action was brought to foreclose a street assessment lien for grading Montgomery avenue, in the city and county of San Francisco. The contract under which the work was done required its completion within sixty days. The work was not completed within the time, and subsequently the board of supervisors of the city and county extended the time for its completion. Held, that upon the failure to complete the work within the time required, the contract expired, and the board of supervisors had no jurisdiction to revive or validate it. (Fanning v. Schammel, 68 Cal. 428.)

Cited 69 Cal. 455; 80 Cal. 4; 89 Cal. 319; 90 Cal. 7; 97 Cal. 14.

359. A contract having been entered into for the performance of work in grading a street, and the time mentioned in the contract for the performance of the work having expired, and the contractor having applied for an extension of the time, and the board of supervisors, having refused to grant such extension of time, subsequently made an order for the extension of time, held, that the order was unauthorized and void. (Turney v. Dougherty, 53 Cal. 619.)

Cited 54 Cal. 57, 570; 97 Cal. 111.

360. Where street work for which an assessment is made is not completed within the time fixed by the contract, and the order of the board of supervisors, granting an extension, is not made until after the expiration of the time allowed by the contract for its completion, the contractor does not acquire a valid lien upon the property, and a sheriff's deed, upon a foreclosure of such lien, vests no title in the purchaser. (Brady v. Burke, 90 Cal. 1.)

361. The sixth section of the present street law of San Francisco (Stats. 1871-72, p. 806), requiring the superintendent of public streets, upon the failure of a contractor to complete his work before the expiration of the contract time, to report the same to the supervisors, and the supervisors to relet the work, is mandatory, and excludes the exercise, by the board or superintendent, of any power to extend the time for completing the work after the expiration of the contract time, or of an extension ordered during the running of the contract time; and such an extension is therefore void. (Beveridge v. Livingstone, 54 Cal. 54.)

Cited 54 Cal. 570, 571; 68 Cal. 429; 69 Cal. 455; 80 Cal. 4; 89 Cal. 306, 319; 90 Cal. 7; distinguished 93 Cal. 163.

362. There can be no valid extension of time to complete a contract for street work after the time for its performance has expired, and it is not in the power of the supervisors to validate a void assessment for such work by refusing to set it aside as invalid upon appeal. (Dougherty v. Nevada Bank, 81 Cal. 162.)

363. The fact that an extension of time on a street contract was made with knowledge that the work had not been finished, and that upon the faith thereof the contractor expended money in good faith to

complete the contract, cannot cure the invalidity of the extension. No void act of a municipal officer, done without authority of law, can be cured by aid of the doctrine of estoppel. (*Raisch v. City and County of San Francisco*, 80 Cal. 1.) Cited 97 Cal. 111.

364. The action of the city council in setting aside an assessment and a warrant issued by the street commissioner upon his acceptance of the street work done under a contract therewith with the city, and in directing further work as the result of an appeal by lot-owners, does not operate as an extension of time to the contractor to complete the work. (*Heft v. Payne*, 97 Cal. 108.)

365. The act of March 19, 1878, so far as it attempts to revive street contract which has expired because not completed in time, and validate an assessment for street work done under it, is unconstitutional and void. (*Fanning v. Schammel*, 68 Cal. 428.) Cited 97 Cal. 111.

366. The failure of the superintendent of streets to indorse upon the original contract an extension of time properly granted to the contractors by the board of supervisors, or to cause the resolution of extension to be recorded until after the period fixed by the contract, does not render the extension ineffectual. (*McVerry v. Boyd*, 89 Cal. 304.)

367. The provisions of section 7 of the statute of 1871-72 providing that it shall be the duty of the superintendent of streets, on the passage of a resolution extending the time of a contract for street work, to cause the same to be recorded, and to specify in the certificate of extension the number of the resolution granting the extension, are designed for the information of the county officers, and are merely directory, and not of the essence of the thing required to be done, and a failure of such officer to perform them will not operate to the prejudice of the contractor. (*Ede v. Knight*, 93 Cal. 159.)

368. The failure of the superintendent of streets to cause the resolution of extension to be recorded during the life of the contract does not render the extension ineffectual. (*Ede v. Knight*, 93 Cal. 159.) Cited 96 Cal. 407.

369. The fact that the certificate of extension stated that the additional time was granted in accordance with a resolution, "No. 14518," passed upon a specified day, when in fact the resolution was "No. 14519," does not show such a material variance as will render the extension of time ineffectual. (*Ede v. Knight*, 93 Cal. 159.)

Extension of time on contract entered into before new constitution. See ante, 260.

4. Reletting Contract.

370. When the person who has contracted to grade a street in the city of San Francisco fails to perform the work, and it becomes necessary or expedient to relet the job, the same course must be pursued in reletting which is prescribed in the first instance by the sixth section of the statute in relation to

the improvement of streets in San Francisco. (*Meuser v. Risdon*, 38 Cal. 239.) Cited 41 Cal. 501; 54 Cal. 569; 97 Cal. 110.

371. Each proceeding to improve a street in San Francisco, whether in relation to the first contract or a reletting on the failure of the first contractor to perform, is a separate and independent proceeding, and must stand or fall by itself. (*Meuser v. Risdon*, 38 Cal. 239.)

372. In case of such reletting, the clerk of the board of supervisors, as such, has no power to give the notice inviting proposals for the work, nor does the original resolution of the board inviting proposals confer such authority, nor can the board confer such authority on him by a general resolution directing him, in all cases where contractors fail to perform, to readvertise for proposals. (*Meuser v. Risdon*, 38 Cal. 239.)

373. Where the contract to grade the street was entered into for a certain sum per cubic yard, and afterward, without any request of the contractor, another resolution of intention was published, resulting in a second contract with the same contractor for a larger sum per cubic yard, and no reason appears for letting the second contract, it will be presumed that the board acted regularly in effecting the second contract, and that a valid and sufficient reason existed for its action, and an assessment against the owners is not thereby invalidated. (*Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40.)

374. Under the statutes regulating street improvements in San Francisco, the board of supervisors have the power to readvertise for bids, where a contractor has failed to perform the work, without repeating the steps necessary to obtain jurisdiction. (*Himmelmenn v. Oliver*, 34 Cal. 246.)

Failure to perform, reletting contract. See ante, 342.

Letting second contract, remedy by appeal. See ante, XIV, 10.

Provision as to is mandatory. See ante, 361.

5. Fulfillment of Contract and Acceptance by Superintendent.

375. The provisions of section 26 of the act of April 1, 1872 (Stats. 1871-72, p. 822), concerning streets in San Francisco, requiring an entry of the due performance of a contract for street work to be made in the record of the superintendent, are directory only, and a failure to comply with these provisions does not invalidate the assessment. (*Brady v. Bartlett*, 56 Cal. 350.) Cited 93 Cal. 162, 163.

376. In an action by a contractor against the owner of a lot in San Francisco to recover the tax assessed on the same for work done on the street in front of a lot under a contract with the superintendent of public streets, if the contract was fulfilled to the satisfaction of the superintendent, the defendant cannot introduce evidence to prove that the work was not done according to the specifications of the contract nor in accordance with the ordinance. (*Emery v. Bradford*, 29 Cal. 75.) Cited 31 Cal. 248; 97 Cal. 110.

377. An error in determining whether street contractor in San Francisco had fulfilled his contract is not a jurisdictional defect which vitiates an assessment levied on a lot to pay for the work specified in the contract. (*Emery v. Bradford*, 29 Cal. 75.) Cited 31 Cal. 256; 32 Cal. 278; 34 Cal. 320; 35 Cal. 526; 38 Cal. 75.

378. The assessment and warrant attached are prima facie evidence that work on a street improvement was done to the satisfaction of the superintendent. The superintendent may approve the work upon the certificates of the city surveyor and deputy superintendent without personal inspection, and proof of lack of personal inspection by him does not overcome the proof of acceptance from those certificates showing that the work was completed according to contract, taken in connection with the personal making and signing of the assessment, diagram, and warrant by the superintendent. (*Jennings v. Le Breton*, 80 Cal. 8.)

379. Under section 12 of the act of April 1, 1872, if the contractor for a street improvement in San Francisco fails properly to complete the work according to contract, and the work is improperly approved or accepted by the superintendent of streets before completion, the only remedy for lotowners assessed for the improvement is to appeal to the board of supervisors. (*Jennings v. Le Breton*, 80 Cal. 8.) Cited 87 Cal. 46; 89 Cal. 310; 93 Cal. 163.

380. The remedy of an owner of a lot in San Francisco assessed for work on a street in front of the same, if dissatisfied with the decision of the superintendent of public streets that the contractor has fulfilled his contract, is an appeal from such decision to the board of supervisors. (*Emery v. Bradford*, 29 Cal. 75.) Cited 29 Cal. 131; 40 Cal. 520; 80 Cal. 11; 93 Cal. 188; 97 Cal. 110.

381. The owner of a lot sued for street improvements in San Francisco cannot show in defense that the contractor did not perform the work according to his contract, if the superintendent of streets has accepted the work as completed. His remedy is an appeal from the decision of the superintendent to the board of supervisors. (*Cochran v. Collins*, 29 Cal. 129.)

382. In an action for street assessments in San Francisco, the admission "that after the completion of the work the same was accepted by the superintendent, and no appeal from the decision of the superintendent in reference thereto was taken to the board of supervisors" is conclusive of the case, and judgment should be given for plaintiff without further proof. (*Shepard v. McNeil*, 38 Cal. 72.) Cited 93 Cal. 188.

Acceptance by superintendent, effect of. See ante, 345.

Parol evidence as to completion of street work. See Evidence, 384.

6. Liability of City or Contractor for Damages Resulting from Work.

383. Unless imposed by statute or organic law, no liability attaches to a municipal cor-

poration for consequential damages to adjoining property, resulting from a street improvement done by it in a lawful manner and without malice. Under such circumstances, it is the duty of adjoining proprietors to protect their property. (*Reardon v. City and County of San Francisco*, 66 Cal. 492.) Cited 67 Cal. 545; 85 Cal. 618, 619; 86 Cal. 638; 8 Col. 405; 5 Wash. 40.

384. But under a constitutional provision that "private property shall not be taken or damaged for public use, without just compensation having been first made to the owner," a municipal corporation is liable for such special consequential damages as the adjoining proprietor receives over and above the common injury to the other abutters on the street, or the general public. (*Reardon v. City and County of San Francisco*, 66 Cal. 492.)

385. The act of April 3, 1876, does not provide a mode of compensation for damages where a municipality in grading a street causes one's land to be overflowed, and consequently the party injured may maintain an ordinary action therefor against the municipality. Such action is not barred until the expiration of three years from the time the cause of action accrued. (*Conniff v. City and County of San Francisco*, 67 Cal. 45.)

386. In grading Montgomery avenue under the act of April 3, 1876, the city and county of San Francisco had no authority to erect an embankment across a natural watercourse in such a manner as to obstruct the natural flow of the waters therein, and cause them to run over and permanently remain on the land of an adjoining proprietor. Such conduct is a trespass amounting to the taking of the property of another. The former constitution of California, under which the work was done, renders void all legislation purporting to authorize such a proceeding. (*Conniff v. City and County of San Francisco*, 67 Cal. 45.) Cited 80 Cal. 343.

387. When the law compels the corporation to give out a contract for grading a street to the lowest bidder, it takes away from the corporation the responsibility arising from the acts of the person taking the contract. (*James v. San Francisco*, 6 Cal. 528.) Cited 48 Cal. 214.

388. Where a party was injured by falling at night into an excavation made in grading the street of a city, owing to the failure to put lights or guards about the place, the contractor, and not the city, is liable where the city is compelled to let out the contract to the lowest bidder. (*James v. San Francisco*, 6 Cal. 528.)

389. When the charter of a city requires work in improving streets to be done by contract, or by the owners of adjacent lots, the city is not liable for damages sustained by reason of the negligence of the contractor, or owner of adjacent lots, in performing such work. (*Krause v. City of Sacramento*, 48 Cal. 221.)

390. When the charter of a city requires work in the improvement of streets to be done by contract, or by the owners of adjacent lots, and an action is brought against the

city for an injury sustained by negligence in the work on such improvements, an averment in the complaint that the work was being done at the instance of the city will be construed as alleging that the work was being done as the charter directed. (*Krause v. Sacramento*, 48 Cal. 221.)

391. A city has the right to raise the grade of a street; and if the contractor performs the work with proper care and skill, he is not responsible for any damage which may result to the contiguous property. (*Shaw v. Crocker*, 42 Cal. 435.)
Cited 66 Cal. 498, 500.

392. In a suit against a contractor for damages occasioned to contiguous property by raising the grade of a street under a city contract, it is incumbent upon the plaintiff to show that the work was performed in an improper or negligent manner, or that the damage resulted from a want of care or skill on the part of the contractor or his servants. (*Shaw v. Crocker*, 42 Cal. 435.)

393. Negligence or want of skill in the grading of a street by a contractor, under a city contract, will not be presumed nor inferred from the mere fact of damages, but must be proved. (*Shaw v. Crocker*, 42 Cal. 435.)

394. In an action for damages alleged to have been caused to plaintiff's property by the negligence of the defendant in prosecuting street work under a contract with the city, where the defendant denies the allegations of negligence, and claims that the operations resulting in the injury were justifiable and unavoidable in the prosecution of a lawful work, and the jury finds in favor of the plaintiff, upon the ground that the defendant was negligent, the judgment will not be reversed, if there is evidence tending to support the verdict, and there are no errors of law in the instructions of the court. (*Bellegarde v. San Francisco Bridge Co.*, 90 Cal. 179.)

Excavation, flooding from, sufficiency of complaint. See Negligence, 59.

XVI. Assessments.

1. Statutes Governing; Effect of Amendment of.

395. General statutes relating to street grades and improvements in San Francisco, as modified by the act of April 1, 1878, governs in relation to the assessment for the work and proceedings prior thereto. (*Jennings v. Le Roy*, 63 Cal. 397.)

396. The act of April 4, 1870, relative to street assessments in San Francisco, does not apply to contracts made previous to the passage of that act, nor to the remedies for their enforcement. (*Dyer v. Barstow*, 53 Cal. 81.)
Cited 97 Cal. 110.

397. The plaintiff, in November, 1860, entered into a contract for the improvement of streets in San Francisco under the law of 1859, which provided that for payment an assessment should be levied upon the adjacent lots in proportion to their respective values. Before the completion of the work the amendatory act of 1861 was passed, providing for an assessment in payment of such contracts ac-

cording to the street frontage of each lot. Held, that the provisions of the law of 1859 respecting the mode of assessment was part of the contract, and that the assessment, though made after the amendatory act, must be in the mode prescribed by the old law. (*Houston v. McKenna*, 22 Cal. 550.)
Cited 8 Wash. 319.

398. The Consolidation Act of 1856, as amended in 1859, authorized the city authorities of San Francisco to enter into contracts with individuals for grading its streets, and provided that the charges under the contract should be borne by the owners of the adjacent lots. Section 59 authorized a contractor, upon the completion of his work, to sue each delinquent owner for the amount of the assessment. In March, 1861, a contract was entered into with plaintiff for grading a certain street, and the work under it was completed by him in April. May 18, 1861, an act was passed repealing section 59. In August, 1861, plaintiff commenced the present action against one of the delinquent owners to recover the amount assessed against him. Held, that plaintiff's right to maintain the action was not impaired by the repealing act; that the right to sue the property owners was a part of the contract, and could not be taken away by legislation subsequent to his performance of the work. (*Creighton v. Fragg*, 21 Cal. 115.)

Statute must be strictly pursued. See post, XVI, 11.

2. Nature of.

399. Word "assessment" is employed in the constitution to represent those local burdens imposed by municipal corporations upon property bordering upon an improved street, for the purpose of paying the cost of the improvement, and laid with reference to the benefit the property is supposed to receive from the expenditure of the money. (*Taylor v. Palmer*, 31 Cal. 240.)
Cited 68 Cal. 79; 92 Cal. 50; 96 Cal. 408; 97 Cal. 111.

400. An assessment for the improvement of streets is a municipal tax, levied by the corporation upon the property adjacent to the street, to defray the expenses of the improvement, and no demand can be made a setoff against it unless expressly so authorized by statute. (*Himmelmann v. Spanagel*, 39 Cal. 389.)

401. Assessment of for street improvement is a tax. (*Whiting v. Quackenbush*, 54 Cal. 306.)
Cited 80 Cal. 16; 87 Cal. 220.

402. An assessment upon the different lots fronting on a street in a city in proportion to the number of feet frontage of each, for the purpose of raising money to pay the expenses of grading the street, is an exercise of the sovereign right of taxation, and not of the power to appropriate private property to public use under the right of eminent domain. (*Emery v. San Francisco Gas Co.*, 28 Cal. 345.)
Cited 29 Cal. 123.

403. An assessment for the improvement of a street in a city is a municipal tax, and in

San Francisco the property owner is not brought into relations with the proceeding resulting in the assessment, until the tax is levied, which is when the assessment is made and issued. (*Hancock v. Whittemore*, 50 Cal. 522.)

404. The lot owner is not held liable on the theory that there is a contract between him and the street contractor. The assessment is levied and collected by virtue of the sovereign power of taxation, and its validity depends upon the same general principles applicable to taxes proper levied for ordinary governmental purposes. (*Emery v. Bradford*, 29 Cal. 75.)

Cited 31 Cal. 474; 32 Cal. 279, 485; 36 Cal. 244; 39 Cal. 392; 40 Cal. 526; 97 Cal. 110.

405. An assessment levied by a municipal government upon lots adjacent to a street to pay for improvements made on the street, if held to be a tax, cannot be maintained because it lacks the constitutional requirement of equality and uniformity. (*Creighton v. Manson*, 27 Cal. 613.)

Cited 28 Cal. 348.

406. An assessment for street work in the city and county of San Francisco, under the Consolidation Act, is not "taxation," within the meaning of the thirteenth section of article XI of the constitution. (*Chambers v. Satterlee*, 40 Cal. 497.)

Cited 40 Cal. 531; 57 Cal. 519.

Taxation and assessment. See post, XVI, 3.
Assessment is not taxation. See Taxation, 10.

3. Power to Assess; Equality and Uniformity of.

407. The last clause of section 8, article I, of the constitution, which provides that "no property shall be taken for public use without just compensation," has no application to assessments for street work in the city and county of San Francisco, under the Consolidation Act as amended in 1862 and 1863. (*Chambers v. Satterlee*, 40 Cal. 497.)

408. Legislature cannot by direct act make assessment within an incorporated city. (*Schumacker v. Toberman*, 56 Cal. 508.)

409. Legislature cannot exercise power of assessment in an incorporated city, but may empower the municipal authorities to do so. (*People v. Lynch*, 51 Cal. 15.)

410. Constitution does not prohibit legislature, or municipal authorities acting under authority of law, from imposing assessments upon lots in city fronting on street to defray the expenses of improvements of the street in the nature of grading and planking. (*Emery v. San Francisco Gas Co.*, 23 Cal. 345, cited 29 Cal. 82, 83, 95, 31 Cal. 250, 255, 474, 667, 690, 32 Cal. 557, 40 Cal. 514, 54 Cal. 568, 80 Cal. 15, 12 Cal. 596; *Emery v. Bradford*, 29 Cal. 75, cited 31 Cal. 248, 34 Cal. 541, 40 Cal. 514, 54 Cal. 568, 80 Cal. 15, 97 Cal. 110.)

411. It is from state only that a municipality has power to levy an assessment on property for street work; in the absence of a delegation of such power, its efforts in that direction would be futile. (*Thomason v. Ruggles*, 69 Cal. 465, 472.)

412. Power of "assessment" cannot be exer-

cised as independent or principal power like that of "taxation," but must be used as an incident to the power of organizing municipal corporations. (*Taylor v. Palmer*, 71 Cal. 240.)

Cited 49 Cal. 549; 51 Cal. 20-24; 53 Cal. 45; 54 Cal. 539; 56 Cal. 511; 80 Cal. 15.

413. Legislature cannot by direct act make an assessment within an incorporated city. (*Schumacker v. Toberman*, 56 Cal. 508.)

414. The legislature has no power to levy an assessment not uniform and equal in an incorporated city, for the purpose of improving a street. (*Brady v. King*, 53 Cal. 44.)

Cited 54 Cal. 539; 57 Cal. 153.

415. The legislature has not the power to levy an assessment not uniform and equal upon lots fronting on a street in an incorporated city, for the purpose of improving the street, nor can it, after an assessment has been made by the municipal authorities for such purpose which is void for want of uniformity and equality, validate it. (*People v. Lynch*, 51 Cal. 15.)

Cited 52 Cal. 198; 53 Cal. 45; 54 Cal. 539; 56 Cal. 511; 57 Cal. 153, 177; 64 Cal. 181, 520; 67 Cal. 157; 68 Cal. 430; 72 Cal. 411; 73 Cal. 89; 80 Cal. 15.

416. The legislature has not the power to charge the persons who reside on a street in a city with the expenses of an improvement on that street. (*Creighton v. Manson*, 27 Cal. 613.)

Cited 29 Cal. 124.

417. For the expenses of street improvements, it is competent for the legislature to provide, either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto and specially benefited thereby. (*Burnett v. Sacramento City*, 12 Cal. 76.)

Cited 28 Cal. 352, 361; 40 Cal. 514; 57 Cal. 519; 92 Cal. 325; 2 Or. 158.

418. Assessment for improvements must be levied with equality and uniformity. But if it be so levied under a system which apportions it with reference to the number of feet fronting on the improvement, or by any other standard which will approximate equality and uniformity, it is not void. (*Whiting v. Quackenbush*, 54 Cal. 306.)

Cited 80 Cal. 16; 87 Cal. 220.

419. The provision of the charter of Sacramento authorizing the street improvements and the mode and manner of the assessment is not in conflict with the thirteenth section of article XI of the constitution of this state providing that taxation shall be equal and uniform. (*Burnett v. Sacramento City*, 12 Cal. 76.)

420. That section provides for equality and uniformity of taxation upon property, but applies only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the government of the state, or of some county or town. It has no reference to special assessments for local improvements, by which individual parties are chiefly benefited in the increased value of their property, and in which the

public is only to a limited extent interested. (Burnett v. Sacramento City, 12 Cal. 76.) Cited 47 Cal. 234.

Uniformity and equality of. See ante, 405; post, 464.

For widening streets. See ante, X.

Assessment in Sacramento. See Sacramento, 13.

4. Extent of Power of.

421. When a statute for opening a street in a city provides that, to pay the damages and expenses incurred thereby, an assessment shall be levied on the lots benefited "according to the enhanced value of the respective parcels of lands as fixed" in a report of a board of public works, the assessment must be limited to the increased value of each lot caused by the improvement, and must not include the value of the lot without the improvement. (People ex rel. Doyle v. Austin, 47 Cal. 353.)

422. If, under the power to take private property for public uses upon making a just compensation therefor, the legislature possesses the power to levy an assessment upon lots in a city adjacent to a street to pay for improvements made on the street, the assessment cannot exceed the value of the benefit conferred on the lot or its owner by the improvement, and can be enforced only by proceedings to subject the lot to a sale in discharge of the lien. (Creighton v. Manson, 27 Cal. 613.) Cited 72 Cal. 441.

423. Under the act of 1885 in relation to street improvements, a lot cannot be charged for work called for by one resolution of intention and order in a greater sum than one-half the value of such lot upon the preceding assessment-roll for municipal purposes; and it makes no difference that the work called for by the resolution and order is split up into separate contracts and assessments. (Kreling v. Muller, 86 Cal. 465.) Cited 99 Cal. 298.

424. Under the street law of 1885 (Stats. 1885, p. 147), a lot liable to an assessment for street work may be held to the extent of one-half its assessed value for any single assessment for such work, regardless of the fact that it has already, during the same tax year, been assessed for other work. (Warren v. Postel, 99 Cal. 294.)

425. Property not benefited by an improvement cannot be subjected to an assessment for it. (Taylor v. Palmer, 31 Cal. 240.)

426. A tax upon specific property, to pay the expense of opening and grading a street, can be supported only upon the ground that the property taxed is benefited by the improvement. (Matter of Market Street, 49 Cal. 546.)

427. In an action to recover an assessment under the act of April 1, 1872, it is immaterial whether the lot sought to be charged was benefited by the work done. (Whiting v. Townsend, 57 Cal. 515.) Cited 80 Cal. 16.

Objection to because improvement not beneficial. See ante, 184.

428. Assessment cannot be laid on lot or its

owner when lot has received only injury by the work on the street for which the assessment is levied. (Creighton v. Manson, 27 Cal. 613.)

5. Duty of Superintendent in Relation to; Jurisdiction of.

429. If superintendent "originally" fails to authenticate his record by his official signature, it is his duty afterward to make a valid assessment. (Shepard v. McNeil, 38 Cal. 73.)

430. By the legislative acts of 1862 and 1863, concerning street improvements in San Francisco, it is made the duty of the superintendent of streets, in the first instance, to make the assessment for street improvements, and deliver the same, with a warrant attached, to the contractor, authorizing him to collect the money from the owners of the lots liable therefor. (Smith v. Cofran, 34 Cal. 310.)

431. It is the duty of the superintendent of streets of San Francisco, after the fulfillment of a contract to improve the same, to make an assessment on the lots to cover the sum due for the work, and then to issue a warrant thereon. No time is limited within which the assessment must be made, nor is the fact that a void assessment has already been made an excuse for not making a valid one. (Himmelmänn v. Cofran, 36 Cal. 411.) Cited 38 Cal. 75; 54 Cal. 487; 69 Cal. 640; 76 Cal. 547; 13 Or. 284, 289; 6 Wash. 321.

432. An abortive attempt to make a valid street assessment does not exhaust the power of the superintendent, nor does it constitute a good defense to an application for a mandate to require the superintendent to make an assessment in the mode prescribed by law. (Himmelmänn v. Cofran, 36 Cal. 411.)

433. Laying the venue in the caption of a street assessment, by inserting the words "state of California, city and county of San Francisco, ss," is sufficient to show that the property sought to be charged is within the jurisdiction of the superintendent of streets of that city and county. (Whiting v. Quackenbush, 54 Cal. 306.)

Compelling superintendent to make new assessment. See Mandamus, II, 12, 1.

6. Assessment in Gold Coin

434. A tax due for an assessment for improving a street in Oakland may be assessed upon a gold basis and collected in gold coin. (Beaudry v. Valdez, 32 Cal. 269.)

7 To Whom Property to be Assessed.

435. If the superintendent of public streets and highways in San Francisco, in assessing a lot for improvements on the street on which the lot fronts, makes the assessment to a deceased person, the assessment is void. (Smith v. Davis, 30 Cal. 536.)

436. Assessments for improvement of streets in Sacramento are required to be listed to the owner, if known; if not known, to him as "unknown owner." (Mayo v. Ah Loy, 32 Cal. 477.)

437. Assessments on lots for street improvements, in the city of San Francisco, to be

valid, must be made to the true owner, if known; and if not, to "owners unknown." (*Himmelmann v. Steiner*, 38 Cal. 175, cited 39 Cal. 392, 40 Cal. 269, 50 Cal. 654, 59 Cal. 609, 611; *Taylor v. Donner*, 31 Cal. 480, cited 32 Cal. 332, 38 Cal. 179, 97 Cal. 574.)

438. It is the duty of the superintendent of streets, if, upon reasonable inquiry, he entertains doubts about the ownership of property to be affected by the assessment, to assess it to "owners unknown." (*Himmelmann v. Steiner*, 38 Cal. 175.)

439. The superintendent of streets of San Francisco, unless he is satisfied beyond all doubt as to the ownership of a lot, may assess it to "unknown owner" (and it is almost impossible to show that he did know the owner), and when the assessment is made to "unknown owner," payment of an assessment on it for improving the street may be demanded publicly on the premises. (*Himmelmann v. Hoadley*, 44 Cal. 213.)

440. An assessment on a lot in San Francisco for street improvements must be made to the owner, if known, and if not known, the word "unknown" must be written opposite the number of the lot and the amount of the assessment. (*Smith v. Davis*, 30 Cal. 536.) Cited 31 Cal. 481, 482; 34 Cal. 314, 320; 38 Cal. 180; 44 Cal. 227, 279; 53 Cal. 667; 54 Cal. 523; 66 Cal. 21; 90 Cal. 465.

441. Among other essential things, the statute requires the assessment to show the name of the owner of each lot or portion of a lot, if known to the superintendent making such assessment; and if unknown to him, the word "unknown" shall be written opposite the number of the lot. There is no authority for making an assessment strictly in rem without reference to the owners of lots, either known or unknown, nor without showing a compliance with said requirements in respect to the names of lot owners; and any lot, the owner of which is not designated in the assessment either by name or as "unknown," will be unaffected by it, as will, also, the owner himself, because not made a party to the assessment. (*Smith v. Cofran*, 34 Cal. 310.) Cited 38 Cal. 180; 13 Or. 251.

442. With respect to such owner, not made a party to the assessment, it is no assessment; and this, whether as, in case no appeal be taken, the failure to make the proper entry of his name, or of the word "unknown" on the assessment was the neglect alone of the superintendent of streets; or in case of such appeal, of the board of supervisors. In either case, such owner and his property are absolutely unaffected by the assessment, and he is under no obligation to take any steps, by appeal or otherwise, to avoid incurring personal liability or the encumbrance of his property by way of lien for such assessment. (*Smith v. Cofran*, 34 Cal. 310.)

443. The word "unknown" written in the assessment opposite the number of the lot is sufficient to show that the name of the owner was unknown to the superintendent of streets, and is an exact compliance with the statute in that respect. (*Hughes v. Reis*, 40 Cal. 255.) Cited 40 Cal. 518, 526.

444. In an action to enforce a lien for a street assessment on lots in Stockton, alleged in the complaint to have been the property of the defendant at the date of the assessment, it appeared from the assessment list offered in evidence that the lots were assessed to "Shubal Dunham and unknown." Held, the assessment was void, and the ruling of the court in excluding it from the evidence correct. (*City of Stockton v. Dunham*, 59 Cal. 608.)

445. The statute prescribing the mode of making assessments does not require the superintendent to act upon presumption or probabilities, nor upon implied or express notice of the existence of facts, in his determination of the question of ownership; neither does it require that he shall undertake to determine the question of ownership as between different parties or claimants. When, from any cause, a rational doubt may exist as to the fact of ownership, he cannot, in the sense of the statute, be held to know the fact, and then he is authorized, and required, to assess the premises to owner "unknown," and to leave the risk and responsibility of ascertaining the party who holds the legal title to the party interested in collecting the assessment by an enforcement of the lien. (*Himmelmann v. Steiner*, 38 Cal. 17.)

446. An assessment on property for street work, made by superintendent of streets, to "unknown owners," amounts to an official certificate by the proper officer that the owner of the particular lot designated was unknown to him. The certificate is conclusive of the truth of the fact so certified, and cannot be collaterally called in question in an action brought upon the assessment. (*Chambers v. Satterlee*, 40 Cal. 497.) Cited 93 Cal. 163.

447. If lot is assessed for street improvement to person by name, and not to unknown owners, the contractor cannot recover judgment against another person for the assessment. (*Blatner v. Davis*, 32 Cal. 328.) Cited 53 Cal. 667; 54 Cal. 523; 66 Cal. 21.

448. An assessment on a lot in San Francisco for a street improvement, made to a person by name, is an assessment to him as owner. Such assessment, to be valid, must be made to the owner, if known. (*Blatner v. Davis*, 32 Cal. 328.)

449. When assessment for street improvements is made to person as owner, it creates no liability against any other person, and not against him unless he is the owner. (*Taylor v. Donner*, 31 Cal. 480.)

450. In a proceeding for the improvement of streets in San Francisco by contract, under the regulations of the Consolidation Act, the liability of the real owner is not released or affected by an erroneous assessment of the tax upon his property to another person. (*Conlin v. Seamen*, 22 Cal. 546.) Cited 29 Cal. 87; distinguished 30 Cal. 538; 32 Cal. 487.

451. In an action to enforce a lien for a street assessment alleged in the complaint to be the property of the defendant at the date of the assessment, it appeared from the assessment list offered in evidence that the lots were assessed to "S. Dunham or owner"; it was held

the assessment did not comply with the statutes. (*City of Stockton v. Dunham*, 59 Cal. 609.)

8. Description of Property and Diagram.

452. An assessment for improving a street in San Francisco must contain a description of the property assessed. (*Himmelmann v. Cahn*, 49 Cal. 285.)

453. The assessment must show the locality of the street assessed, and if a diagram is used it must contain such references as will enable the description of the premises to be understood. (*San Francisco v. Quackenbush*, 53 Cal. 52.)

Cited 54 Cal. 310; 55 Cal. 289.

454. The assessment was held to be invalid as to one of the lots, for the reason that the provisions of the statute requiring each lot or portion of lot to be numbered and the frontage shown were not complied with. The lot was numbered, but portions thereof assessed for work done on the street crossings were not numbered either in the assessment or on the diagram nor did the diagram show the number of feet frontage of the portions so assessed. (*Dyer v. Harrison*, 63 Cal. 447.)

455. A diagram of street work attached to an assessment therefor is only auxiliary to the assessment, and if it exhibits the street upon which the work was done and also delineates the several lots assessed, and shows that each of the lots assessed fronts upon such street and that its location is within the territory liable to be assessed for the work done, it sufficiently complies with the statute, and is not required to show the location of the particular portion of the street in which the work was done. (*McDonald v. Conniff*, 99 Cal. 386.)

456. A street assessment which gives the number of the lot assessed, and refers to the diagram for a further description, is sufficient, so far as the designation of the property is concerned, if the two documents, taken together, show a clear description of the property. (*Ede v. Knight*, 93 Cal. 159.)

Cited 96 Cal. 407.

457. An assessment for grading a street in San Francisco, which gives the number of the lots to be assessed as shown upon a diagram attached to the assessment, and the frontage of each lot, and refers to the diagram for further description, sufficiently describes the property to be assessed. (*Hughes v. Reis*, 40 Cal. 255.)

Cited 93 Cal. 163.

458. The description in an assessment for a street improvement may be made by a diagram; and in such diagram the point of a scroll is as competent as the barb of an arrow to denote north. Accordingly, where the diagram in such an assessment exhibited the streets on which the work had been done, the lot itself as designated by its number, the number of its feet front on the street, and the depths of its side lines, and also a scroll designating the direction of the street, held, that the description was sufficient. (*Whiting v. Quackenbush*, 54 Cal. 306, cited 58 Cal. 529, 59 Cal. 55; *Williams v. McDonald*, 58 Cal. 527.)

459. The fact that no separate diagram was made showing the lot assessed for work done on the street crossing could only prejudice the contractor, and would not injure or prejudice the owner of the lot which should have been charged with such work, but was only charged in fact with work done along the street, it appearing that all the work called for in the contract had been duly and fully performed. (*Ede v. Knight*, 93 Cal. 159.)

Cited 96 Cal. 407.

460. Under the San Francisco street assessment law, the assessment and diagram, as recorded, must show in what direction the streets run. (*Norton v. Courtney*, 53 Cal. 690.)

Cited 54 Cal. 310; 87 Cal. 219, 220.

461. A diagram for a street assessment in San Francisco is sufficient if it correctly exhibits the street and street crossings on which work has been done, and shows the number of front feet assessed for work contracted for and performed, and the relative location of each lot or portion of a lot to the work done. (*Dorland v. McGlynn*, 47 Cal. 47.)

Absence of arrow or scroll in the diagram is immaterial. See *Judicial Notice*, 52.

9. Apportionment of; Space Formed by Junction of Streets.

462. It rests in discretion of legislature to say upon what principle the assessment on lots fronting on a street, to pay for improvements on the street, shall be apportioned among the lots. (*Emery v. San Francisco Gas Co.*, 28 Cal. 345.)

Cited 32 Cal. 485; 36 Cal. 244; 39 Cal. 392; 50 Cal. 654.

463. A street assessment may be apportioned to frontage of the land assessed on the improvement, without other reference to benefits. (*Jennings v. Le Breton*, 80 Cal. 8.)

464. An assessment made upon lots fronting on a street in a city for the purpose of improving a street may be apportioned by reference to the number of front feet on the street, or any other standard which will approximate equality; yet, whatever standard is adopted, it must be levied with uniformity and equality. (*People v. Lynch*, 51 Cal. 15.)

Cited 54 Cal. 310; 57 Cal. 519; 63 Cal. 448; 76 Cal. 311, 322; 86 Cal. 49.

465. San Francisco street law does not provide that each lot in district assessed shall pay for the work done in front of it. (*Diggins v. Brown*, 76 Cal. 318.)

Cited 86 Cal. 49.

466. Where the board of supervisors order "that plank sidewalks be constructed on Olive avenue between Laguna and Buchanan streets where not already constructed, and that the roadway be macadamized where not already done," the district to be assessed is the block between the streets mentioned, subject to the provision of subdivision 10 of section 8 of the Consolidation Act as to work done on one side of the center line of the street. (*Diggins v. Brown*, 76 Cal. 318.)

467. If, at the time a contract in San Francisco is regularly let to improve a street, a lot fronting on the same is owned as one lot, the

owner cannot, by selling a part of it before the assessment is made, prevent the whole of it from being assessed as one lot to pay the cost; and cannot, by such sale, prevent the contractor from having a lien on the whole lot for such assessment, even if the part sold extends along the entire front next to the street. Such lien attaches to the whole lot, into whosoever hands it may go. (*Dougherty v. Miller*, 36 Cal. 83.)

468. If, at the time the board of supervisors of San Francisco acquire jurisdiction to improve a street, and when the contract is entered into, any part of the land fronting on the street to be improved constitutes one lot, the contractor is entitled to have the cost of the improvement made opposite the lot assessed on the whole of the same in one assessment; and no subsequent change in cutting up the lot by selling parts of the same can defeat that right. (*Dougherty v. Miller*, 36 Cal. 83.)

469. The jurisdiction of the board of supervisors of San Francisco to improve a street and render a lot fronting on the same liable for an assessment for the cost of such improvement, when it once attaches, extends to the whole lot through all the subsequent proceedings, although it may afterward, and before the assessment is made, be divided by sales to different parties. (*Dougherty v. Miller*, 36 Cal. 83.)

470. That part of section 37 of the Consolidation Act of San Francisco which speaks of a "space formed by the junction of two streets terminating at same point," does not mean a space formed by the intersection of two streets, or the space formed where one street intersects and stops at another street which continues on—as where Battery intersects and stops at Market street; and for repairs to such space all the lots in the block adjoining the space cannot be assessed—the latter part of section 37 not applying to such a case, and the provision therein for assessing all the lots where the streets are not parallel, and hence the blocks are of irregular shape, being inapplicable. (*Bassett v. Enwright*, 19 Cal. 635.)

471. For repairs to the space formed by the intersection of Battery and Market streets, the Consolidation Act makes no provision, unless the expenses of such repairs could be charged as local repairs, under section 56, solely upon the lots on the south side of Market street; and this question is not raised. (*Bassett v. Enwright*, 19 Cal. 635.)

472. The act of April 1, 1872, providing for street work in the city and county of San Francisco, contains no provision for an assessment for work done on the spaces included within the intersections of Montgomery avenue and other streets. (*Kelly v. Luning*, 76 Cal. 309.)
Cited 82 Cal. 12.

473. Under the act of 1889 (Stats. 1889, p. 157), the city council has authority in certain cases to order the improvement of only a portion of street lying between two main street crossings, and when so ordered, the assessment therefor must be upon only the lots which front on the portions of the work or-

dered, and an assessment for work done under such order is not void upon its face because only a part of the lots on the street on which the work is to be done are assessed therefor. (*McDonald v. Conniff*, 99 Cal. 386.)

Apportionment of assessment for opening street. See ante, 101.

10. Authentication and Recording of.

474. The proper mode for authenticating the record of the assessment, diagram, and warrant, in cases of a tax on lots for improving or grading a street in San Francisco, is to append thereto the official certificate of the officer whose duty it is to make the record. The assessment need not have a separate certificate. (*Himmelmänn v. Hoadley*, 44 Cal. 213.)

475. Such certificate need not specify the pages upon which the assessment, diagram, and warrant are copied, but if it does, it will be limited to the pages specified, unless the record itself shows that the reference to the pages is a clerical error. (*Himmelmänn v. Hoadley*, 44 Cal. 213.)

476. When such record is copied on to six pages, ending with page 79, and the certificate states that "the foregoing on pages No. 79 is a true and correct record of the assessment, diagram, and warrant," it is apparent that the omission of the five preceding pages was a mere clerical error. (*Himmelmänn v. Hoadley*, 44 Cal. 213.)

477. When the assessment, diagram, and warrant and sworn return of demand of payment for a street improvement in San Francisco are recorded in the office of the superintendent of streets, a certificate of their recording should be attached to the same, signed by the superintendent. Without such certificate the record is valueless. Whether such certificate should be affixed to the separate record of the assessment, diagram, and warrant, not decided. (*Himmelman v. Danos*, 35 Cal. 441.)

Cited 35 Cal. 521, 522; 44 Cal. 225; 87 Cal. 219, 220; 97 Cal. 318.

478. An assessment made by the superintendent of streets of San Francisco, to cover the sum due for the improvement of a street, is an official act, and must be attested by his official signature. (*Dougherty v. Hitchcock*, 35 Cal. 512.)

Cited 36 Cal. 412; 98 Cal. 430; 13 Or. 264.

479. Assessment not officially attested, though attached to the diagram and the superintendent's warrant, which were in due form and properly attested, does not constitute a valid assessment, and is not admissible in evidence, either by itself or in connection with the warrant and diagram. (*Dougherty v. Hitchcock*, 35 Cal. 512.)

480. The certificate authenticating the record of the assessment, diagram, and warrant in case of tax on a street for improving the same in San Francisco, may be signed by a deputy of the street superintendent, in the name of his principal, and such deputy need not affix the word "deputy" to his signature if the certificate purports in the body of it to be the official signature of the principal. (*Himmelmänn v. Hoadley*, 44 Cal. 213.)

481. The assignment, diagram, and warrant for improvements on a street in San Francisco must be recorded before the demand of payment and return of the same by affidavit, or a failure to pay the assessment confers no right of action on the contractor. (*Himmelmänn v. Danos*, 35 Cal. 441.)

482. Where the warrant of assessment was properly signed by the superintendent of streets, and countersigned by the mayor, the fact that the name of the mayor and the designation of his office were omitted from the record by the superintendent does not render the recording ineffectual. (*Gillis v. Cleveland*, 87 Cal. 214.)
Cited 96 Cal. 407.

Recording warrant. See post, XVI, 21.
Assessment, certified copies of. See Evidence, II, 5, g.

11. Statute Must be Strictly Pursued.

483. In actions to recover assessments for street improvements a strict compliance with the provisions of law authorizing them must be shown, to sustain a recovery. (*Haskell v. Bartlett*, 34 Cal. 281.)

484. To render an assessment for street improvements valid the various acts prescribed by the statutes must, in all essential particulars, be strictly performed. (*Smith v. Cofran*, 34 Cal. 310.)
Cited 38 Cal. 180; 18 Or. 251.

485. To render valid an assessment on a lot for the improvement of a street in San Francisco the various acts prescribed by the statutes must, in all essential particulars, be strictly performed. (*Smith v. Davis*, 30 Cal. 536.)
Cited 32 Cal. 331, 332; 40 Cal. 524; 54 Cal. 487.

486. Proceedings upon which a street assessment is based, being in invitum, must be strictly pursued in strict compliance with the law under which they are taken, else the assessment will be void. (*Brock v. Luning*, 89 Cal. 318.)
Cited 97 Cal. 310, 313.

487. The liability of owners of property in San Francisco for assessments made by the city authorities for repairing streets depends on the statute, and only inures after the steps required by the statute have been taken. (*Blanchard v. Beideman*, 18 Cal. 261.)
Cited 35 Cal. 448.

488. Unless all provisions of statute prior to award of contract for a street improvement in San Francisco are complied with the defendant is not liable for the assessment. (*Himmelmänn v. Danos*, 35 Cal. 441.)

489. Where statute requires series of acts to be performed before the owners of the property are properly chargeable with the tax, such acts are conditions precedent to the exercise of the power to levy the tax, and all the requirements of the statute must be complied with, or the tax cannot be collected. (*Hughes v. Reis*, 40 Cal. 255.)
Cited 6 Dak. 401.

490. The provisions of the statute concerning assessments of taxes on lots in San Francisco for street improvements must be strictly followed in order to charge the lot or the

owner. This rule is universal, and applies to all statutes upon the subject of taxation, whether for local improvement or public revenue. (*Taylor v. Donner*, 31 Cal. 480.)
Cited 54 Cal. 487; 97 Cal. 574.

Want of petition, effect of. See ante, 170.

12. Effect of Omission of Lots; Assessing Property not Chargeable.

491. If, in levying assessment for improving a street a lot fronting on the street is left out, and the whole expense is assessed upon the remaining front feet, the whole assessment is void. (*People v. Lynch*, 51 Cal. 15; *Dyer v. Harrison*, 63 Cal. 447.)

492. Where a lot within the district to be assessed and liable to assessment is omitted the whole assessment is void. (*Diggins v. Brown*, 76 Cal. 318.)
Cited 92 Cal. 327.

493. When, to pay the expenses of opening a street in a city, an assessment is imposed on the lots to be benefited thereby, in proportion to the benefits accruing to each, the exemption from the assessment of lots belonging to the United States, to this state, and to the city, does not render the statute void or the assessment illegal. (*People ex rel. Doyle v. Austin*, 47 Cal. 353.)

494. It is duty of superintendent, when part of street is ordered improved, to exclude from the assessment lots fronting upon accepted work already done; but the remedy of the party aggrieved is by an appeal to the supervisors for correction of the assessment, and it is not rendered void upon its face for including lots which ought not to be assessed. (*McDonald v. Conniff*, 99 Cal. 386.)

495. Under subdivision 3 of section 8 of the act of April 1, 1872, an assessment for work done on a main street crossing is void if made chargeable upon a lot or part of a lot which does not form a portion of the quarter block adjoining and cornering on the crossing. (*Parker v. Reay*, 76 Cal. 108.)

496. An assessment was made for the grading of Leavenworth street from Green to Union street in the city and county of San Francisco. Between Green and Union streets there was a small street, thirty-five feet in width, terminating at one end in Leavenworth street, and known as Lincoln street. The cost of the work in front of Lincoln street was assessed against the lots fronting on that street. In the assessment, Lincoln street is designated by its name, but it is also numbered and referred to as a lot having a frontage of thirty-five feet on Leavenworth street, and chargeable with a certain amount as its proportion of the cost of the work. On the diagram attached to the assessment there is a space marked Lincoln street, with a number upon it corresponding to the number of the assessment. Held, that the assessment was properly made, that Lincoln street is not to be regarded as one of the lots assessed, and that the reference to it was merely for the purpose of a distribution of the cost of the work as between the lots liable therefor. (*Dyer v. Martinovich*, 63 Cal. 353.)

497. When a contract is let for improving a street in San Francisco, and the length of

the street is afterward increased, and lots fronting on that portion added to the street are assessed for the improvement, the question arises as to whether the assessment is not void for want of jurisdiction. (*Himmelman v. Hoadley*, 44 Cal. 276.)
Cited 76 Cal. 136; 96 Cal. 193; 97 Cal. 312.

Effect of assessment on property not chargeable. See post, 504.

13. Work not Included; Separating Costs of Work; Incidental Expenses.

498. The action was brought to foreclose a street assessment for work done in the city and county of San Francisco, under the act of April 1, 1872. The work ordered by the board of supervisors was for curbing and sidewalking Second street, from Folsom to Harrison streets. The notice, bids, award, and contract mentioned the corners, which were between the points named, but it did not appear whether they were portions of the sidewalk or of a crossing. No mention was made in the assessment of any work except curbs and sidewalks. Held, that on an appeal from a judgment foreclosing the assessment, it could not be held that any part of a crossing was included in the assessment. (*Doane v. Houghton*, 75 Cal. 360.)

499. In an action to enforce a lien for a street assessment in San Francisco, the defense was, that there was included in the assessment, as well as in the demand, a charge of fourteen cents per front foot for work done which was not authorized by the resolution of intention, nor the invitation for sealed proposals. Held, the defense was good, and was not affected by a failure of the parties aggrieved to appeal to the board of supervisors. (*Donnelly v. Howard*, 60 Cal. 291.)
Cited 97 Cal. 312; 99 Cal. 523.

500. Street work done according to the plans and specifications in the office of the city surveyor, which call for work outside of the limits authorized by the resolution of intention, is done without authority as to the work outside of those limits, and the contractors are not entitled to an assessment for the excess. (*Frick v. Morford*, 87 Cal. 576.)
Cited 97 Cal. 312, 313.

501. An assessment for street work done in the city and county of San Francisco, under the act of April 1, 1872, in pursuance of a valid contract, is not void because it purports to include the expenses of work not performed under the contract. (*Blair v. Luning*, 76 Cal. 134.)
Cited 89 Cal. 310.

502. Where a contract for street work is otherwise valid, the fact that in making the assessment for street work the superintendent of streets included the cost of certain bulkheads, which were not named in the plans and specifications attached to the contract, does not render the assessment void, where it does not appear that the construction of the bulkheads was an entire departure from the general plan or scope of the improvement described in the resolution of intention. The only remedy of the property owner for such erroneous action on the part of the superintendent in including work not specified in the

contract, but which might have been included in it under the resolution of intention without rendering the contract void, was by an appeal to the city council, and his failure to appeal thereto constituted a waiver of the objection, which cannot be urged in an action to foreclose the lien of the assessment. It is only where the contract is void, or where the assessment includes work which the city would have no jurisdiction to contract for, because not embraced in the resolution of intention nor reasonably related thereto, that the property owner need not appeal. (*Perine v. Forbush*, 97 Cal. 305.)
Cited 99 Cal. 523.

503. An assessment for street work sought to be enforced as an entirety must stand or fall as a whole, and if it includes the cost of work which is not legally chargeable upon the property sought to be charged therewith, it cannot be enforced. (*Partridge v. Lucas*, 99 Cal. 519.)

504. If lot assessed wholly fronts upon work done in excess of authority, it cannot be held liable for any assessment; but if it fronts in whole or in part upon work authorized by the resolution of intention, the assessment against it will not necessarily be rendered void by the fact that the entire assessment purports to make a charge upon lots not within the limits fixed by the resolution of intention. (*Frick v. Morford*, 87 Cal. 576.)

505. An excess of work done outside of the limits fixed by the resolution of intention will not invalidate an assessment against lots within those limits for work which was authorized by the resolution, if the cost of the work was estimated by the linear foot, so that the cost of the excess can be easily segregated from the cost of the remainder. (*Frick v. Morford*, 87 Cal. 576.)

506. A street assessment which includes the cost of more work than that authorized is not void as to the cost of work properly included therein, and may be corrected on an appeal to the board of supervisors. (*Dyer v. Scalmanini*, 69 Cal. 637.)

507. An objection that the assessment and demand included a charge for work not authorized to be done under the contract can only be taken on appeal to the board of supervisors. (*Fanning v. Leviston*, 93 Cal. 186.)
Cited 96 Cal. 193; 97 Cal. 312.

508. An assessment for street work embracing only the frontage covered by the resolution of intention, but including the expense of an excess of work done in accordance with the specifications, but not authorized by the resolution, may be corrected by appeal to the city council, and the failure to take such appeal is conclusive upon the owner as well as the contractor. (*Frick v. Morford*, 87 Cal. 576.)
Cited 97 Cal. 312, 313.

509. Remedy where assessment includes the expense of work not performed under the contract is by appeal. (*Blair v. Luning*, 76 Cal. 134.)

510. The board of supervisors of San Francisco ordered that the roadway and sidewalks of Greenwich street from Laguna to Fillmore

street—a distance of three blocks—be macadamized, and that redwood curbs be furnished and laid thereon. In making the assessment, the superintendent of streets separated the roadway and curbing from the sidewalks. Held, that in estimating the cost of the work and distributing the same over the lots liable therefor, the roadway and curbing could not be separated from the sidewalks, and that the entire assessment was void; and further that if a separate assessment were required for each kind of work, the assessment here could not be sustained, because the cost of the curbing and the expense of macadamizing the roadway are united. (*Dyer v. Harrison*, 63 Cal. 447.) Cited 86 Cal. 49; 93 Cal. 165.

511. An item for engineering work done is properly included in the "incidental expenses" in the assessment, and upon the face of the assessment it must be assumed that the work was done and the amount included therefor is correct. (*McDonald v. Conniff*, 99 Cal. 386.)

512. Term incidental expenses as used in the act of April 1, 1872, is confined to contracts for grading. (*Deady v. Townsend*, 57 Cal. 298.) Cited 58 Cal. 529.

14. *Occupancy of Street by Railroad Bound to Improve; Including Cost of Printing.*

513. Mere fact that portion of street improved was occupied by railroad company, whose duty it was to improve, or bear the expense of improving, a part of the street, does not impair the prima facie correctness of the assessment, and the burden is on a property owner who contests the validity of the assessment to show, in order to invalidate the assessment, that the expense of improving the portion of the street occupied by the railroad was included in the assessment against him. (*McVerry v. Boyd*, 89 Cal. 304.)

514. An assessment for a street improvement in the city and county of San Francisco, under the act of April 1, 1872, is not invalidated by including therein the cost of printing. (*Burk v. Altschul*, 66 Cal. 533.)

Assessment, liability of street railroad for. See Railroads, X, 7.

15. *Assessments Partly Void.*

515. Where an assessment is made in gross for the work of curbing and macadamizing a street, and demand is made for payment of the entire assessment, the invalidity of the assessment as to the macadamizing vitiates it as to the curbing. (*Dorland v. Bergson*, 78 Cal. 637.)

516. Where two assessments, one valid and the other void, are severed, and separate demands made, the contractor is entitled to recover the amount of the valid assessment. (*Ede v. Knight*, 93 Cal. 159.) Cited 96 Cal. 407.

517. Where separate assessments are made for different portions of the work, and separate demands are made for the payment of each assessment, the invalidity of one of the

assessments does not render the other invalid. (*Parker v. Reay*, 76 Cal. 103.) Cited 93 Cal. 165.

16. *Legalizing Void Assessment.*

518. The legislature has no power to validate a street assessment that is void for want of jurisdiction in the board of supervisors to levy it. (*Brady v. King*, 53 Cal. 44.) Cited 68 Cal. 430.

519. The act of March 19, 1878, in so far as it purports to provide a mode of assessment against property owners for work previously done on such spaces of intersections, is invalid. (*Kelly v. Luning*, 76 Cal. 309.)

520. The legislature cannot legalize a void assessment. (*Schumacker v. Toberman*, 56 Cal. 508.)

521. The legislature cannot legalize a void assessment, nor can it, by direct act, make an assessment within an incorporated city, Held, accordingly, that the act of March 23, 1878, "to authorize the issuance of bonds for the widening and extension of Los Angeles street," etc., was unconstitutional, because it not only attempts to give effect to the void assessment referred to above, but also provides for new assessments to be levied annually to meet the interest on the bonds, and for the creation of a sinking fund to pay the principal. (*Schumacker v. Toberman*, 56 Cal. 508.)

Act validating assessment, validity. See ante, 365.

522. An act validating a void assessment for the improvement of a street, if constitutional, makes the assessment valid only from the date of its passage, so that pending suits brought to enforce the tax are not affected by the act. (*People v. O'Neil*, 51 Cal. 91; *People v. McCain*, 51 Cal. 360.)

523. An act validating an assessment for improving a street, if of any effect, makes the assessment valid only from the time of its passage. (*People v. Kinsman*, 51 Cal. 92; *Reis v. Graff*, 51 Cal. 86, cited 51 Cal. 93, 361.)

Assessment under void contract cannot be validated. See ante, 362.

524. So far as the lotowner is concerned, the city of San Francisco cannot, by its act, ratify proceedings taken to grade a street and impose an assessment on the lot for the same so as to make the same valid, when they were invalid in the first instance. The power of ratification, if it exists, is in the legislature. (*Meuser v. Risdon*, 36 Cal. 239.) Cited 97 Cal. 110; 13 Or. 257.

Act validating street proceedings, constitutionality of. See Constitutional Law, 248.

17. *Second Assessment.*

525. If street assessment is valid, the superintendent of streets cannot be required to make another assessment. (*Frick v. Morford*, 87 Cal. 576.)

526. If street assessment is invalid because including the cost of work not authorized, the superintendent of streets had power to make the second assessment which, if valid, superseded the first assessment. (*Dyer v. Scalmanini*, 69 Cal. 637.)

527. If an assessment has been adjudged to be void for causes affecting the assessment itself, and not the proceedings upon which it rests, a new assessment may be made within a reasonable time. Instance of time which was not unreasonable under the circumstances. (*Wood v. Strother*, 76 Cal. 545.)

528. The defendants, in an action for the enforcement of a street assessment in the city and county of San Francisco, averred in their answer that the assessment was void because it included the cost of work that was not authorized by the order of the board of supervisors, and procured the dismissal of the action on that ground. The superintendent of streets, acting upon the supposed invalidity of the assessment, thereupon made a second assessment, covering the work ordered by the board, which the present action was brought to enforce. The defendants set up the first assessment as a bar to the action. Held, that the defendants were estopped to deny the invalidity of the first assessment, and that the plaintiffs could introduce evidence of the estoppel without pleading it. (*Dyer v. Scalmanini*, 69 Cal. 637.) Cited 76 Cal. 548.

529. The fact that some of the owners have paid what was charged against their property by the void assessment is not of itself a reason why a valid assessment should not be made. Semble, that the contractor would not be allowed to collect twice from the owners who had paid, but that a court of equity would treat the payments made as payments in advance, and would compel the contractor to satisfy the second assessment of record. (*Wood v. Strother*, 76 Cal. 545.)

18. Action to Declare Assessment Void.

530. In action to declare void assessment under the act of 1889 (Stats. 1889, p. 70), made against the property of the plaintiff for the payment of the expenses of opening and widening a street, and to enjoin the enforcement thereof, an allegation in the complaint that the property within the assessment district was not all assessed renders the complaint sufficient, and a demurrer thereto is properly overruled. (*Davies v. Los Angeles*, 86 Cal. 37.)

19. Liability of City; Relief Acts.

531. The improvements in this case, being to particular streets, were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor, he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. (*Argenti v. San Francisco*, 16 Cal. 255.)

532. The common council of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to

grade, plank, and sewer a portion of Mission street. This ordinance was published and the advertisement required was made. Proposals were received and opened and the work awarded to B. Subsequently, an instrument was executed by B. as contractor, and by the street commissioner, setting forth the acceptance by the city of B's proposal and an agreement by it to pay him for the work at certain designated rates. B. began the work, and afterward transferred his contract and his interest therein to plaintiff, who completed the work. The work was measured as it progressed, by the city's engineer, who duly certified to the accounts, which accounts were duly audited, and upon them warrants were drawn by the controller. The warrants were presented to the treasurer and payment refused on the ground that there were no funds applicable. Previous to the demand assessments had been duly levied, and these assessments had been collected and paid into the city treasury. Plaintiff sues the city as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use. Held, that as, under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. (*Argenti v. San Francisco*, 16 Cal. 255.)

533. The charter gives the contractor a direct lien upon the adjacent property for his work, but where the city has collected this money from the property holders, it is liable to the contractor therefor, and can be compelled to return the same. The city being the trustee of the contractor, and also the agent of the property holder, it follows that a liability created thereby is not a violation of that portion of its charter which limits the power of the corporation in contracting debts. (*Lucas v. San Francisco*, 7 Cal. 463.)

534. Where city enters into a contract for street improvement, the city is primarily liable; it, and not the contractor, must look to the property holders adjacent to the improvements for the necessary expenses; the property holders are not parties to the contracts; the city must levy and collect the assessments; the contractor has no claim upon the property or the property holders, but must look alone to the city; the clause in the ordinance as to how the improvements shall be paid for is only a designation of the sources upon which the city relies for payment. (*Argenti v. San Francisco*, 16 Cal. 255.)

535. The city having discharged the assessments, by receiving in payment thereof outstanding warrants, it is primarily liable to the street contractor as for moneys received to his use, even on the theory that it acted simply as the agent of the contractor in collecting the assessments. (*Argenti v. San Francisco*, 16 Cal. 255.)

536. The city would not be liable independent of the contract made by its acceptance of the proposals of the contractor. A muni-

capital corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts has no application to cases of this character. (*Argenti v. San Francisco*, 16 Cal. 255.) Cited 9 Col. 27; 9 Mont. 320; 3 Utah, 207.

537. Liability of city for street improvements is limited to the expense of improving the crossings. The remainder is to be paid by the property fronting upon the streets. The city, in contracting as to the latter, must be regarded as the mere agent or trustee, and is, therefore, not primarily liable. (*Lucas v. San Francisco*, 7 Cal. 463.) Cited 16 Cal. 272.

City is not liable for assessments. See ante, 46.

538. Under the act of April 4, 1870, providing that a contractor for street work in the city and county of San Francisco, when he has faithfully performed his contract, shall be paid the amount due thereon out of the street department fund, after the assessment for the work has been declared invalid by the highest courts of the state, if such invalidity shall appear by the decision of the courts not to have been caused by the fault of the contractor, the judgment rendered in the action to foreclose the assessment, determining its invalidity, is not conclusive upon the contractor, in a subsequent action by him against the city and county to recover the amount due on the contract, as to the grounds upon which the assessment was held invalid. Nor is it essential to the right of the contractor to maintain the action against the city and county that the judgment on the assessment should affirmatively show that the invalidity of the assessment was not caused by any fault of his. (*Gafney v. City and County of San Francisco*, 72 Cal. 146.)

539. In an action on a street contract against the city and county, under the act of April 4, 1870, the contractor is only entitled to recover legal interest upon the amount due under the contract from the time when the adjudication of the invalidity of the assessment became final. (*Gafney v. City and County of San Francisco*, 72 Cal. 146.)

540. The city and county of San Francisco is not liable either upon an express or implied contract to pay for a street improvement, unless it is alleged and shown that no assessment had been made, or that the property holders had resisted it and had not paid the amounts assessed, through no fault of the contractor. It should appear how much, if any thing, has been paid by abutting owners. (*Raisch v. City and County of San Francisco*, 80 Cal. 1.)

541. Under the act of April 4, 1870, a contractor for street work in the city and county of San Francisco acquires no right to maintain an action against the city and county to recover the contract price after the assessment therefor has been finally adjudged invalid, unless the contract under which the work was done is valid and binding on the city and

county. (*Daly v. City and County of San Francisco*, 72 Cal. 154.) Cited 98 Cal. 430.

542. The circumstance that the contract under which Patrick Creighton did certain street work in San Francisco expressly provided that the city should in no event be liable for any portion of the expenses thereof, held, not to affect or in any manner invalidate the special act subsequently passed by the legislature (Stats. 1869-70, p. 309) requiring the city to pay him. (*Creighton v. San Francisco*, 42 Cal. 447.)

Acts directing city to pay claims. See Constitutional Law, VIII, 6, b.

20. Remedy by Appeal; Effect of Failure to Appeal.

543. The San Francisco street law of 1863, in providing for an appeal to the board of supervisors (Stats. 1863, sec. 12, p. 530), does not exact from persons objecting to an assessment the same strictness and precision, in stating their objections, which would be required in a pleading at common law. (*Barber v. San Francisco*, 42 Cal. 630.)

544. Where a petition on appeal to the supervisors of San Francisco, from a street assessment, based upon the ground that the petitioners did the work in front of their premises in time, and were not allowed therefor, omitted to show that petitioners had obtained the certificate from the surveyor required by law (Stats. 1867-68, sec. 8, subd. 11, p. 361), held, that such petition was not bad on account of such omission, or insufficient to give the board jurisdiction. (*Barber v. San Francisco*, 42 Cal. 630.)

545. The failure of a property owner, who is dissatisfied with a street assessment, to appeal to the board of supervisors, estops him from complaining of any matters which were the subject of appeal. (*McVerry v. Boyd*, 89 Cal. 304.)

546. By the provisions of acts of 1862 and 1863, concerning street improvements in San Francisco, the assessment for street improvements and the warrant for the collection of the money from the owners of the lots, chargeable therefor, are required to be put in the hands of the contractor, who then has fifteen days from the date of the warrant within which to examine it, and if found in any respect to be incorrect or illegal, it is made his duty to apply to the board of supervisors, by appeal, to have it corrected and made legal. (*Smith v. Cofran*, 34 Cal. 310.)

547. This power of correction conferred on the board of supervisors extends to a case where an assessment had been made by the superintendent against a person not then living, and not to the owner of the lot, or unknown owners, and was, therefore, illegal and void. (*Smith v. Cofran*, 34 Cal. 310.)

548. Said statute makes it the duty of the contractor, if he have any objections to the assessment made by the superintendent of streets, for incorrectness or illegality therein, to appeal to the board of supervisors for their correction; and if he fails to avail himself of this means of protection afforded him by law,

in case the assessment be incorrect or void, it is as much his own neglect as of the superintendent of streets, and he cannot hold the latter responsible in damages for the result. (Smith v. Cofran, 34 Cal. 310.) Cited 44 Cal. 279; 47 Cal. 51; 87 Cal. 580.

549. One who is a party to and bound by legal proceedings in relation to an assessment for widening a street cannot attack these proceedings for mere error, in a collateral action. His remedy is by appeal. (Bucknall v. Story, 48 Cal. 589.)

550. In an action to foreclose a lien for a street assessment, it appeared that the only objection to the assessment was purely technical, and that it did not and could not affect any substantial right or interest of the defendant. Held, by neglecting to appeal to the board of supervisors, the defendant waived the objection. (Dyer v. Parrott, 60 Cal. 551.) Cited 80 Cal. 12.

551. If appeal lies to board of supervisors of San Francisco, for errors in the diagram for a street assessment, there is no other remedy. (Dorland v. McGlynn, 47 Cal. 47.) Cited 80 Cal. 11; 89 Cal. 310.

552. Objection that work was not properly graded must be taken by appeal. (Fanning v. Leviston, 93 Cal. 186.) Cited 96 Cal. 193; 97 Cal. 312.

553. Conceding the validity of the statute of March 23, 1876, for the widening of Dupont street, and that the preliminary steps were taken which authorized the work to be done, an owner of property assessed for the improvement cannot maintain an action to enjoin the enforcement of the assessment on account of mere irregularities or fraud on the part of the commissioners in making the assessments, for which relief could have been obtained in the county court. (Lent v. Tillson, 72 Cal. 404.)

554. If a lot improperly assessed is partly within and partly without the limits of the work authorized by the resolution of intention, it is the duty of the contractor, under section 11 of the act of March 8, 1885, to appeal to the city council to have the assessment corrected, and upon his failure to take such appeal he is concluded, and cannot have the assessment corrected in any other mode. (Frick v. Morford, 87 Cal. 576.) Cited 97 Cal. 312, 313.

555. An assessment on a lot in San Francisco for a street improvement, if made to one alone of several joint owners, can be corrected only by an appeal to the board of supervisors. (Taylor v. Palmer, 31 Cal. 240.) Cited 38 Cal. 75.

556. An objection to a street assessment in San Francisco, that it included an amount, as incidental expenses, for engineering and printing, is waived by a failure to appeal to the board of supervisors. (Boyle v. Hitchcock, 66 Cal. 129.) Cited 76 Cal. 136; 80 Cal. 12; 87 Cal. 579; 89 Cal. 310; 93 Cal. 188; 96 Cal. 193; 97 Cal. 312.

557. When the superintendent includes in the assessment on the lots fronting on the old street the expenses of the work on that part

added to the street, it is an error only, but it must be corrected by appeal to the board of supervisors, and is not a defense in an action to recover the assessment. (Himmelmänn v. Hoadley, 44 Cal. 276.) Cited 80 Cal. 11; 87 Cal. 579; 89 Cal. 310; 93 Cal. 188; 96 Cal. 193; 97 Cal. 312.

558. If there is any irregularity in the demand for the amount of an assessment for a street improvement in Oakland, or any defect in the assessment roll, the same is waived by a failure to appeal to the common council. (Beaudry v. Valdez, 32 Cal. 269.)

559. If there is any irregularity in the act of the mayor of Oakland in countersigning a warrant for the collection of an assessment for a street improvement, such irregularity is waived by a failure to appeal from the mayor to the common council. (Beaudry v. Valdez, 32 Cal. 269.) Cited 38 Cal. 75; 69 Cal. 641.

Failure to appeal. See ante, 498, 499.

Effect of failure to appeal. See ante, 494, 502.

Failure to appeal where assessment to wrong owner. See ante, 442.

560. The provision of section 11 of the act of March 18, 1885, authorizing street improvements, to the effect that no assessment shall be held invalid except upon appeal to the city council, etc., does not apply to a case in which an appeal is not authorized, or in which, if taken, the council could not have remedied the defect, the assessment being void by reason of incurable defects. (Manning v. Den, 90 Cal. 610.) Cited 98 Cal. 430, 431.

561. An objection to the correctness of the proceedings upon a street assessment, by reason of defects defeating the validity of the contract for the street improvement, is not waived by the failure of the owner whose property is sought to be charged to appeal to the city council from the assessment, the defects being such that the council could not remedy or avoid them upon such an appeal. (Manning v. Den, 90 Cal. 610.)

562. An illegal assessment creates no lien upon the land assessed, and the owner thereof is not a person "aggrieved," and is not required to appeal to the city council. (Frick v. Morford, 87 Cal. 576.) Cited 97 Cal. 312, 313.

563. Where a resolution of intention to do street work failed to include the construction of rock gutterways in the street to be improved, an objection to an assessment for the work done because the cost of such gutterways was included therein, is not waived by the failure of the defendants to appeal to the board of trustees for the correction of the assessment, or to ask for a new assessment to pay only the contract price for the work which was done in macadamizing the street according to the resolution of intention. (Partridge v. Lucas, 99 Cal. 519.)

564. The contract being invalid because of the failure of the superintendent to enter into the contract within the time fixed by the statute, the assessment based thereon is void; and the failure of the property owner to ap-

peal to the city council from the act of the superintendent in entering into the contract after the time fixed does not validate the assessment. (*Perine v. Forbush*, 97 Cal. 305.) Cited 99 Cal. 523.

565. Where lot is not liable to be assessed for repairs under the Consolidation Act, the owner thereof is not a party directly interested in the contract, work, or assessment within the forty-fifth section, and is not bound to appeal from the assessment. This section does not mean that a mere stranger to the locality must appeal from the assessment to the board of supervisors, or be cut off from his defense. (*Bassett v. Enwright*, 19 Cal. 635.)

566. Owner appealing to city council in case of assessment void for incurable defects cannot be estopped by a denial of relief upon such appeal; and even if they should expressly determine that the assessment was valid and the proceedings regular, their jurisdiction being limited and special, it may be shown that the facts conferring jurisdiction upon them to determine the question did not exist. (*Manning v. Den*, 90 Cal. 610.)

567. Assessment is void where work is not completed within time specified in the contract, and it is not made valid by an appeal. (*Mahoney v. Braverman*, 54 Cal. 565.) Cited 69 Cal. 456.

568. Owners of lots against which assessment is levied are not estopped from disputing its validity because they protested against the extension and appealed from the assessment to the board of supervisors. (*Dougherty v. Coffin*, 69 Cal. 454.)

569. When an appeal from an assessment on a lot for improving a street in San Francisco is taken regularly and in proper time, the board has no power to dismiss it; and even if an order is made dismissing it, the assessment does not become a finality, and an action cannot be maintained on it. (*People v. O'Neil*, 51 Cal. 91.) Cited 54 Cal. 569.

570. In an action upon a street assessment, it appeared that an appeal had been taken from the assessment, which had been dismissed upon the report of the city and county attorney; but it did not appear that any testimony was offered by the party appealing. Held, that this was consistent with the fact that the only matter urged on the appeal was a question of law, and did not show that the appeal was improperly dismissed. (*Mahoney v. Braverman*, 54 Cal. 565.)

Appeal, effect of on right to claim work not completed in time. See ante, 348.

Remedy by appeal where assessment includes work not authorized. See ante, XVI, 13.

Failure to appeal, effect of. See Appeals, 2415.

Illegal assessment, objection to must be first taken below. See Appeals, 2414.

21. Warrants.

571. Act of mayor of Oakland in countersigning a warrant for the collection of an assessment for street improvements is purely ministerial. (*Beaudry v. Valdez*, 32 Cal. 289.)

572. Under section 10 of the act of 1872 (Stats. 1872, p. 813), relating to street assessments in San Francisco, which directs the superintendent of streets to attach to the assessment a warrant, and prescribes the form of the warrant and its date and authentication, the date is an essential part of the assessment, and includes the month and day of the month, as well as the year; and a warrant reciting the year merely, without the month or day of the month, is invalid. (*Shipman v. Forbes*, 97 Cal. 572.)

573. The fact that the county auditor, when he countersigned the warrant, wrote the date of his signing under his signature does not give the warrant itself that date, or cure the defect arising from the failure of the superintendent of streets to date it. (*Shipman v. Forbes*, 97 Cal. 572.)

574. A controller's warrant, to be valid, must be in the form prescribed by the charter of San Francisco. Per *Burnett, J.* (*Lucas v. San Francisco*, 7 Cal. 463.)

575. Warrants in this case, with few exceptions, do not comply, in their form, with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriations under which they were issued, and the date of the ordinances making the same. (*Martin v. City and County of San Francisco*, 16 Cal. 285.)

576. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco, upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. (*Martin v. City and County of San Francisco*, 16 Cal. 285.) Cited 23 Cal. 126; 74 Cal. 607.

577. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they were given. (*Martin v. City and County of San Francisco*, 16 Cal. 285.)

578. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts, held, that plaintiff cannot recover on the warrant; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund, and no other. (*Argenti v. San Francisco*, 16 Cal. 255.) Cited 16 Cal. 286; 23 Cal. 126; 77 Cal. 640; doubted 20 Cal. 593.

579. Nor can plaintiff recover on some of the warrants so drawn, for the further reason that they do not specify the appropriations under which they were issued, nor the date of the ordinance making the same, as is required by the eighth section of the third article of the city charter; and they would

not constitute any authority to the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Field, C. J. (Argenti v. San Francisco, 16 Cal. 255.)*
Cited 11 Cal. 439.

580. A warrant of assessment must, in order to create a lien upon the property charged, be recorded in the office of the superintendent of streets before it is delivered to the contractor or his assigns. (*Gillis v. Cleveland, 87 Cal. 214.*)

581. The warrant is a process in the hands of the contractor, which he is required to serve, and he will be held to the same measure of diligence in its service as is an officer holding legal process for service. (*Guerin v. Reese, 33 Cal. 292.*)
Cited 96 Cal. 190.

Duty to issue. See ante, XVI, 5.

Warrant, to whom issued, where contract assigned. See ante, 334.

Irregularity in countersigning warrant. See ante, 559.

Recording warrant. See ante, XVI, 10.

Warrants, countersigning by auditor. See *Mandamus, 160.*

Service of warrants. See post, XVI, 23.

22. Demand.

582. In making the service, it is the duty of the contractor, first, to make a reasonable effort to find and serve the person assessed; failing in this, it is his next duty to make a like effort to find and serve the agent of the person assessed; and only when such first and second efforts have failed is he authorized to make service by a public demand for the assessments upon the premises assessed. (*Guerin v. Reese, 33 Cal. 292.*)

583. Where the return of a contractor to a warrant showed service made as to R. only by a public demand upon the premises assessed, and the only reason stated therefor was "that he [contractor] could not conveniently find R.," held, that the return was insufficient. (*Guerin v. Reese, 33 Cal. 292.*)

584. The legal purpose of the demand is to give to the owner, as far as practicable, actual notice of the existence of the lien created by the assessment and resting upon his property, so as to enable him to take the proper steps for its discharge. (*Guerin v. Reese, 33 Cal. 292.*)
Cited 96 Cal. 190.

585. There are three modes in which demand may be made by the contractor for street assessment, to wit: (1) Of the person assessed; (2) of his agents; and (3) a demand, publicly made, upon the premises assessed. (*Guerin v. Reese, 33 Cal. 292.*)

586. An agent of an assignee of a street contractor is competent to make the demand of payment of the assessment, and to make return of such demand on the warrant. (*Himmelman v. Woolrich, 45 Cal. 249.*)

587. When more than one person, either by the original contract, or by assignment from the contractor, is interested in a contract for improving a street in San Francisco, the demand required by the statute for the payment

of the assessment on a lot for improving the street, before the lot can be charged with a lien for the same, is sufficient, if made by one alone of the persons interested in the contract. (*Gaffney v. Gough, 36 Cal. 104.*)
Cited 99 Cal. 517; 2 Wash. Ter., N. S., 576.

588. A demand for the payment of a street assessment is unnecessary where the property is assessed to unknown owners. (*Whiting v. Townsend, 57 Cal. 515.*)

589. Under act of April 4, 1864, where the land is assessed to unknown owners, the demand for the payment of the assessment must be publicly made on the premises; a demand made to the owner personally, or on the street in front of the premises, is insufficient. (*Alameda Macadamizing Co. v. Williams, 70 Cal. 534.*)

590. When there is tenant occupying lot in San Francisco which has been assessed for street work, should not the demand for the payment of the assessment be made upon the tenant, query? (*Himmelman v. Townsend, 49 Cal. 150.*)

591. A demand for the aggregate sum due on two lots, under a street assessment, is insufficient. The demand should be on each lot, for the amount assessed thereon. (*Schirmer v. Hoyt, 54 Cal. 280.*)
Cited 60 Cal. 292; 87 Cal. 218.

592. A demand for the payment of an assessment levied on a lot for improving a street in a city, must be for the amount which is properly chargeable against the lot; and if the assessment is for improving roadway and sidewalk both, and the lot is chargeable only with the cost of improving the roadway, the demand must be for such sum. (*Dyer v. Chase, 52 Cal. 440.*)
Cited 54 Cal. 281; 60 Cal. 292.

593. If at the time of the demand the contractor stood upon any part of the premises lying within the exterior boundaries of the lot designated in the diagram, the demand is good. (*Ede v. Knight, 93 Cal. 159.*)

594. The verified return of the contractor, stating that he went upon each of the lots exhibited on the diagram, and publicly demanded on each lot payment of the sum assessed to each, is prima facie evidence of the facts stated, and if not disputed, shows a proper demand. (*Ede v. Knight, 93 Cal. 159.*)

595. The fact that the contractor, after demanding the sum due upon the lot designated in the diagram for the grading of the street, demanded on the same lot, without authority, the sum due for grading the crossing, would not affect the validity of the first demand for which the lot was properly assessed. (*Ede v. Knight, 93 Cal. 159.*)

596. Where, in an action to recover a street assessment, a judgment of nonsuit had been rendered because of the insufficiency of the tone of voice in which the demand for payment had been made, held, that the judgment should not be disturbed because of error in holding the demand insufficient. (*Himmelman v. Booth, 53 Cal. 50.*)

597. The statute requires the return to state "the nature and character of the demand" made by the contractor. Under this require-

ment, it is incumbent on him, by his return, to show a demand upon the person assessed, or a satisfactory reason why it was not done, before resorting to the other modes of making the demand. (*Guerin v. Reese*, 33 Cal. 292.) Cited 96 Cal. 190.

598. In an action to foreclose a street assessment, under the act of 1872 (Stats. 1871-72, p. 814), the affidavit of demand is competent evidence to prove the demand. (*Dyer v. Brogan*, 57 Cal. 234.) Cited 57 Cal. 299.

599. In an action to foreclose a street assessment, under the act of April 1, 1872, the affidavit of demand prescribed in said act is sufficient proof of demand. (*Deady v. Townsend*, 57 Cal. 298.) Cited 93 Cal. 164.

600. The affidavit of the person making demand for payment is prima facie evidence that he was the agent of the contractor. (*Whiting v. Townsend*, 57 Cal. 515.)

601. An affidavit of demand stating that the person making it was at the time of making the demand the manager of the owners of it, and that he made the demand as such manager, is prima facie evidence of his character, as agent of the owners, which is not overcome by proof that he was at the same time the agent of assignees who held the assessment as security for indebtedness of the owners, and that he received the assessment, warrant, and diagram from them. (*Foley v. Bullard*, 99 Cal. 516.)

602. In an action by a contractor to recover an assessment on a lot in San Francisco for improving the street, the return of an agent of the plaintiff, indorsed on the warrant for the collection of the assessment, showing a demand of payment of the assessment, is evidence of such demand. (*Himmelmänn v. Hoadley*, 44 Cal. 213.) Cited 57 Cal. 519.

603. The statute does not prescribe any time within which the affidavit of demand shall be recorded by the superintendent of streets. (*Himmelmänn v. Reay*, 38 Cal. 163.) Cited 89 Cal. 308; 93 Cal. 162.

Irregularity in. See ante, 558.

Demand by owners on assignment. See post, 617.

Assessment for improvement after owner's death, claim for need not be presented. See *Estates of Deceased Persons*, 77.

23. Lien of.

604. A statute creating a lien upon a lot in a city to secure the payment of an assessment levied on the lot for improvements in the street adjacent must be strictly construed, and the proceedings authorized by the statute to create and enforce the lien must be followed precisely as directed, or the whole proceeding will be void. (*Creighton v. Manson*, 27 Cal. 613.)

605. As the contractor is not entitled to a personal judgment against the person assessed, he is bound to pursue the course specified in said act for the preservation of his lien upon the property charged therewith, otherwise he is without remedy for the col-

lection of the assessments. (*Guerin v. Reese*, 33 Cal. 292.)

606. Where there was no lien upon the lot at the time when it is claimed that the waiver of a failure to complete the work in time was made, no lien could be created by any oral statements of the lotowner, whatever effect such statements might have upon his personal liability. (*Helt v. Payne*, 97 Cal. 108.)

607. Until the assessment, diagram, and warrant are recorded in the office of the superintendent of streets, in San Francisco, the contractor does not acquire a lien on a lot for work on the street. (*Himmelmänn v. Danos*, 35 Cal. 441.)

608. Under the act of 1862 relating to streets in San Francisco the return by the contractor of the warrant of the superintendent of streets, within the time and in the form prescribed in the eleventh section of said act, is essential to the continuance of the contractor's lien upon the lands, lots, and portions of lots assessed, after the time limited in said act for the contractor to make said return. (*Guerin v. Reese*, 33 Cal. 292.)

609. A lien for the improvement of a street in San Francisco cannot be enforced unless the assessment and diagram as recorded contain a sufficient description of the lot to enable the court to enforce a lien on it. (*Himmelmänn v. Bateman*, 50 Cal. 11.) Cited 54 Cal. 310; 87 Cal. 219, 220.

610. If an action upon a street assessment is commenced within two years from the recording of the assessment, the lien will not lapse, though the judgment is rendered after the two years expire. (*Dougherty v. Henarie*, 47 Cal. 9; *Randolph v. Bayue*, 44 Cal. 366, cited 47 Cal. 12, 46; *Himmelmänn v. Carpenter*, 47 Cal. 42.)

611. If an action to enforce a lien for an assessment for improving a street in San Francisco is commenced within two years after the lien attaches, the lien does not expire on the expiration of two years, but continues until the judgment is rendered. (*Dorland v. McGlynn*, 47 Cal. 47.)

612. An action cannot be maintained to enforce lien for a street improvement, which lien did not exist at the time the action was commenced. (*Reis v. Graff*, 51 Cal. 86.)

613. Under the act of March 18, 1885 (Stats. 1885, p. 147), providing for the assessment of abutting lots for the expenses incurred for street improvements, and that the amount assessed upon each lot shall be a lien thereon, each lot or portion of a lot is separately liable for its proportion of the cost of the improvement, and the liability of each is independent of any other, and constitutes a separate demand upon which a separate cause of action may be based, and the foreclosure of a lien upon one lot is not a bar to an action to foreclose a lien upon another lot owned by the same person. (*Gillis v. Cleveland*, 87 Cal. 214.)

614. The foreclosure of a junior street assessment lien does not extinguish prior liens of the same kind, if the holders of such prior liens are not made parties to the foreclosure suit. (*Wood v. Brady*, 68 Cal. 78.)

616. Street assessment liens are purely statutory, and exist only for the term given by the statute; and the purchaser under foreclosure of a valid subsequent assessment may insist that claimants whose liens have expired shall find their right to enforce them only in the statute which authorized their creation and fixed the limit of their continuance; and he is not bound, in an action brought by him to quiet title, to require the property to be sold and the proceeds applied in satisfaction of such expired liens of defendant as were originally valid in the order of their priority, and the maxim that he who seeks equity must do equity does not require such a sale. (*Brady v. Burke*, 90 Cal. 1.)

Lien, effect of sale of part. See ante, 467, 468.

Assessment, homestead is subject to lien. See *Homesteads*, X, 4.

Lien of extinguished by tax sale. See *Taxation*, 744.

24. Assignability of Demand.

616. A demand by a contractor against the owner of a lot in San Francisco for an assessment on the lot for street improvement is assignable. (*Cochran v. Collins*, 29 Cal. 129.) Cited 31 Cal. 248.

617. Where a street assessment is assigned as security for indebtedness, the title to the assessment still remains in the assignors, and a proper demand by their agent in their name and behalf for the amount of the assessment is valid, even though the agent making the demand is also in fact the agent of the assignees. (*Foley v. Bullard*, 99 Cal. 516.)

Assessment, payment of before notice of assignment. See *Assignments of Contracts*, 52.

25. Actions on.

a. When Lie.

618. Assistant city and county attorney of San Francisco has no authority to commence an action under the act of April 4, 1870, to enforce the lien on a lot for an assessment for improving a street until after the tax-collector of the city and county shall have published a notice for the period of thirty days that the assessment is in his hands for collection, and that the same will be delinquent if not paid in that time. (*People v. Reay*, 52 Cal. 423.)

Effect of amendment of statute. See ante, 397, 398.

b. Pleadings in; Summons.

619. The power of the legislature to prescribe the requirements of a complaint in actions relative to assessments for street work, admitted by counsel. (*Richardson v. Tobin*, 45 Cal. 30.) Cited 67 Cal. 265; 73 Cal. 622.

620. The matter of pleadings is a proper subject for legislative regulation. Held, accordingly, that that portion of the act of the legislature of April 1, 1872, prescribing the contents of complaints for the recovery of street assessments, is valid. (*Whiting v. Townsend*, 57 Cal. 515.) Cited 87 Cal. 13, 14.

621. It is incumbent upon the plaintiff, in an action upon a street assessment, to show

in the complaint, by either special or general averments of the character permitted by statute, that the various provisions of the statute under which it is sought to charge the defendant were complied with. (*Perine v. Forbush*, 97 Cal. 305, cited 97 Cal. 317; *Himmelmänn v. Danos*, 35 Cal. 441, cited 52 Cal. 352, 71 Cal. 246, 97 Cal. 318, 19 Nev. 37.)

622. When notice of intention to improve is not set forth in the complaint, and a contract is set forth, it will be presumed that the contract given conformed in its description of the work to the description in the notice, and if the description in the contract is for work on the street designated "where necessary," the complaint is fatally defective. (*People v. Clark*, 47 Cal. 456.)

623. It is not necessary in such action to aver that notice of the intention of the board was given in the resolution, nor to give the name of the official newspaper; and it is sufficient to aver that the contract "was in the form and contained the notices, matters, and conditions prescribed by law," and to aver that the work was completed within the time fixed by the superintendent. (*Himmelmänn v. Woolrich*, 45 Cal. 249.)

624. It is not necessary to aver in the complaint that the board of supervisors ordered their clerk to sign the resolution of intention to grade a street. (*Himmelmänn v. Woolrich*, 45 Cal. 249.)

625. In an action to recover a street assessment in San Francisco, an averment that a resolution to do the work was passed by the board of supervisors, and that the resolution was signed by the clerk, and published ten days (Sundays excepted) in the official newspaper, is sufficient to support a judgment by default, or to authorize proof that the board directed the resolution to be published. (*Dyer v. North*, 44 Cal. 157.)

626. An allegation in a complaint in an action to foreclose the lien of a street assessment that the city council, deeming it necessary, "duly gave and made its determination to order the work done," is a statement in legal effect that every thing necessary to be done to give the order validity had been done and the complaint need not set forth the steps required by the statute to give the city council jurisdiction to order the work done. (*Pacific Paving Co. v. Bolton*, 97 Cal. 8.)

627. In an action to recover a street assessment in San Francisco, the complaint must allege that the notice of the award of the contract was published by order of the board of supervisors. (*Himmelmänn v. Townsend*, 49 Cal. 150.)

628. In a complaint to recover an assessment for improving a street in San Francisco, it is sufficient to aver that notice of the award of the contract to the contractor, and the particulars thereof, was published for five days, without alleging that the board of supervisors passed a resolution directing notice of the award, etc., to be published. (*Himmelmänn v. Haskell*, 46 Cal. 66.)

629. A complaint in an action upon a street assessment is insufficient if it fails to show that the contract for the work done fixed the

time for the commencement and completion of the work to be done thereunder, in accordance with the requirements of section 6 of the act of March 18, 1885 (Stats. 1885, p. 147), as amended by the act of March 14, 1889. (Stats. 1889, p. 157.) (*Washburn v. Lyons*, 97 Cal. 314.)

630. The complaint in an action upon a street assessment must allege facts affirmatively showing that the contract was valid, and must show that the contract for the work done fixed the time for the commencement and completion of the work. It is not sufficient to allege generally that the contract entered into was one by which the contractor agreed to do the work named therein in accordance with specifications, which are not set out, and under the direction and to the satisfaction of the superintendent of streets, but it must affirmatively appear from the statement of the contract, whether it is set out in *hæc verba* or according to its legal effect, that it contained every thing essential to make it a valid contract under the statute. (*Libbey v. Elsworth*, 97 Cal. 316.)
Cited 97 Cal. 315.

631. In an action on a street assessment where the complaint describes the land assessed as bounded by the side line of the adjoining street, the presumption that the land extends to the center of the street is rebutted. (*Alameda Macadamizing Co. v. Williams*, 70 Cal. 534.)

632. In an action to foreclose a street assessment the complaint need not allege that the width of the sidewalk to be constructed had been established by the board of supervisors before the institution of the proceedings for doing the work. (*Doane v. Houghton*, 75 Cal. 360.)

633. The complaint in an action by a contractor against a property owner, upon a contract for improving streets in San Francisco in pursuance of the provisions of the Consolidation Act, need not aver any special demand upon the defendant other than a compliance with the forty-ninth section of the act. (*Conlin v. Seamen*, 22 Cal. 546.)

634. The fact that an assessment was made and issued is a material averment in a complaint to enforce the collection of street assessments in San Francisco. (*San Francisco v. Eaton*, 46 Cal. 100.)

635. An averment in a complaint in an action to recover upon a street assessment in San Francisco, that "the said superintendent duly made an assessment to cover the sum due for the work performed and specified in said contract, including the expenses thereof," is a sufficient averment of the assessment. (*Himmelmann v. Woolrich*, 45 Cal. 249.)

636. In an action to foreclose a lien for a street assessment the complaint should allege that the assessment was made in the terms prescribed by the statute, and a complaint alleging that the assessment was made "upon the property benefited by said street improvement" does not show a compliance with the statute providing that the expenses incurred "shall be assessed upon the lots and lands fronting thereon, each lot or portion of a lot being separately assessed in propor-

tion to the frontage." (*Miller v. Mayo*, 88 Cal. 568.)

637. The complaint in an action to enforce a lien for a street assessment in San Francisco must aver that the defendants are the owners of, or have some interest in the land sought to be charged with the alleged lien. (*San Francisco v. Doe*, 48 Cal. 560.)
Cited 49 Cal. 414; 52 Cal. 482; 53 Cal. 410; 63 Cal. 440; 72 Cal. 231.

638. If an ordinance of a city provides that the city shall have a lien on lots for improvements made by the city on the street, which lien may be enforced by a suit against the owner, to authorize a judgment in favor of the city, enforcing the lien, it is necessary to allege that the defendant owns the lot, and if it is denied, prove it. (*Santa Barbara v. Huse*, 51 Cal. 217.)

639. Law of 1869-70 concerning assessments in San Francisco, which prohibits any defense, except that the board did not acquire jurisdiction to order the work, or payment, or fraud in the assessment, was not intended to prevent the defendant from denying material averments in a complaint, but was merely intended to restrict affirmative defenses to those mentioned. (*San Francisco v. Eaton*, 46 Cal. 100.)

640. Allegation in answer that board of supervisors had no authority or jurisdiction to order the work done upon a street, for which an assessment is sought to be foreclosed, and findings responsive to such allegation, are mere conclusions of law. The facts should be alleged and specifically found. (*Spaulding v. Wesson*, 84 Cal. 141.)

641. In an action on a street assessment, an averment in the answer that the defendant had not sufficient information or belief on the subject of his ownership of the property assessed to enable him to answer the plaintiff's allegation of his ownership, and therefore denies the same, is a sufficient denial, where no motion is made to strike it out. (*Harney v. McLeran*, 66 Cal. 34.)

642. To a complaint seeking to enforce the lien of an assessment for street improvements in San Francisco, an answer which denies that the superintendent of streets "originally" made the assessment in his official capacity is evasive, and tenders an immaterial issue. (*Shepard v. McNeil*, 38 Cal. 72.)

643. The complaint alleged that "East street, in the city of Stockton, had been laid out and dedicated as a public highway, and has been used as a public thoroughfare for sixteen years." The answer denies that there is such a street in Stockton. Held, that the answer is evasive. (*Fuhn v. Weber*, 38 Cal. 636.)

644. Under section 21 of the act of March 27, 1872, reincorporating the city of Stockton, an answer in an action to enforce a street assessment must be verified. If an unverified answer be filed to a complaint which states facts sufficient to constitute a cause of action, and on the trial the defendant introduces no evidence, the plaintiff is entitled to judgment on the pleadings, although the evidence introduced by him was insufficient to prove all the material allegations of the com-

plaint. (*City of Stockton v. Dahl*, 66 Cal. 377.) Cited 80 Cal. 60.

645. Where the complaint avers that "the space formed by the junction of Market and Bush streets had been laid out, graded, and planked, and that the space formed as aforesaid is a space formed by the junction of two streets terminating at the same point, according to the provision of section 37 of the Consolidation Act"; and the answer avers that "the space formed by the junction of Market and Bush streets as mentioned in the complaint is not formed by the junction of two streets terminating at the same point, within the true intent and meaning of the thirty-seventh section of the Consolidation Act," held, that the answer meets the allegation of the complaint as to the manner in which the space is formed, and that if no material issue is made on this point, it is because the material fact, to wit, that the space was formed by the junction of two streets terminating at the same point, is not directly alleged. (*Bassett v. Enwright*, 19 Cal. 635.)

646. In an action to enforce a street assessment against a lot in San Francisco, it appeared from the original complaint that all the defendants were joint owners of the lot, and, as such, necessary parties to the suit; but when the case was called for trial, the action was dismissed, on motion of the plaintiff, as to some of the defendants, and the complaint amended by striking their names from its caption. Held, that if the effect of the amendment was to show that the dismissed defendants had no interest in the lot, then it was the right of the remaining defendants to amend their answer, and aver that the dismissed defendants did have an interest in the lot. (*Harney v. Appelgate*, 57 Cal. 205.)

Cited 60 Cal. 381; 63 Cal. 440; 87 Cal. 13.

Service of returned summons, when void. See *Summons*, 145.

Suit to foreclose against infant's property, service of summons. See *Infancy*, 31.

c. In What Right Contractor Sues; Parties.

647. In suing a lot owner for a street assessment the contractor is quasi assignee or agent of the city, and is vested with all her rights. (*Hendrick v. Crowley*, 31 Cal. 471.) Cited 32 Cal. 279; 36 Cal. 244, 245.

648. The act of April 4, 1870, requiring actions to recover street assessments in San Francisco to be brought in the name of the city and county of San Francisco, instead of being brought in the name of the contractor, as was required by law before that time, does not apply to contracts for improving streets entered into before April 4, 1870. (*Dyer v. Pixley*, 44 Cal. 153.) Cited 44 Cal. 160; 53 Cal. 81.

649. An action to recover an assessment for improving a street in San Francisco should be brought in the name of the contractor, and not in the name of the city. (*Dyer v. North*, 44 Cal. 157.)

650. The contractor or his assigns are the only persons authorized to maintain an action to enforce the lien of an assessment on a lot

for the improvement of a street in San Francisco. (*Bays v. Lapidge*, 52 Cal. 481.)

651. The people of the state of California, and not the city of Sacramento, is the proper plaintiff in an action brought under the act of March 16, 1864, to foreclose a street assessment in the city of Sacramento. If such an action be brought in the name of the city as plaintiff, the judgment therein is void, although rendered in favor of the people of the state as well as the city. (*Sullivan v. Mier*, 67 Cal. 264.) Cited 73 Cal. 622.

652. The provision of the act of March 16, 1864, requiring the action to be brought in the name of the people of the state of California, is constitutional. (*Sullivan v. Mier*, 67 Cal. 264.)

653. Under the act of April 1, 1872, when the owner of a lot in the city and county of San Francisco dies after a resolution of intention to improve the adjoining street has been passed by the board of supervisors, and the contract for the work has been let, but before the assessment therefor has been made, his personal representatives are not necessary parties defendant in an action brought to foreclose the assessment pending the settlement of his estate. His heirs or devisees are the only necessary defendants. (*Phelan v. Dunne*, 72 Cal. 229.)

654. In an action to foreclose a street assessment upon a specific tract of land in the city and county of San Francisco, under the act of 1871-72, all of the owners of the property assessed must be made parties defendant, and the lien cannot be enforced against any of the owners, in the absence of another owner who is not joined as a defendant. (*Robinson v. Merrill*, 87 Cal. 11.)

655. A lien for a street assessment in San Francisco cannot be enforced without making all the owners of the property defendants, and serving them all with summons. (*Hancock v. Bowman*, 49 Cal. 413.) Cited 54 Cal. 526; 63 Cal. 440; 72 Cal. 231; 87 Cal. 12.

656. If the owner of the property assessed for street improvements in Sacramento is not made a party to a suit to collect the same, and the action is not brought against "all owners and claimants," and service is not made on the real estate, the judgment is void. (*Mayo v. Ah Loy*, 32 Cal. 477.) Cited 33 Cal. 322; 87 Cal. 148.

657. The statute authorizing the enforcement of street assessment liens contemplates that the legal owner at the time of the rendition of the judgment in foreclosure proceedings shall be a party, unless he is a purchaser pendente lite affected with notice of the action; and one who has acquired title to the land, under a foreclosure of a prior street assessment lien, pending a suit for the foreclosure of later assessment liens, but without notice of such suit, should be made a party thereto before judgment, and he is not bound by the judgment if not so made. (*Brady v. Burke*, 90 Cal. 1.)

658. If assessment is not paid, the district attorney must sue the person assessed, the

real estate, and "all owners and claimants" to the same. (*Mayo v. Ah Loy*, 32 Cal. 477.)

659. Where an action to enforce the lien of a street assessment is brought in the name of one of two owners, who is a proper party plaintiff, objection to a defect of parties by nonjoinder of the other owner is waived if not taken by answer. (*Foley v. Bullard*, 99 Cal. 516.)

660. In an action to recover an assessment for street improvements against the owners of the lot and certain persons who "have or claim to have" an interest or claim in or to the premises, the nature and extent of such interest or claim must be set up before they can be admitted to defend the action. (*Himmelman v. Spanagel*, 39 Cal. 389.) Cited 50 Cal. 654.

Dismissal as to some of the defendants. See post, XVI, 25, g. B.

Parties, dismissal as to some, amendment of answer. See ante, 646.

Action lies against administrator. See *Executors and Administrators*, 309.

Parties in action against executor. See *Executors and Administrators*, 309.

Amendment admitting parties not interested on the trial. See *Pleading and Practice*, 549.

d. Counterclaim.

661. Damages for injury to property against which assessment was issued cannot be set up as a counterclaim in an action to recover an assessment for the improvement of the street. (*Himmelman v. Spanagel*, 39 Cal. 389.)

Setoff in action for street assessment. See ante, 400.

e. Litigation of Title in.

662. Title to lot on which assessment for street improvements in San Francisco is made, if put in issue by the pleadings in an action for the assessment, may be litigated in that action. (*Taylor v. Donner*, 31 Cal. 480.)

f. Evidence; Verbal Agreement to Accept Land.

663. A provision in a city charter which declares that the delinquent tax list on an assessment for grading a street shall be evidence to prove "that all the forms of law in relation to the levy and assessment had been complied with" does not make it conclusive evidence, but the lot owner may go behind the same and show a substantial error in the proceedings. (*City of Stockton v. Orenor*, 45 Cal. 643.)

664. The certificate of the city and county surveyor and deputy superintendent of streets, and the assessment, diagram, and warrant signed by the street superintendent, and countersigned by the auditor, are prima facie evidence of the fact that the contract has been duly and fully performed. (*Ede v. Knight*, 93 Cal. 159.)

665. The warrant, assessment, and diagram which are made by section 12 of the act of April 1, 1872, prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings and acts of the superintendent, etc., are prima facie evidence that there was a recommendation of the street

superintendent to the board of supervisors that the work should be done. (*Fanning v. Leviston*, 93 Cal. 186.)

666. In an action upon a street assessment it appeared that ten days before the order of the board of supervisors directing the clerk to advertise for bids, written objections were filed by the owners of more than one-half in frontage of the lots fronting on the improvement. Held, that under the first section of the act of 1863, relating to street improvements in San Francisco, such written objections displaced the prima facie proof of regularity made by the warrant, assessment, and diagram, and threw upon the plaintiff the burden of showing that the bar effected by the objections had been removed. (*Dougherty v. Harrison*, 54 Cal. 428.)

667. The statute making the assessment, and other documents prima facie evidence of the regularity and correctness of the assessment, and of the prior proceedings, is a constitutional regulation of the rules of evidence, and is not a local or special law "regulating the practice of courts of justice" within the inhibition of the state constitution. (*McDonald v. Conniff*, 99 Cal. 386.)

668. The law making the assessment, warrant, and diagram, with affidavit of demand and nonpayment, prima facie evidence of the indebtedness and right to recover, in an action to enforce a lien for a street assessment in San Francisco, was not repealed by the act of April 4, 1870, on the same subject. (*Dorland v. McGlynn*, 47 Cal. 47.)

669. The thirteenth section of the statute in relation to street improvements in San Francisco, to the effect that the assessment, warrant, and diagram, with the affidavit of demand and nonpayment, shall be prima facie evidence of the defendant's indebtedness, does not establish a rule of pleading, but a rule of evidence only. (*Himmelman v. Danos*, 35 Cal. 441.)

670. The provision of the statute, making the assessment, warrant, etc., prima facie evidence of the plaintiff's right to recover, is a rule of evidence, and not of pleading; and it was therefore competent for the defendants to disprove the presumption thus arising, by proving that the contract was prematurely made; that the defense is not an affirmative defense, and it is therefore unnecessary to decide whether the legislature can deprive a defendant of other defenses than those specified in the statute. (*Burke v. Turney*, 54 Cal. 486.)

671. The ninth section of the act of April 4, 1870, as to street assessments in San Francisco, did not have the effect of changing the rule of evidence fixed in the fourth section of the act of March 26, 1863, which provides that the warrant, assessment, and diagram, with the affidavit and demand of nonpayment, shall be prima facie evidence of the plaintiff's right to recover, so as to compel the plaintiff to prove all prior proceedings, but, under said act of 1870, the assessment, or assessments, or original record thereof, are prima facie evidence of the plaintiff's right to recover. (*Himmelman v. Carpentier*, 47 Cal. 42.)

672. Although the award, assessment, and diagram, with the affidavit of demand and nonpayment, when offered by the plaintiff in an action to foreclose a street assessment lien, are prima facie evidence that a valid contract was entered into for the street improvement for which the assessment was made, it is competent for the defendant, who denies the contract, to overcome the effect of such evidence, and documentary proof from the office of the superintendent of streets, showing that the original contract on file therein was prepared for execution by both parties, and was not signed by the superintendent, and that the bond on file was in blank, without specifying the names of obligors or the penalty, or any contract for specific work, and without date, is admissible for the defendant, as tending to show that no contract for doing the work had been entered into by the superintendent. (*Manning v. Den*, 90 Cal. 610.)

673. In an action to enforce an alleged street assessment in the city and county of San Francisco, parol evidence is admissible to show that a certain document, offered by the plaintiff as the record of the board of supervisors ordering the work upon which the assessment was founded to be done, was not in fact a record of the board, and that the true record did not authorize the work. (*Dyer v. Brogan*, 70 Cal. 136.)

674. Exclusion of written protest against the work is without prejudice to the defendant if the plaintiff admits the names of the protestants and the number of feet owned by each, as the admission of the plaintiff afforded him the benefit of the testimony which the protest would have furnished. (*Alameda Macadamizing Co. v. Williams*, 70 Cal. 534.)

675. The burden of proof that the defendants sued in an action on a street assessment are the owners of the land is upon the plaintiff, where such ownership is denied by the defendants; and an answer alleging that another person, not sued, owns an undivided interest in the land is in legal effect merely a denial of the averment of the complaint as to ownership by the defendants, and is not an averment of new matter casting the burden of proof upon the defendants. (*Robinson v. Merrill*, 87 Cal. 11.)

676. To sustain action it is sufficient to show that defendants were owners in fee of the land, without regard to the particular undivided interest claimed by a defendant in his answer. (*Whiting v. Townsend*, 57 Cal. 515.)

677. In an action to recover an assessment for the grading of a street under the act of April 1, 1872, relating to street work in San Francisco, which provides that no grading can be ordered by the supervisors unless a majority of the frontage of the lots shall be represented in the petition requesting the work, where the petition under which the grading was done did not show whether the petitioner owned a majority of the whole frontage or not, evidence that the petitioner was not the owner of more than one-half of such frontage is inadmissible. (*Spaulding v. North San Francisco Homestead etc. Assn.*, 87 Cal. 40.)

Evidence to show want of petition. See ante, 172.

678. It is no defense to an action upon a street assessment that the contractor made a verbal agreement with the defendant to enter into a written contract by which the contractor was to accept from the defendant a conveyance of certain land in payment of the amount which should be assessed against the property of the defendant for the street improvements, and to pay to the defendant the balance of the purchase price of the land, and that the contractor refused to complete such written contract after doing the street work; and an averment by the defendant in his answer that if it had not been for such verbal agreement he would have commenced an action to enjoin the contractor from prosecuting the work, does not strengthen the attempted defense. (*Perine v. Forbush*, 97 Cal. 305.)

Findings against the evidence. See post, XVI, 25, h.

g. Judgments in.

A. Personal Liability of Defendant; Quantum Meruit.

679. The act of 1862 making the owner of a lot fronting on a public street in San Francisco personally liable to a contractor for an assessment on the lot for improvements on the street in front of the lot, and giving the contractor also a lien on the lot for the same, is not unconstitutional. (*Walsh v. Mathews*, 29 Cal. 123.)

Cited 29 Cal. 131; 40 Cal. 514; 54 Cal. 568.

680. That part of the Consolidation Act of San Francisco which makes the owner of a lot bordering on an improved street personally liable for that part of his assessment for the improvement of the street which may remain unpaid after a lien has been enforced on the lot, is unconstitutional. (*Taylor v. Palmer*, 31 Cal. 240.)

Cited 32 Cal. 279, 529; 33 Cal. 296; 36 Cal. 105, 292, 293; 90 Cal. 617.

681. The legislature has not by the Consolidation Act for the government of San Francisco and the amendments thereto, prior to 1862, done any thing more than to provide for a lien upon lots adjacent to a street for improvements made on the street, and define the manner in which the same may be enforced. These acts do not create any personal liability on the part of the owners of such lots for such improvements, nor does the amendment of 1862 create any personal liability for work done or to be done under contracts entered into before its passage. (*Creighton v. Manson*, 27 Cal. 613.)

682. The expense of the improvement is a lien upon the property benefited, and not a charge against the owner personally. (*Gillis v. Cleveland*, 87 Cal. 214.)

683. In an action by a street contractor to foreclose a street assessment lien upon land benefited by the work, there is no personal liability of the owner of the land, and the doctrine of estoppel in pais has no application. (*Heft v. Payne*, 97 Cal. 108.)

684. A contractor who improves a street in a city, under a contract with the city authorities, for which improvement an assessment is made on the lots fronting on the street, is

not entitled to a personal judgment against the lotowner for the amount assessed against the lot. (*Randolph v. Bayue*, 44 Cal. 366.)

685. The owner of land in a municipal corporation, bordering upon an improved street, cannot be made liable for the cost of the improvement beyond the value of his land. (*Taylor v. Palmer*, 31 Cal. 240.) Cited 31 Cal. 481; 32 Cal. 526, 528; 33 Cal. 179; 72 Cal. 441; 87 Cal. 217.

686. Lots fronting on a street cannot be taxed by way of assessment to pay a person for grading done by him on the street some two or three years before, under an abortive contract made by him with the municipality. (*Matter of Market Street*, 49 Cal. 546.) Cited 72 Cal. 441.

687. The claim of such person, if he has one, is a claim affecting the public conscience, and must be satisfied through the legislative power of appropriation out of the moneys of the state, or of the municipality. (*Matter of Market Street*, 49 Cal. 546.)

688. In an action for a street assessment in San Francisco, it is error to render personal judgment therefor against the owner of the lot assessed. (*Coniff v. Hastings*, 36 Cal. 292.) Cited 36 Cal. 106.

689. A personal judgment cannot be rendered against the owner of a lot in San Francisco for a street assessment. The lot may be charged with a lien for the assessment. (*Gaffney v. Gough*, 36 Cal. 104.)

690. A personal judgment for the amount of an assessment for a street improvement in Oakland should not be rendered against the defendant for a deficiency which may remain due after the enforcement of a lien on the lot. (*Beaudry v. Valdez*, 32 Cal. 289.)

691. A judgment of foreclosure of a street assessment lien which provides for a personal judgment against the defendant for any deficiency that might remain after a sale of the lot assessed is unauthorized and erroneous. (*Manning v. Den*, 90 Cal. 610.)

692. The contractor is entitled to a lien on a lot in San Francisco, and to a personal judgment against the owner for the amount of an assessment levied on the same for work done on the street in front of the same. (*Emery v. Bradford*, 29 Cal. 75.) Cited 29 Cal. 124; 31 Cal. 250; 34 Cal. 319.

693. An action to foreclose the lien of a street assessment, under the act of 1872, was not a proceeding strictly in rem, but the decree therein was in personam, the measure of satisfaction, however, being the interest which the defendants had in the land, and such decree did not bind the interests in the land of any persons not made parties to the action. (*Wood v. Curran*, 99 Cal. 137.)

Personal judgment cannot be rendered against the owner. See ante, 605.

694. A permit from superintendent of streets to private parties to do work on the street does not impose any liability on the property owner. (*Nagle v. McMurray*, 84 Cal. 539.)

695. After a property owner has protested against street work, a promise to pay for it cannot be implied from the fact that he saw

the work done without further objection, and made suggestions to the workmen as to the proper way of doing it. (*Nagle v. McMurray*, 84 Cal. 539.)

696. When the complaint declares upon an express contract for a street improvement, and there is no allegation as to what the work done was worth, there can be recovery upon quantum meruit. (*Kaisch v. City and County of San Francisco*, 80 Cal. 1.)

Action on personal judgment, enjoining. See Injunctions, 48.

B. Form of; Judgment Must be Against All the Parties.

697. In action in which it is admitted that several defendants are owners of the lot, it is erroneous to order judgment for the amount of the assessment against only one of the defendants. (*Clark v. Porter*, 53 Cal. 409.) Cited 57 Cal. 207; 60 Cal. 381; 63 Cal. 440; 87 Cal. 13, 15.

698. When two or more lots are separately assessed for expense of improving a street, each lot is chargeable only with the amount assessed upon it, and, in enforcing the lien, the judgment should state the amount for which each lot is liable, and should order a sale of each lot, or so much thereof as may be necessary to satisfy such amount and costs. (*Brady v. Kelly*, 52 Cal. 371.) Cited 76 Cal. 583; 87 Cal. 218.

699. Where an action to enforce the lien of a street assessment is against two or more owners, no decree can be entered after a dismissal as to one of the defendants. All the owners must be before the court. (*Driscoll v. Howard*, 63 Cal. 438.)

700. In an action to enforce a street assessment, judgment was entered against all the defendants except one, who had not been served with process, and who was alleged in the complaint to be interested. Held, that the judgment was erroneous, (1) because the case had not been disposed of as to the defendant not served, and (2) because, in such a case as this, the statute gives no authority for a decree enforcing the lien, in the absence of any of the parties interested. (*Diggins v. Reay*, 54 Cal. 525.) Cited 57 Cal. 207; 60 Cal. 381; 63 Cal. 440; 76 Cal. 609; 87 Cal. 13, 15.

C. Penalty; Interest.

701. The tax-collector of the city and county of San Francisco has no authority to add five per cent to an assessment for widening Kearny street, on failure of the owner to pay the assessment when due. (*Bucknall v. Story*, 36 Cal. 67.) Cited 67 Cal. 484.

702. The common council of the city of San Francisco has no authority, under the charter of the city, to impose a penalty of one per cent per day for the nonpayment of an assessment. (*Weber v. City of San Francisco*, 1 Cal. 455.)

703. Street assessments in San Francisco do not draw interest. (*Himmelmann v. Oliver*, 34 Cal. 246.)

704. Street assessments in San Francisco

are not contracts within the meaning of the statute in relation to interest, nor, by any statute, is interest allowable on street warrants issued for street improvements in that city. (*Haakell v. Bartlett*, 34 Cal. 281.) Cited 34 Cal. 247.

705. Interest may be allowed on a street assessment in San Francisco, if the assessment has been made subsequent to the passage of the act of March 28, 1868, notwithstanding the contract for the work was awarded prior to that date. (*Dougherty v. Henarie*, 47 Cal. 9.)

706. A judgment rendered for street assessments in San Francisco draws interest from the time of its rendition. (*Himmelman v. Oliver*, 34 Cal. 246.) Cited 38 Cal. 549; 15 Nev. 319.

707. There is no constitutional impediment which estops the legislature from enacting that, if a property owner neglects to pay an assessment made for improving a street, it shall bear interest, even if the contract was made before the passage of the act. (*Dougherty v. Henarie*, 47 Cal. 9.)

Judgment, interest on. See Interest, 53.

D. Attorney's Fees.

708. Under section 12 of act of March 18, 1865 (Stats. 1865, p. 147), allowing a certain amount as an attorney's fee, in addition to the taxable costs, in all cases of recovery under the provisions of the statute, the fee may be allowed as against each lot, although owned by the same person. (*Gillis v. Cleveland*, 87 Cal. 214.)

E. Validity and Conclusiveness.

709. Although property on I street cannot be lawfully taxed for improvements on J street, yet if it is done, and suit is brought and service of process obtained and judgment rendered as required by law, the judgment is not void, but only erroneous and liable to be reversed on appeal. (*Mayo v. Ah Loy*, 32 Cal. 477.)

710. When assessment is made and suit is brought, and the summons is properly served, the judgment when rendered is conclusive and binding upon all the world. (*Mayo v. Ah Loy*, 32 Cal. 477.) Cited 36 Cal. 222; 39 Cal. 440.

Judgment on the pleadings. See ante, 644.

Collateral attack on judgment by showing payment. See Judgments, 724.

h. Findings.

711. In an action to enforce a street assessment in San Francisco, the court found that the board of supervisors had not acquired jurisdiction to order the work, but also found particular facts sufficient to show such jurisdiction. Held, that under the findings, judgment should have been rendered for the plaintiff. (*Dyer v. Chase*, 57 Cal. 284.) Cited 79 Cal. 441.

712. In an action for the foreclosure of a street assessment, if the court finds generally that all the allegations of the answer are true, without passing specifically upon an issue tendered as to whether the portion of the

street upon which the work was done had ever been dedicated as a public street, and the evidence shows that it had been so dedicated, an order refusing a new trial must be reversed. (*Spaulding v. Wesson*, 84 Cal. 141.)

713. The court below found that the resolution of the board of supervisors ordering the work to be done was not published after its introduction and before final action thereon, and that certain notices required in the course of the proceedings prior to the assessment were not given. The plaintiff gave in evidence the assessment, diagram, warrant, and affidavit of demand and nonpayment, with the indorsements thereon showing the same to have been duly recorded, and no other evidence was introduced in regard to the proceedings. The assessment, diagram, and warrant being prima facie evidence of the regularity of the previous proceedings, held, that the findings could not be sustained. (*Jennings v. Le Roy*, 63 Cal. 397.) Cited 80 Cal. 15; 93 Cal. 87.

714. When the superior court, in an action to enforce a street assessment, finds all the facts which are necessary to sustain the validity of the assessment, including facts showing a sufficient publication of the notice of intention, but draws an erroneous conclusion of law from the finding that the publication was void and insufficient to give jurisdiction to award the contract for the street improvement, and consequently renders judgment for the defendant, upon appeal by the plaintiff from such judgment a judgment will be rendered in favor of the appellant upon the findings. (*Oakland Paving Co. v. Bagge*, 79 Cal. 439.)

Judgment foreclosing or refusing to foreclose street assessment, presumptions as to. See Appeals, 2716, 2717.

Notice of appeal in action to foreclose, upon whom to be served. See Appeals, 583.

Omission of findings, effect of. See post, 722.

i. Sales in; Rights of Purchaser.

715. Sale of land to satisfy void street assessment which the legislature has unconstitutionally attempted to validate, would be taking property "without due process of law." (*Brady v. King*, 53 Cal. 44.)

716. An assessment for widening a street, void on its face, creates no lien on the property, and a purchaser at the sale does not acquire even a color of title which will operate as a cloud on the true title. (*Bucknall v. Story*, 46 Cal. 589.)

717. By article IX of the charter of Los Angeles, it is provided that, upon a sale of property for a street assessment, a deed shall be made to the purchaser, "stating therein that it is made subject to redemption as provided in this article," and further, that the deed "must express the true consideration thereof, which is the amount paid by the purchaser." A deed purporting to be made in pursuance of these provisions, after reciting that the property was sold for one hundred and sixty-eight dollars, stated that the deed was made subject to redemption, "as provided in article VIII" of the charter, and that the considera-

tion was one hundred and eighty-seven dollars and fifty cents. Held, that the deed was void, because it failed to state that it was "made subject to redemption as provided in article IX," and also because it failed to state the true consideration. (*Hubbell v. Campbell*, 56 Cal. 527.)

718. A purchaser under a tax sale for widening Kearny street, in San Francisco, in order to recover the land must introduce in evidence not only his deed, but the assessment, and must show the regularity of all the proceedings. (*Bucknall v. Story*, 36 Cal. 67.)

719. A deed executed under a sale made for the nonpayment of an assessment for widening Kearny street in San Francisco, without other evidence, is not prima facie evidence of title. (*Bucknall v. Story*, 36 Cal. 67.) Cited 72 Cal. 435.

720. A title to land under a judgment of foreclosure of a street-assessment lien relates back to the date of the original liens foreclosed, and a sheriff's deed based upon a judgment of foreclosure of such a lien conveys a superior title to a sheriff's deed based upon a prior judgment of the same character, where the liens under which the later judgment was rendered are older than the liens to which the deeds under the prior judgment relate. (*Brady v. Burke*, 90 Cal. 1.)

721. In an action to quiet title to lands, where the plaintiff claims under a judgment of foreclosure of a street assessment lien, defendants, who claim under liens upon which suits are pending, must show the facts establishing their validity. (*Brady v. Burke*, 90 Cal. 1.)

722. In action by purchaser at a sale under a street assessment, to quiet title, where the defendant claims under liens upon which suits are pending, and the findings do not disclose that any of the alleged liens are valid, and no evidence appears to sustain some of the facts essential to their validity, the omission of necessary findings as to their validity or invalidity will not justify the reversal of a judgment involving their invalidity. (*Brady v. Burke*, 90 Cal. 1.)

723. Purchaser at sale under foreclosure of street assessment lien, to which an heir was made a party, took the rights of such heir subject to the provisions of the Probate Act for the support of the family of the deceased, and for the payment of his debts and the expenses of administration, and subject to be divested by a sale of the realty for such purposes by order of the probate court. (*Wood v. Curran*, 99 Cal. 137.)

Judgment foreclosing lien for assessment, execution must issue in five years. See Executions, 18.

Percentage in action to recover street assessment. See Costs, 18.

Sale, final judgment in action to enjoin sale. See Injunctions, 338.

Sale under street assessment, enjoining. See Injunctions, II, 16.

XVII. Street Work Done on Property Not Dedicated to Public Use.

724. No recovery can be had for any street work done on private property not dedicated

as a public street. (*Cook v. Sudden*, 94 Cal. 443.)

725. A street assessment levied for opening of street across private lot which had not been dedicated to the public or condemned for public use, and of which there was no user by the public until after the grading was done for which the assessment in question was levied, is invalid, and cannot be enforced. (*Spaulding v. Bradley*, 79 Cal. 449.)

STRIKING OUT.

Evidence. See Evidence, X, 7.

Leading questions, striking out. See Witnesses, VI, 4.

Referee's report. See Reference, IX, 4.

Disobedience of subpoena, striking out answer. See Witnesses, I.

Parties, striking out. See Parties, VIII.

Pleadings, striking out. See Pleading and Practice, VII, 13.

Demurrer, striking out. See Pleading and Practice, X, 3.

Opposition to probate of will, striking out. See Wills, X, 9, d.

Notice of motion for new trial, striking out. See New Trial, V, 3, h.

Striking statement on motion for new trial from the files. See New Trial, V, 7, i.

Record on appeal, striking out. See Appeals, VI, 7, b.

SUBCONTRACTORS.

See Mechanics' Liens.

Suit by. See Building Contracts, III.

SUBLEASE.

See Landlord and Tenant, VII, 3.

SUBMISSION.

To arbitration. See Arbitration.

Demurrer, submission of. See Pleading and Practice, X, 11.

Pleadings, submission of case on, conclusiveness of judgment. See Judgments, X, 9, l.

Petition for prohibition, submission on pleadings. See Prohibition, II, 2.

Land contests, submission on the pleadings. See Public Lands, XVII, 8.

Cause, submission of. See Pleading and Practice, XX, 13.

Nonsuit after submission of cause. See Nonsuit, IV, 2.

Submission of case on motion for nonsuit. See Nonsuit, VI, 4.

Motion for new trial, submission of. See New Trial, IX, 5.

SUBPENA.

See Witnesses, I.

Quashing. See Depositions, VII.

Disobedience of. See Contempt, IV, 4; Depositions, VII; Witnesses, I.

SUBROGATION.

1. Subrogation is the substitution of another person in the place of a creditor, the substituted party succeeding to the rights of the creditor in relation to the debt. It is

treated as the creature of equity, and is so administered as to secure real and essential justice without regard to form, and is independent of any contractual relations between the parties to be affected by it, and includes every instance in which one party for his own protection pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter. (*Redington v. Cornwell*, 90 Cal. 49.)

2. Although a lien will be kept alive, under some circumstances, by subrogation, in favor of one who has paid the lienholder, even when the latter has satisfied and discharged it of record, yet where the equity is a latent one, the lien will not be kept alive to the prejudice of a subsequent bona fide purchaser. (*Richards v. Griffith*, 92 Cal. 493.)

3. Payment of judgment of foreclosure of mortgage may operate as equitable assignment to the person who makes the payment, although the mortgagee enters satisfaction of the judgment upon the record. But the lien of the judgment will not be kept alive to the prejudice of a subsequent bona fide purchaser of the land, who had no notice of the equities of the person who made the payment, and who purchased while it appeared of record that the judgment had been satisfied and discharged. (*Persons v. Shaeffer*, 65 Cal. 79.) Cited 92 Cal. 496.

4. Naked purchaser at judicial sale made under decree foreclosing mortgage is not entitled to have the satisfaction of the judgment under which the sale was made set aside, and to be subrogated to the rights of the plaintiff in the judgment, because the sale was void, and he acquired no title to the property purchased. (*Branham v. Mayor and Common Council of San Jose*, 24 Cal. 585.)

Purchaser, subrogation of. See Mortgages, XX, 6.

Purchaser under foreclosure, subrogation of. See Mortgages, XIX, 18, h.

Purchasers at execution, subrogation of. See Executions, IX, 6, c.

Purchasers at void sale not entitled to, when. See Estates of Deceased Persons, 306.

5. Where one of two defendants in joint judgment pays it, but not with the intention of discharging it, he is entitled to use the judgment for his protection and indemnity, and may enforce it against his codefendant for his legal proportion of the debt. (*Coffee v. Tevis*, 17 Cal. 259.)

6. If A makes a verbal contract with B to sell him a tract of land, and puts B in possession thereof, judgment creditors of B do not thereby, by virtue of the lien of their judgment or the levy of an execution, acquire such an interest in the land as to entitle them to be subrogated to B's rights, and to compel A to make a conveyance to them upon paying him the purchase price which B was to pay. (*Logan v. Hale*, 42 Cal. 645.)

7. Purchaser of land subject to mortgage agreed with the owner and the mortgagee to pay off the mortgage debt as part consideration for the purchase. The mortgage debt was paid by the purchaser to the mortgagee,

and the remainder of the purchase money to the owner, who thereupon conveyed the land to the purchaser. The mortgagee entered satisfaction of the mortgage debt upon the record. Held, that the transaction operated as an equitable assignment of the mortgage to the purchaser, and was a lien prior and superior to that of a judgment against the mortgagor procured and entered after the date of the execution of the mortgage and before the entry of satisfaction of the mortgage debt. (*Matzen v. Shaeffer*, 65 Cal. 81.) Cited 65 Cal. 80; 85 Cal. 286.

8. If A makes a verbal contract with B to sell him a tract of land, and puts him in possession, B is a necessary party to an action commenced by the judgment creditors against A to be subrogated to B's rights in the land. (*Logan v. Hale*, 42 Cal. 645.)

Surety's right to. See Suretyship, 148.

Guarantor, subrogation of. See Guaranty, IV.

Stockholder paying more than his share. See Corporations, 304.

Rights and remedies of subrogated stockholder. See Statute of Limitations, 144.

Of cotenant redeeming from foreclosure sale. See Cotenancy, 32.

Wife, when has right to as against husband. See Husband and Wife, 36.

Of city to rights of sheriff in bond of deputy. See Bonds, 115.

Subsequent mortgagee. See Injunctions, 83.

One paying mortgage at request of mortgagor. See Mortgages, 478.

Mortgagee, subrogation of on conveyance by mortgagor. See Mortgages, 383, 384.

Assignee of mortgage, subrogation of. See Mortgages, 438.

New mortgagee, subrogation of. See Mortgages, 513, et seq.

Payment from proceeds of another mortgage on, subrogation. See Mortgages, 516.

Stranger paying and discharging mortgage cannot have discharge set aside. See Equity, 46.

Parties in action to be subrogated to superior lien. See Executions, 211.

Action for. See Statute of Limitations, 290, 291.

SUBSCRIPTION.

See Signatures.

1. If a number of persons subscribe to a paper, in which they promise to contribute money for the accomplishment of an object of interest to all, as the erection of a building for a college, and which object cannot be accomplished save by their common performance, their mutual promises constitute mutual obligations, and are a sufficient consideration to support the promise of each. (*Christian College v. Hendley*, 49 Cal. 347.) Cited 80 Cal. 32; distinguished 70 Cal. 160.

2. A promise to pay a subscription to help defray the expenses of some charitable object is a mere offer, which may be revoked at any time before it is accepted by the promisee, and an acceptance can only be shown by some act by the promisee whereby a legal liability is incurred or money is expended on the faith of the promise. If the promisor die

before his offer is accepted it is thereby revoked, and cannot afterward, by any acts showing an acceptance, be made enforceable against his estate. The rule is otherwise when subscribers agree together to make up a specified sum, and where the withdrawal of one increases the amount to be paid by the others. In such a case, as between the subscribers, there is a mutual liability, and the co-subscribers may maintain an action against one who refuses to pay. (*Grand Lodge of the Independent Order of Good Templars v. Farnham*, 70 Cal. 158.)

3. Party cannot occupy double character of debtor and creditor. And where the plaintiff was himself a subscriber to the paper upon which his claim was founded, his liability and that of the defendant was of the same character, and would not constitute the defendant a debtor of the plaintiff. (*Smith v. Truebody*, 2 Cal. 341.)

4. The city of San Francisco agreed for the purchase of a lot of ground for a public street, but the agreement fell through. Staples, Truebody, and divers others were interested in the opening of the street. Staples, to prevent a failure, procured an offer from the owner of the lot to take five thousand dollars in addition to the payment proposed by the city, and convey the lot to the city. Staples then started a subscription paper and procured signatures to the amount of about three thousand dollars; of these subscribers Staples himself was one, and Truebody, the defendant, another, each for the sum of eight hundred dollars. Afterward Staples, learning that the owner of the lot had conveyed it to the city, tore up the subscription paper, believing (as he testified) that no further subscriptions could be obtained. And after the paper was destroyed he assigned to Smith, the plaintiff, his claim against the subscribers to it; and this suit was brought against Truebody to recover the amount subscribed by him. Held, that the subscription paper thus assigned by Staples to the plaintiff could create no liability in favor of the latter. (*Smith v. Truebody*, 2 Cal. 341.)

5. If subscriptions of money in aid of a college, made to a finance committee, passed by operation of law to a corporation afterward formed, the complaint, in an action to recover a subscription, should aver that fact. (*Christian College v. Hendley*, 49 Cal. 347.)

6. A complaint in an action by the members of a "railroad committee," appointed by residents along the line of a proposed railway to raise funds by subscription, to secure rights of way and depot grounds therefor, alleging the facts connected with their appointment as such committee, and showing that one of their number, who was their authorized agent to procure previous subscriptions, had secured subscriptions from many residents along the line of the road, and that at his instance the defendant had subscribed an amount specified, in satisfaction of which he had executed two notes set out in the complaint, which were payable to the order of their agent, described therein as "Agt. R. R. Com.," that no part of either of the notes had been paid, and that plaintiffs had pur-

chased various rights of way and depot grounds, for which they had paid more than the amount of defendant's subscription, relying thereupon, sufficiently states a cause of action as against a general demurrer. (*Judson v. Gage*, 91 Cal. 304.)

7. Where a subscription paper duly executed by the defendant E. and others recited, among other things, that: "Whereas, the undersigned desire to procure the construction and operation of a steam railroad from the Oakland wharf of the C. P. R. R. Co. to the State University at Berkeley, and the Western Development Co. proposes to construct and operate, or cause to be operated, a steam railroad on said line, provided the undersigned will, at their own expense, procure and convey to it the right of way, etc., and provided further that the undersigned will pay, or cause to be paid, to said company the sum of twenty thousand dollars upon the completion of the road—the road to be commenced upon the execution of the conveyances and the deposit of said twenty thousand dollars in bank; the money to be paid by the bank to the company upon the completion of the road"; and which subscription paper contained the following clause: "Now, therefore, in consideration of the premises, we, the undersigned, hereby agree to contribute and pay for carrying out the foregoing enterprise, on demand, the sum of money set opposite our names, in United States gold coin." Held, that the contract was made for the benefit of the Western Development Company, and that as the money when recovered will belong to it, the company is the real party in interest. The action was properly brought in the name of the Western Development Company. (*Western Development Co. v. Emery*, 61 Cal. 611.)

8. Where it appears that the subscription in satisfaction of which the notes in suit were given was made on condition that the road was to be constructed through the defendant's land, on a specified line, testimony that the railroad was built, substantially, as described in the subscription, and that if there was any slight variance from the exact line therein described, such variance was with the defendant's knowledge and consent, and that the road conformed with his ideas, will support a finding that the conditions of the subscription were complied with. (*Judson v. Gage*, 91 Cal. 304.)

Wills, signature to. See Wills, IV.

Stock, subscription to. See Corporations, IV, 2.

Colleges, subscription. See Colleges.

Contracts of adjoining owners to pay sums on completion of road. See Railroads, X, 5.

Compelling subscription to railroad. See Mandamus, II, 13, e.

Municipality, subscription to stock of corporation by. See Municipal Corporations, XI, 9.

SUBSEQUENTLY ACQUIRED TITLE.

See cross-references under After-acquired Title.

Effect of prior judgment on. See Judgments, X, 9, c.

SUBSIDIES.

To railroads. See Railroads, II.

SUBSTITUTION.

Parties, substitution of. See Parties, IX.
 Attorney, substitution of. See Attorney and Client, VIII.
 Trustees, substitution of. See Trusts and Trustees, VII, 10.

SUBTERRANEAN WATERS.

See Watercourses, VIII.

SUCCESSION.

See Estates of Deceased Persons, VIII, 4.
 Aliens, right of inheritance of. See Aliens, III, 1.
 Adopted child, right of inheritance. See Parent and Child, 42.
 Illegitimate child, inheritance of. See Legitimacy, V.

SUCCESSORS IN INTEREST.

Judgment, whether binds. See Judgments, X, 10, m.

SUFFERANCE.

Tenancies by. See Landlord and Tenant, III, 3.

SUFFRAGE.

See Elections, VI.

SUICIDE.

See Insurance, 218.

SUITABLENESS FOR CULTIVATION.

See Public Lands, XIII; Swamp and Overflowed Lands, VI.

SUMMARY PROCEEDINGS.

See Assistance, 1; Forcible Entry and Unlawful Detainer; Habeas Corpus.

Quo warranto. See Quo Warranto.
 For removal of officers. See Offices and Officers, XVI, 3.

Sheriff, summary proceedings against to compel paying over of proceeds. See Sheriffs, IV, 3, p.

Removal of plaintiff in condemnation proceedings for failure to pay. See Eminent Domain, 293, 294.

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SUMMONING.

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SUMMONS.

I. Issuance of; Alias Summons.

II. Form of and Contents.

III. Amendment of.

IV. Service of.

1. *Who may Serve.*

2. *Necessity of; How Made; Presumption as to Residence of Defendant.*

3. *Service Out of State Without Publication.*

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7. *Publication of Summons.*

a. *Jurisdiction by; Constitutionality and Construction of Statute; Strict Compliance With.*

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f. *Proof of.*

8. *Appearance or Answer as Waiver of Service or Defect in.*

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V. Return.

Summons, fees for service. See Fees, 6, 7.
 Notice of application to admit will to probate is not. See Wills, 111.

I. Issuance of; Alias Summons.

1. Judge has no power to order summons to issue, but only to order a summons already issued to be served in a special manner. (*People v. Huber*, 20 Cal. 81.)

2. Since the amendment of 1860 to the twenty-third section of the Practice Act, the clerk is not authorized to issue a summons in an action, without an order from the court, after the expiration of one year from the filing of the complaint. This principle applies as well to causes in which the complaint was filed before, as to those in which the complaint was filed after the amendment took effect. (*Dupuy v. Shear*, 29 Cal. 238.) Cited 5 Col. 47, 48; 6 Col. 296; distinguished 35 Cal. 301, 302.

3. A summons is not issued within one year after filing the complaint, within the meaning of the twenty-third section of the Practice Act, unless, within one year after filing the complaint, both a summons and a certified copy of the complaint, properly prepared and certified, are placed at the disposal of the party for service. (*Reynolds v. Page*, 35 Cal. 296.)

Cited 69 Cal. 526; 6 Col. 296.

4. Section 406 of the Code of Civil Procedure, requiring the summons to be issued within one year after filing the complaint, is mandatory. (*Linden G. M. Co. v. Sheplar*, 53 Cal. 245.)

Cited 6 Col. 296.

5. Where an action on a promissory note was commenced by filing a complaint within four years after the note became due, and a summons was issued within one year thereafter, but not until after the expiration of said four years, held, that this was sufficient, and the cause of action was not barred by the statute. (*Allen v. Marshall*, 34 Cal. 165.)

6. If court is authorized to direct summons to issue after expiration of year, the exercise of the power rests in the legal discretion of the court, and its action will not be set aside on appeal unless it clearly appears that the discretion was not soundly exercised. (*Dupuy v. Shear*, 29 Cal. 238.)

Delay in issuance, dismissal for. See Dismissal, 34.

Power to send summons out of territorial limits for service. See Process, 3.

7. The clerk of the district court is authorized, on demand of the plaintiff, and without an order of court, to issue an alias summons after the expiration of the year during which the original must be issued. (*Dunker v. Lutz*, 48 Cal. 464.)

8. An objection to the regularity of the issuance of an alias summons in an action in a justice's court is not jurisdictional, and cannot be taken advantage of in a collateral attack. (*Dore v. Dougherty*, 72 Cal. 232.)

Order for publication in advance of issuance. See post, IV, 7, c.

Issuance of new summons after return. See post, 146.

II. Form of and Contents.

9. Summons must contain all that is required by statute, whether deemed needful or not. (*Ward v. Ward*, 59 Cal. 139.)

Cited 67 Cal. 398; 11 Mont. 421; 3 Wash. 405.

10. The provisions in the twenty-fourth section of the Practice Act, as to what the summons shall state, are not merely directory, but are mandatory. (*Lyman v. Milton*, 44 Cal. 630.)

Cited 59 Cal. 141; 6 Col. 392; 3 Mont. 48, 49; 11 Mont. 421; 12 Mont. 161; 3 Wash. 405; distinguished 83 Cal. 369.

11. A failure to indorse the name of the plaintiff's attorney upon the back of a summons will not invalidate it when the name is written upon the face of the writ. (*Shinn v. Cummins*, 65 Cal. 97.)

Cited 67 Cal. 399; 21 Nev. 208; 3 Wash. 405, 406.

12. A summons must state the names of all the parties to the action. Where there are several parties defendant, it is not sufficient to give the name of one in the summons, followed by the words "et al." (*Lyman v. Milton*, 44 Cal. 630.)

Cited 6 Col. 392; 12 Mont. 161.

13. Where summons was headed with words "district court," but was issued out of county court, under the county court seal, and testified by the judge of said court, it was held good as the writ of the county court. (*Crane v. Brannan*, 3 Cal. 192.)

14. A summons issued out of the superior court of the city of San Francisco was not defective if it omitted to notify the defendant to appear within twenty days, if served out of the county, but in the district in which the action was brought. (*McCauley v. Fulton*, 44 Cal. 355.)

15. The "district" mentioned in the second subdivision of the twenty-fifth section of the Practice Act, which speaks of the service of summons in the district in which the action is brought, is the district or territory over which the court exercises jurisdiction. (*McCauley v. Fulton*, 44 Cal. 355.)

16. A summons is sufficient if it states the nature of the action in general terms. It is unnecessary to state whether the right to the money sought to be recovered accrued from

work and labor, or from goods sold and delivered, or to state the kind of lien sought to be foreclosed, or on what property such lien attaches. The object of the requirements of the statute as to what the summons shall contain are carried out by a general statement of what is specialized in the complaint, to which the summons points expressly or by implication of law, and it is immaterial whether a copy of the complaint is served with the summons or not on the party objecting to its sufficiency. (*Bewick v. Muir*, 88 Cal. 368.)

Cited 90 Cal. 506.

17. In ejectment, if the summons contains no description of the demanded premises, except to refer to the complaint for such description, and two or more of the defendants reside in the same county, and the summons is served on all defendants in that county, but a copy of the complaint on one only, the summons is sufficient to sustain a judgment by default against those not served with a copy of the complaint. (*Calderwood v. Brooks*, 28 Cal. 151.)

18. A statement in a summons that "the said action is brought to recover judgment against the defendants for the sum of five thousand three hundred and seventy-one dollars and twelve cents, and interest at three per cent per month from November 14, 1883, and the further sum of eleven dollars and twenty cents, and the costs of this action," is sufficient to answer the twenty-fourth section of the Practice Act, as a copy of the complaint is served with the summons. (*King v. Blood*, 41 Cal. 314.)

Cited 83 Cal. 370; 90 Cal. 506; 21 Nev. 205.

19. The rule of construction adopted in section 4 of the Code of Civil Procedure, which enacts that "its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice," is applicable to section 407 of the Code of Civil Procedure, regulating the contents of a summons; and it will be implied from a notice in a summons that the plaintiff will take judgment for the relief demanded in his complaint that he will take it in a lawful, and not in an unlawful, manner. (*Clark v. Palmer*, 90 Cal. 504.)

20. A summons, in an action for goods sold and delivered, stating that the action was brought to obtain a judgment for a specified sum, with legal interest thereon until paid, alleged to be due plaintiff upon account, and for costs of suit, and referring for particulars to the complaint, and containing a notice that in case defendants failed to appear and answer as required under the law, the plaintiff would "take judgment as prayed for," although not stating in terms the amount for which judgment would be taken, in effect complies with the requirements of the statute. (*Behlow v. Shorb*, 91 Cal. 141.)

Cited 21 Nev. 208.

21. The summons in an action in a justice's court for a trespass on land contained a statement that in case of the defendant's failure to answer, "the plaintiff would take judgment for the amount claimed in the complaint." Held, that a judgment by default

rendered after a personal service on the defendant was voidable only and could not be collaterally attacked. (*Keybers v. McComber*, 67 Cal. 395.)

Cited 72 Cal. 234; 21 Nev. 208.

Summons in action for breach of promise, form of. See Defaults, 64.

Summons, notice in. See Fraud, 126.

Summons not stating nature of action. See Defaults, 63.

Summons, absence of seal. See Injunctions, 58.

Defective, effect of. See Defaults, VI, 3.

Action on reclamation assessment, summons in. See Swamp and Overflowed Lands, XVII, 3, *x*, D.

Foreclosure, summons in. See Mortgages, XIX, 9.

Fraud, summons in actions for. See Fraud, IV, 7.

In action of forcible entry. See Forcible Entry and Unlawful Detainer, VI, 5.

In actions against executors. See Executors and Administrators, VII, 3, d.

III. Amendment of.

22. Court may allow summons to be amended by inserting notice of cause of action, etc., required by the act of 1851. (*Polack v. Hunt*, 2 Cal. 193.)

Cited 44 Cal. 635; 67 Cal. 398; 5 Mont. 552; 19 Nev. 56.

23. Where an amended complaint is filed before the defendants are brought into court, and an amended summons is issued which refers to the complaint on file, and not in terms to the amended complaint, the amended summons is not misleading, nor is such reference uncertain or ambiguous. The amended complaint entirely takes the place of the former one and becomes the complaint. (*Dowling v. Comerford*, 99 Cal. 204.)

24. The question of the right to amend a summons, by inserting the names of defendants after motion to dismiss, spoken of. (*Lyman v. Milton*, 44 Cal. 630.)

IV. Service of.

1. Who may Serve.

25. The service of summons by a person not a sheriff, as provided by the Practice Act, is a service "according to the course of the common law." (*Peck v. Strauss*, 33 Cal. 678.)

26. Service of summons may be made by the sheriff of the county where the defendant may be found, his deputy, or special appointee, the special appointee of the judge of the court in which the action is brought, or by any white male citizen of the United States over twenty-one years of age who is competent to be a witness on the trial of the action. (*Hahn v. Kelly*, 34 Cal. 391.)

2. Necessity of; How Made; Presumption as to Residence of Defendant.

Supplemental complaint, service of summons on. See Supplemental Pleadings.

Summons, necessary on service of amendment bringing in new party. See Pleading and Practice, 626.

Necessity of on bringing in new parties. See Parties, 81.

Want of service. See Defaults, VI, 3.

Want of service of, vacation of judgment. See Judgments, XIV, 2, b.

27. In making service of a summons, and in the return of such service, the provisions of the statute must be, and must be shown to have been, substantially observed and followed by the officer, otherwise the proceedings cannot be supported upon a direct appeal taken. (*People v. Bernal*, 43 Cal. 385.) Cited 3 Mont. 47.

28. If copy of summons and certified copy of complaint are personally delivered to a defendant, and issued from a court of general jurisdiction, the court thereby acquires jurisdiction of the person of the defendant. An irregularity in the mode of delivery is merely a ground of application to the court to set aside the summons. (*Peck v. Strauss*, 33 Cal. 678.)

29. A summons cannot be served by delivering a copy to the attorney in fact of the defendant. (*Drake v. Duvenick*, 45 Cal. 455.)

30. Where, in a justice's court, the complaint was filed against the Independent Company, and the service, as shown by the return, was on R., a member of the Independent Company, and the summons was addressed to, and the judgment, which was by default, rendered against, the Independent Tunnel Company, held, that the court did not acquire jurisdiction of the Independent Tunnel Company, and the judgment was void. (*King v. Randlett*, 33 Cal. 318.)

31. A summons issued from a justice of the peace, at the suit of respondent against appellants, designated in no other way than by the name of "Adams & Co.," which was returned served by "leaving a copy thereof with Captain Charles B. Macy." No one appeared for defendants on the return day, and the justice gave judgment against the defendants for three hundred and sixty-nine dollars. There was nothing on the record to connect Macy with the defendants. Defendants appealed to the county court of Yuba county, who affirmed the judgment. Held, that the judgment was bad. (*Adams v. Town*, 3 Cal. 247.)

32. When there are several defendants, and all are served with summons in one county, the presumption is that all resided in the county where served, and a service of a copy of the complaint on one is deemed a service on all. (*King v. Blood*, 41 Cal. 314.)

33. The legal service of summons in a justice's court includes, as a necessary part of such service, service of the complaint. (*Southern Pac. R. R. Co. v. Superior Court of Kern County*, 59 Cal. 471.)

34. The complaint, after setting forth several causes of action against the defendant for work and labor, alleged that the defendant was indebted to the plaintiff thereon "in the sums hereinbefore stated." In the copy of the complaint which was served on the defendant with a copy of the summons, the word "hereinbefore" was written "hereinafter." Held, on a motion to set aside the

service of summons, that the variance was immaterial and could not have misled the defendant or affected its substantial rights. (*Fraser v. Oakdale Lumber and Water Co.*, 73 Cal. 187.)

35. Where the action was brought against R. W. Spencer, John Doe, and Richard Roe, and Spencer was served with a copy of the summons only, held, that the service was good, and that he could not remain silent and then claim that the service was void, but should have searched the files of the clerk's office for the complaint. (*Sacramento Sav. Bank v. Spencer*, 53 Cal. 737.) Cited 63 Cal. 119; 67 Cal. 399.

Service of copy of complaint with summons. See ante, 16, 17.

36. Mere irregularity in the service of a summons does not render a judgment void for want of jurisdiction. (*Drake v. Duvenick*, 45 Cal. 455.) Cited 53 Cal. 740; 59 Cal. 493.

Redelivery and service after return. See post, V.

Service of summons by posting. See Taxation, 649.

Defective service or return, enjoining judgment. See Injunctions, 67, et seq.

Service of summons in actions against lunatic. See Insanity, 66.

Service of on teller of bank. See Banks and Banking, 91.

Insufficient service, judgment on, validity. See Judgments, XII, 20.

Insufficient service in foreclosure. See Mortgages, XIX, 9.

Service of, in action against infant. See Infancy, II, 2.

Service of summons in suit to quiet title. See Quieting Title, III, 7.

Service of, in actions against bank. See Banks and Banking, VIII.

Service upon foreign corporations. See Corporations, XI, 3.

Service upon corporations. See Corporations, XI, 3.

Service of, in action for delinquent tax. See Taxation, XII, 4, h.

37. If the affidavit of service of summons states the county in which service was made, and defendant makes default, it will be presumed that he was a resident of the county where service was made. (*Calderwood v. Brooks*, 28 Cal. 151.) Cited 41 Cal. 317; 67 Cal. 583.

3. Service Out of State Without Publication.

38. Service of summons out of the state can be made, if at all, only when a publication of the summons has been ordered; and a prior service out of the state is of no avail. (*McBlain v. McBlain*, 77 Cal. 507.)

4. Time and Date of Service.

39. Where defendant's attorney accepted service of the summons, but attached no date, the date of the return of the sheriff was held sufficient. (*Crane v. Brannan*, 3 Cal. 192.)

40. If summons is not served until three years after complaint is filed and it is issued, and there is no reasonable excuse for the de-

lay, the service will be set aside, on motion, and the suit dismissed. (*Eldridge v. Kay*, 45 Cal. 49.)

Cited 100 Cal. 512.

Delay in service of summons, dismissal for. See Dismissal, IV, 2.

Summons, service after return, presumption as to. See Judgments, 602.

5. Admission of.

41. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. (*Montgomery v. Tutt*, 11 Cal. 307.)

42. Statute does not require admission of service to designate place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default may be taken. (*Alderson v. Bell*, 9 Cal. 315.)

Acceptance of service without attaching date. See ante, IV, 4.

43. Where S. and B. admitted "due service" of the summons in an action against them and others, the court thereby acquired jurisdiction of them, and as to them the judgment was valid. (*Sharp v. Brunnings*, 35 Cal. 528.)

6. Proof of; Question of Fact.

44. If proof of service of summons is not made as required by law, the court acquires no jurisdiction of the persons of defendants, and has no authority to render judgment against them, and any judgment rendered without such proof is invalid and void, and may be set aside upon motion. (*Reinhart v. Lugo*, 86 Cal. 395.)

45. Jurisdiction of court does not depend upon preservation of proof of the service of summons, but upon the fact that the service has been made; and where it appears from the record of a judgment that at the date of a memorandum of default indorsed upon the complaint, the service upon the defendant was complete, and that the time for his appearance had expired, the indorsement will be presumed to have been made upon proper proof of the mailing of the complaint, although the indorsement was made prior to the date of the affidavit. (*Sichler v. Look*, 93 Cal. 600.)

46. Proof of personal service of summons, if made by an officer, is by his affidavit or certificate, setting forth the mode, time, and place of such service; if made by a citizen, then by his affidavit, setting forth said facts, and, in addition, the facts constituting his said qualifications. (*Hahn v. Kelly*, 34 Cal. 391.)

47. Affidavit of service of summons must show affirmatively compliance with all requirements of the law. (*McMillan v. Reynolds*, 11 Cal. 372.) Cited 3 Mont. 47; 4 Or. 16, 21; 24 Cal. 354.

48. An affidavit which avers that affiant, on the day named, "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San

Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action," is insufficient. (*McMillan v. Reynolds*, 11 Cal. 372.)

Cited 33 Cal. 514.

49. Service of summons by a person other than the sheriff must be proved by an affidavit showing that at the time of service the person making it was over the age of eighteen years. (*Lyons v. Cunningham*, 66 Cal. 42.) Cited 75 Cal. 377.

50. An affidavit of service of summons should state that the person who served it was over the age of eighteen years at the time of the service. (*Doerfler v. Schmidt*, 64 Cal. 265, cited 75 Cal. 377, 88 Cal. 109, 582; *Maynard v. MacCrellish*, 57 Cal. 355, cited 60 Cal. 11, 604, 64 Cal. 265, 66 Cal. 43, 75 Cal. 377, 88 Cal. 582.)

51. An affidavit of service of summons by a person other than the sheriff, which fails to state that he was over eighteen years of age at the time of service, is insufficient to prove service or to sustain a judgment by default. (*Howard v. Galloway*, 60 Cal. 10, cited 60 Cal. 604, 66 Cal. 43, 75 Cal. 377, 76 Cal. 301, 88 Cal. 582; *Weil v. Bent*, 60 Cal. 603, cited 75 Cal. 377, 88 Cal. 582; *Barney v. Vigoureux*, 75 Cal. 376; *Horton v. Gallardo*, 88 Cal. 581.)

52. If a summons is served by a person other than a sheriff, and in his affidavit of service he states that he is twenty-one years of age, but fails to state that he was twenty-one years of age at the date of service, it is a mere irregularity, and a judgment by default rendered in the case cannot be attacked collaterally. (*Peck v. Strauss*, 33 Cal. 678.) Cited 4 Or. 15.

53. A statement in an affidavit of service that the person making the affidavit was "a white male citizen of the United States," is not equivalent to a statement that he was over the age of eighteen years. (*Lyons v. Cunningham*, 66 Cal. 42.)

54. A judgment by default is not erroneous because the affidavit of service of summons fails to show that the person making the service was a white male citizen of the United States, or that he served a certified copy of the complaint, as neither of these things are necessary. (*Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652.)

55. An affidavit which shows that the summons was served on the defendants in the same county, and that a copy of the complaint was served on one of them, need not state that all the defendants were residents of the county. (*Pellier v. Gillespie*, 67 Cal. 582.)

56. Affidavit of service of summons which states facts constituting affiant a competent witness is sufficient, without stating that he is competent. (*Dimick v. Campbell*, 31 Cal. 238.)

57. The service of a summons and complaint by a notary public must be proved by his affidavit; his mere certificate is insufficient. (*County of Yolo v. Knight*, 70 Cal. 431.)

Cited 7 Wash. 369.

58. A certificate of the service of summons by a deputy sheriff, or one acting as such, is void as proof of such service, if signed by the deputy in his own name, and not sworn to, nor purporting to be an affidavit of service; and a judgment by default will be set aside upon motion if rendered upon such proof of service. (*Reinhart v. Lago*, 86 Cal. 395.)

59. In an action in a justice's court judgment was entered by default upon the following proof of service: "I hereby certify that I have served the within summons by delivering a copy thereof, together with true copy of complaint, personally, at the township and county of Los Angeles, this twenty-fifth day of April, 1879. W. Bettis, Constable," etc. Held, justices' courts are courts of limited jurisdiction, and their jurisdiction must affirmatively appear, or their judgment will be absolutely void. No intendments can be indulged in favor of the jurisdiction of such courts. But within those rules, which are well settled and fixed in our jurisprudence, we think the service is proved by the above return. (*Cardwell v. Sabichi*, 59 Cal. 490.)

60. In an action upon a judgment, where the judgment-roll introduced in evidence showed that both the default entered by the clerk and the judgment recited that the defendant therein was "regularly served with process," and that the affidavit of service of summons stated that the summons was personally served upon the defendant, and where the defendant himself admitted that he had been served with a paper which purported to be a copy of the summons and a paper which purported to be a copy of the complaint, and that he could not deny that he was served on the day stated in the affidavit of service, the service of summons upon the defendant is sufficiently shown. (*McCoy v. Van Ness*, 98 Cal. 675.)

Amended affidavit after service showing service. See post, 120.

61. Upon a motion to set aside a judgment, upon the ground that certain defendants against whom it was rendered had not been served with summons, the question as to whether or not the summons had been served upon them is one of fact. (*Hunter v. Bryant*, 98 Cal. 247.)

Service of summons, proof of. See *Justices of the Peace*, 79.

Summons, presumptions as to service. See *Appeals*, 2720, 2721; *Judgments*, 603.

Recitals in judgment as to service of summons. See *Judgments*, XI.

Recitals of service in justice's docket. See *Justice of the Peace*, 97, 98.

Finding as to service, conclusiveness of. See *Appeals*, 2632, 2633.

7. Publication of Summons.

a. Jurisdiction by; Constitutionality and Construction of Statute; Strict Compliance With.

Publication, service by, sufficiency. See *Irrigation Districts*, 44, 45.

Judgment on constructive service, validity. See *Judgments*, 581, et seq, 835, 836.

Publication, in action against infant. See *Infancy*, §2, 38.

Service by publication in suit to quiet title. See *Quieting Title*, III, 7.

Publication of in suit to cancel certificate. See *Public Lands*, 479.

Publication of in land contest. See *Public Lands*, XVII, 4.

Service of summons by publication in action for divorce. See *Marriage and Divorce*, III, 4, g.

Constructive service in foreclosure. See *Mortgages*, XIX, 9.

62. Superior court of city of San Francisco could acquire jurisdiction of the person of a defendant by publication of a summons. (*McCauley v. Fulton*, 44 Cal. 355.)

63. The power of the legislature to provide for constructive service of process is too well settled to be attacked on constitutional grounds. (*Eitel v. Foote*, 39 Cal. 439.) Cited 87 Cal. 148.

64. Section 412 of the Code of Civil Procedure, providing for the service of summons upon nonresidents, by publication, although general, and in terms applicable to all actions, is not invalid because it includes in its provisions proceedings purely in personam. (*Perkins v. Wakeham*, 86 Cal. 580.)

65. Statutes for acquiring jurisdiction of the person by publication of summons must be strictly construed. (*Forbes v. Hyde*, 31 Cal. 342.)

Cited 47 Cal. 145; 13 Mont. 189; 5 Nev. 92; 6 Utah, 416; 7 Wash. 369.

66. The sections of the Practice Act providing for the service of a summons on a defendant by publication, being in derogation of the common law, must be strictly construed. (*Ricketson v. Richardson*, 26 Cal. 149.) Cited 27 Cal. 314; 30 Cal. 617; 13 Mont. 188; 6 Utah, 416; 7 Wash. 369.

67. The statutory provisions for acquiring jurisdiction of the person of a defendant, by publication of the summons in the stead of a personal service, must be strictly construed. (*People v. Huber*, 20 Cal. 81.) Cited 24 Cal. 434; 27 Cal. 314; 31 Cal. 351, 356.

68. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. (*Jordan v. Giblin*, 12 Cal. 100.) Cited 20 Cal. 82; 30 Cal. 617; 8 Mont. 192; 5 Nev. 92.

69. In proceeding against an absent defendant upon mere constructive service, the conditions of the statute must be strictly pursued, or the judgment cannot be supported upon appeal. (*Cohn v. Kember*, 47 Cal. 144.) Cited 5 Mont. 145.

70. If jurisdiction of the person of defendant is to be acquired by publication of the summons in lieu of personal service, the mode prescribed must be strictly pursued, and in such cases there will be no presumption in favor of jurisdiction. (*McMinn v. Whelan*, 27 Cal. 300.) Cited 29 Cal. 188; 6 Utah, 417.

Law for publication, notice sufficiently expresses subject in title. See *Constitutional Law*, 252.

b. Affidavits.

71. Service of summons by publication is set on foot by affidavit, setting forth certain facts specified in the statute, on which is predicated an order of the court, the judge thereof, or a county judge, directing the publication of the summons in a newspaper named, for a designated period, and if the residence of the defendant be known, by directing that a copy of the summons and complaint be forthwith deposited in the post-office and directed to him at his place of residence, and is terminated by publication and mailing as ordered, or by personal service, made out of the state, which is equivalent to such publication and mailing. (*Hahn v. Kelly*, 34 Cal. 391.)

72. Publication of summons, made without affidavit and order of court authorizing it, does not confer jurisdiction of the person of the defendant, and a default judgment based upon such service is void. (*People v. Mullan*, 65 Cal. 396.) Cited 74 Cal. 403; 76 Cal. 401; 93 Cal. 391.

73. If an order for the publication of summons is based on an affidavit that the defendant resides out of the state, which affidavit is made four months before the order is applied for, has the judge jurisdiction to make the order, and is not the judgment void, query? (*Forbes v. Hyde*, 31 Cal. 342.)

74. When affidavit presents some evidence tending to prove each jurisdictional fact, but of a character clearly too inconclusive to justify an order of publication, the order is erroneous, and the judgment will be reversed on appeal; but it is not void. If there is a total want of evidence upon which to base the order, the judgment is void. In the former case the judgment cannot be attacked collaterally, but only on appeal. (*Forbes v. Hyde*, 31 Cal. 342.) Cited 30 Cal. 621; 34 Cal. 404, 421; 70 Cal. 434; 92 Cal. 355; 13 Mont. 189; 5 Nev. 92; 9 Or. 302; 7 Wash. 369.

75. The existence of a cause of action against the defendant is a jurisdictional fact which must be made to appear before an order for publication of summons can be made, and if it does not appear by the affidavit, the order is void. (*Forbes v. Hyde*, 31 Cal. 342.) Cited 76 Cal. 613.

76. It must appear that a cause of action exists against the defendant. (*Brady v. Seaman*, 30 Cal. 610.) Cited 13 Mont. 190; 24 Or. 354; 7 Wash. 369.

77. Under section 412 of the Code of Civil Procedure, an affidavit for the publication of summons against a nonresident defendant, in a case where the complaint is unverified, must state the facts showing the existence of a cause of action against the defendant, otherwise the court does not acquire jurisdiction of the defendant by reason of the attempted service by publication, and a judgment by default founded thereon is void. (*County of Yolo v. Knight*, 70 Cal. 431.) Cited 15 Col. 285; 7 Wash. 369.

78. Facts should be set out in an affidavit for an order to publish summons, and not a

general expression of opinion or belief that an ultimate jurisdictional fact exists, without the probative facts upon which such opinion or belief is founded. (*Forbes v. Hyde*, 31 Cal. 342.)

79. An affidavit to obtain an order for publication of summons, which states that the deponent "has a good cause of action in this suit against the said defendant, and that he is a proper party defendant thereto, as he verily believes," does not state any fact tending to show a cause of action, and an order and publication based on it are void. (*Forbes v. Hyde*, 31 Cal. 342; *County of Yolo v. Knight*, 70 Cal. 431.)

80. The fact that a cause of action exists may be shown either by affidavit or by the verified complaint on file. If the complaint be not verified, the affidavit may refer to and adopt its statements. In such a case, the oath to the affidavit is an oath to the contents of the document referred to and adopted. (*Ligare v. California Southern R. R. Co.*, 76 Cal. 610.)
Cited 92 Cal. 355.

81. Affidavit must show that defendant is a necessary or proper party. (*County of Yolo v. Knight*, 70 Cal. 431; *Braly v. Seaman*, 30 Cal. 610.)

82. It is not enough to state that defendant is a necessary party, but the facts showing that he is a necessary party must be stated. (*Ricketson v. Richardson*, 26 Cal. 149.)

83. The requirement that the affidavit shall state whether or not the defendant's place of residence is known applies only in cases of nonresident or absent defendants. (*Ligare v. California Southern R. R. Co.*, 76 Cal. 610.)

84. An affidavit to obtain an order for the service of a summons by publication must show whether the residence of the person upon whom service is sought is known to the affiant, and, if known, the residence must be stated. An affidavit which merely repeats the language or substance of the statute is insufficient. The ultimate facts of the statute must not be stated in the affidavit, but the probative facts, upon which the ultimate facts depend. (*Ricketson v. Richardson*, 26 Cal. 149.)

Cited 31 Cal. 354; 70 Cal. 433, 435; 76 Cal.

613, 614; 15 Col. 285; 1 Dak. 500; 8 Mont. 193; 13 Mont. 188; 5 Nev. 92; 7 Wash. 369.

85. An affidavit to obtain an order for the publication of summons on the ground that the defendant cannot, after due diligence, be found within the state, which does not state whether the residence of the defendant is known, and does not show that the affiant does not know where the defendant may be found, is insufficient to authorize the publication of summons. (*Braly v. Seaman*, 30 Cal. 610.)

86. It is not sufficient to state generally that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, but the acts constituting due diligence should be stated. (*Ricketson v. Richardson*, 26 Cal. 149.)

87. The affidavit should not merely follow

the language of the statute, but should set forth the evidence from which diligence can be inferred. And if the evidence be such that the judge might have been satisfied from it, although not conclusive, the showing will be held sufficient on a collateral attack. Instance. (*Ligare v. California Southern R. R. Co.*, 76 Cal. 610.)

88. An affidavit must state facts which show that due diligence to find the defendant has been used, and it must also appear therefrom that the diligence has not been rewarded with a discovery. (*Braly v. Seaman*, 30 Cal. 610.)

89. An affidavit for an order of the publication of the summons, upon the ground of the absence of the defendant, which states that the defendant could not, after due diligence, be found in the county where the action was pending; that affiant had inquired of Fogg, who is an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the state, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the court jurisdiction of the person of the defendant. (*Swain v. Chase*, 12 Cal. 233.)

90. Before jurisdiction of a defendant can be acquired by publication of summons, it must appear by affidavit either that the defendant resides out of the state or has departed from the state, or cannot, after due diligence, be found within the state, or that he conceals himself to avoid the service of summons. (*Braly v. Seaman*, 30 Cal. 610.)

91. An affidavit for publication of summons in an action for unlawful detainer, stating the residence and office of the defendant at the time of the commencement of the action, and that about that time he disappeared from his office and could not be found, and that thereafter affiant made inquiries for the defendant at various places, including his office, and of various persons who knew him, and would be likely to know of his whereabouts, but was unable to find him; that eight new summonses had been issued and four different competent persons had been employed to serve him, but without success, and that a continued and constant effort had been made to secure service upon the defendant; that the defendant "has not been in his accustomed places and resorts, but has left an agent in this city who is using persistent efforts to continue to collect the rents of the premises sought to be recovered"; that affiant does not know the whereabouts of defendant "and verily believes that he conceals himself to avoid the service of said summons," is sufficient to support an order for publication of the summons, although it does not state that the affiant had made inquiry of the defendant's agent as to the whereabouts of the defendant. (*Bradford v. McAvoy*, 99 Cal. 324.)

92. The affidavit stated that the "defendant, D. C. Seaver, was at the time a resident of the first township in the county of Contra Costa; that he had occupied a house on a tract of land claimed to be his own and which

he had cultivated up to the commencement of the suit and for a long time previous; that on the twenty-second day of October, the day before the commencement of the suit, he left his residence, informing his servant that he would be back that evening or the next day; that the summons in the suit was put in the hands of a proper constable, who made diligent search and was wholly unable to serve it; that Seaver had not returned to his residence, and that he believed he concealed himself for the purpose of avoiding the service of the summons, and that the claim sued on is a just debt." Held, to be sufficient to authorize the service by publication, and, when publication made, to give the court jurisdiction. (*Seaver v. Fitzgerald*, 23 Cal. 86.)

93. Affidavit for publication of summons against nonresident defendant, whose residence is known and stated therein, need not allege that an attachment has been issued or levied, or that the defendant has any property in the state. Nor is it necessary for the affidavit to show diligence in finding the defendant in the county or state where the action is pending, or to have the return of an officer that he cannot be found. (*Anderson v. Goff*, 72 Cal. 65.) Cited 76 Cal. 614; 85 Cal. 28; 10 Mont. 321.

94. An affidavit for publication of summons which shows that the person on whom the service is to be made resides out of the state is sufficient under section 412 of the Code of Civil Procedure, and it is not necessary that it should show acts constituting due diligence. Any statement in regard to diligence in such affidavit is immaterial. (*Furnish v. Mullan*, 76 Cal. 646.)

95. If affidavit upon which order for publication of summons is made is insufficient, the court acquires no jurisdiction of the defendant, and the judgment is void. (*Brady v. Seaman*, 30 Cal. 610.)

96. Question of legal sufficiency of affidavit to obtain an order of publication of summons and the order itself can be raised only by a motion made in the action, or by an appeal supported by a statement. (*Sharp v. Daugney*, 33 Cal. 505.)

Affidavit for publication, conclusiveness. See Judgments, 716.

Affidavit for publication of summons in eminent domain, what must state. See Eminent Domain, 111.

Publication, false affidavit. See Judgments, 579.

Publication, affidavit and order no part of judgment-roll. See Appeals, 1111, 1112.

Publication of summons, one affidavit for several cases. See Taxation, 659.

c. Order for.

97. On granting order for publication court acts judicially, and can know nothing about the facts upon which the order is to be granted, except from the affidavit. (*Ricketson v. Richardson*, 26 Cal. 149.)

98. If the affidavit is sufficient, and the order recites that the judge is satisfied therefrom that a case for publication exists, it does not matter that there is also a recital that other evidence was read and considered.

(*Ligare v. California Southern R. R. Co.*, 76 Cal. 610.)

99. Order to publish summons made in advance of issuance of summons is a nullity. (*People v. Huber*, 20 Cal. 81.)

100. Where, after complaint filed and before any summons is issued, an order was obtained from the judge that "summons do issue," and that it be published, and without any further order summons was subsequently issued and published, held, that the attempt thus to acquire jurisdiction of the defendant was ineffectual, and that a judgment rendered against him by default, without any other service of process, was void. (*People v. Huber*, 20 Cal. 81.) Cited 5 Nev. 92.

101. Order for service of summons by publication must state facts proved by the affidavit upon which it is based. It is not sufficient for the order to state, generally, that the defendant resides out of the state, or cannot, after due diligence, be found within the state, or that a cause of action exists against the defendant. (*Ricketson v. Richardson*, 26 Cal. 149.)

102. An order of publication of summons, made by a justice, need not state that the paper designated "is the one most likely to give notice to the person to be served." (*Seaver v. Fitzgerald*, 23 Cal. 86.)

103. An order for the service of summons by publication against a nonresident defendant whose residence was known, after stating the jurisdictional facts, and ordering publication in a designated paper for two months, directed that a copy of the complaint and summons be deposited in the postoffice, addressed to the defendant, but failed to specify that the deposit should be made "forthwith," as provided by section 413 of the Code of Civil Procedure. The deposit was made, however, on the day the order was signed. Held, that the order was sufficient, and that the omission was a mere irregularity, and could not be taken advantage of collaterally. (*Anderson v. Goff*, 72 Cal. 65.)

Order of publication. See ante, 71.

Order of publication, conclusiveness. See Judgments, 716.

Want of signature to order of publication, collateral attack. See Marriage and Divorce, 157.

Publication made without order. See ante, 72.

d. Duration and Manner of.

104. A publication of a summons weekly against a nonresident defendant, commencing on the tenth day of January, and ending on the ninth day of April, is a publication of three full calendar months, and the first day of the forty within which the defendant is required to answer is the 10th of April. (*Savings and Loan Society v. Thompson*, 32 Cal. 347.)

Cited 5 Nev. 426; distinguished 2 S. Dak. 383.

105. If the last day of the publication of a summons is in the same week in which the three months expires, the publication is sufficient to give the court jurisdiction, although this day is less than three months from the

first day of publication. (*Savings and Loan Society v. Thompson*, 32 Cal. 347.)

Publication "for four weeks." See *Swamp and Overflowed Lands*, 221.

Publication, when complete. See *Pleading and Practice*, 232.

106. If some of the publications of a summons, including the last, are made on Sunday, in the regular issues of the paper, it does not vitiate the service. (*Savings and Loan Society v. Thompson*, 32 Cal. 347.)

Publication, successive days, effect of intervening Sunday. See *Ordinances*, 25.

107. If service on a defendant is attempted to be procured by publication, the summons must be published as it was when the order of publication was made. (*McMinn v. Whelan*, 27 Cal. 300.)

108. When the summons is served by publication, the court does not fail to acquire jurisdiction because there is a discrepancy between the original summons and the summons as published, if in sense and meaning the original summons and the published version of it are identical. (*Sharp v. Daugney*, 33 Cal. 505.)

Cited 2 Mont. 413.

Publication, insufficient. See *Judgments*, 560.

Publication in paper. See *Notice*, VI.

Publication in supplement of newspaper. See *Notice*, 80.

Publication in German newspaper. See *Notice*, 79.

Publication, how made. See *Public Lands*, 477.

Publication of defective summons, default on. See *Defaults*, 62.

e. Deposit of Summons and Complaint in Postoffice.

109. In serving summons by publication, the deposit of the copy of the summons and complaint may be properly made in the postoffice at the place where the attorney for the plaintiff resides and has his office, although the order for publication was made at a different place. (*Mudge v. Steinhart*, 78 Cal. 34.)

110. The deposit of a copy of the complaint and summons in the postoffice may be made by the attorney for the plaintiff, and his affidavit is sufficient proof thereof. (*Anderson v. Goff*, 72 Cal. 65.)

111. The affidavit of deposit of summons in a postoffice need not state that the deposit was made by a white male citizen, or that the affiant is such citizen. It is sufficient if the deposit and affidavit are made by a human being. (*Sharp v. Daugney*, 33 Cal. 505.)

112. The affidavit of deposit of summons in a postoffice need not state that there is a communication by mail between the place of deposit and the place to which the package was addressed, nor that the postoffice was a United States postoffice. (*Sharp v. Daugney*, 33 Cal. 505.)

Cited 90 Cal. 642.

Deposit in mail. See *ante*, 71.

Order for deposit in postoffice. See *ante*, IV, 7, c.

Publication, prohibiting trial until personal service. See *Prohibition*, 52.

Deposit in postoffice, proof of. See *post*, 118.

Publication, amended not original complaint to be deposited. See *Pleading and Practice*, 624.

f. Proof of.

113. In order to affirmatively show the jurisdiction of the court over the person of a defendant served with summons by publication, and to support a judgment by default rendered against him, the affidavit of publication required by subdivision 3 of section 415 of the Code of Civil Procedure must be made and appear in the record, and in the absence of such affidavit the recitals in the judgment will not be accepted as a substitute for the proof of service of the summons, where the judgment is directly attacked upon appeal. (*Weeks v. Garibaldi South Gold Min. Co.*, 73 Cal. 599.)

114. Proof of service is by affidavit of printer, his foreman, or principal clerk, setting forth the fact where and how long the publication of summons has been made, and where a deposit in the postoffice has been ordered, then an affidavit showing such deposit. (*Hahn v. Kelly*, 34 Cal. 391.)

115. Where service of summons is had by publication, proof of publication can only be made by the affidavit of the printer, his foreman, or principal clerk; and the affidavit should state that the person taking the same holds one of these positions. An affidavit commencing in this way, "A B, principal clerk, etc., . . . being sworn, deposes," etc., is insufficient, and would not give the court jurisdiction of the person of the defendant. (*Steinbach v. Leese*, 27 Cal. 295.)

Cited 28 Cal. 651; 33 Cal. 514; 34 Cal. 419; 9 Or. 306; distinguished 34 Cal. 428.

116. Affidavit of publication may be made by publisher and proprietor, instead of the printer, foreman, or principal clerk. (*Sharp v. Daugney*, 33 Cal. 505.)

117. Where the affidavit of the publication of a summons, made by one who therein styles himself "the proprietor" of the newspaper in which the publication was made, instead of "the printer," as required by the Practice Act, held, that the terms "printer" and "proprietor" are, in the sense of the statute, synonymous. (*Quivey v. Porter*, 37 Cal. 458.)

Deposit need not be stated in return. See *post*, 118.

118. Publication may be proved by the affidavit of clerk of the publisher of the paper, and the fact that the summons was deposited in a postoffice may also be proved by affidavit; nor is it necessary that the constable state in his return on the summons that such publication was made and such deposit made in the postoffice. (*Seaver v. Fitzgerald*, 23 Cal. 86.)

119. Where there is but one clerk in office of a public newspaper, his affidavit of the publication of summons, or notice, in said paper is sufficient; and it is unnecessary for the affidavit to describe him as principal clerk. (*Gray v. Palmer*, 9 Cal. 616.)

120. After judgment has been rendered in an action of divorce, and before the roll is made up, the court has authority to receive amended affidavits showing a service of summons by publication. (*Estate of Newman*, 75 Cal. 213.)

Publication, presumptions as to. See Appeals, 2721.

Affidavit of deposit of summons in post-office. See ante, IV, 7, c.

Publication, affidavit of, what sufficient. See Husband and Wife, 532.

8. Appearance or Answer as Waiver of Service or Defect in.

121. The only purpose of a summons is to bring the defendant into court, and if he appears and answers, he waives any defect in the summons. (*Randall v. Falkner*, 41 Cal. 242.)

122. The object of the rule requiring the party in interest to be served is substantially met, though there be no personal service upon him, if he is in fact represented by attorneys who appear in behalf of the judge of the superior court. (*Havemeyer v. Superior Court*, 84 Cal. 327.)

123. Where the service of summons is defective, the justice's court does not acquire jurisdiction to proceed against a defendant by reason of his special appearance for the purpose of moving to set aside the service. (*Southern Pac. R. R. Co. v. Superior Court of Kern County*, 59 Cal. 471.)

124. A motion to set aside the service of a summons may be made without entering an appearance in the action. (*Eldridge v. Kay*, 45 Cal. 49.)

125. Where a motion to quash the summons is denied, the defendant, by answering to the merits, waives his objection to all defects therein. (*Sears v. Starbird*, 78 Cal. 225.)

126. A defendant may move to set aside the return of service of a summons, and, if it is denied, may answer without waiving the benefit of an exception to the order denying his motion. (*Kent v. West*, 50 Cal. 185.) Cited 3 Mont. 49; 19 Or. 96.

127. One does not waive his rights by answering after moving to dismiss an irregular summons and motion overruled. (*Deidesheimer v. Brown*, 8 Cal. 339.)

Appearance to set aside summons. See post, IV, 9.

Waiver of objection to summons by pleading to merits. See Certiorari, 101.

Waiver of by appearance. See Appearance, III, 4.

9. Motion to Set Aside Service.

128. A justice of the peace has jurisdiction to entertain a motion of a defendant to set aside the service of a summons attempted to be made upon him in a county other than that in which the action was pending, in violation of the provisions of section 848 of the Code of Civil Procedure, and the motion is properly made upon affidavits showing the grounds of the motion. (*History Co. v. Light*, 97 Cal. 56.)

129. The fact that an unverified complaint

filed in an action in a justice's court alleges that the contract sued upon was to be performed by the defendant therein in the county in which such action was brought does not foreclose all inquiry as to the fact, or deprive the justice of jurisdiction to pass upon the truth of the allegation upon a motion to set aside the service of summons. (*History Co. v. Light*, 97 Cal. 56.)

130. The burden of proving an improper service of summons in an action in a justice's court, upon a motion to set aside the service upon affidavits showing the ground of the motion, is on the defendant, and he is required to present a clear case. (*History Co. v. Light*, 97 Cal. 56.)

Motion to set aside for variance in copy of complaint served. See ante, 34.

Answering after motion to set aside summons. See ante, IV, 7, g.

Amendment of summons after motion to dismiss. See ante, III.

Summons, special appearance to dismiss for defect in. See Appearance, III, 5.

Appearance to quash summons. See Appearance, 42.

Orders refusing to quash. See Certiorari, III, 2, l.

Appealability of rulings on motions to quash. See Appeals, II, 17.

V. Return.

131. A justice of the peace cannot make a summons returnable in eleven days after service. (*Deidesheimer v. Brown*, 8 Cal. 339.)

Cited 1 Nev. 98.

132. By a proper construction of sections 541 and 543 of the Practice Act, the summons—when required to be published—may be made returnable more than ten days from its date. (*Hisler v. Carr*, 34 Cal. 641.)

133. But otherwise, unless publication be required; and to that end plaintiff must make and file with the justice the affidavit provided for in said section 543. (*Hisler v. Carr*, 34 Cal. 641.)

134. The return of a deputy sheriff, on a process served, is a nullity unless made in the name of the sheriff. (*Rowley v. Howard*, 23 Cal. 401.)

Cited 86 Cal. 398.

135. Where the place where the summons was served was not stated, but it was directed to the sheriff of San Francisco, and was returned by him served, the court should have assumed that it was served within his jurisdiction. (*Crane v. Brannan*, 3 Cal. 192.)

136. When the return on a summons states that a copy of the summons was personally served on the defendant in the action, giving the time and place, this return, although informal, is yet sufficient to give the court jurisdiction of the person. So that the judgment is not void for want of jurisdiction when collaterally attacked. (*Drake v. Duvenick*, 45 Cal. 455.)

Cited 59 Cal. 493; 67 Cal. 399; 68 Cal. 400; 89 Cal. 484.

137. Such return does not show that a copy of the summons was not delivered to the de-

fendant personally, and it has at least some legal tendency to prove that it was so delivered. (*Drake v. Duvenick*, 45 Cal. 455.)

138. If in such case there is more than one defendant, the fact that the return does not state that a copy of the complaint was served with the summons does not render the judgment void in a collateral attack. (*Drake v. Duvenick*, 45 Cal. 455.)

139. Where the judgment of the court recites that summons was served on defendant, the fact that, years afterward, there appears some erasure or interlineation on the sheriff's return, is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud, or forgery, or alteration. (*Gregory v. Ford*, 14 Cal. 138.)

140. A recital in a judgment by default that the default of the defendant was duly entered, cures a technical defect in the return of service. (*Peck v. Strauss*, 33 Cal. 678.) Cited 45 Cal. 466; 60 Cal. 622; 77 Cal. 163, 201; 1 Wash. 193.

141. The court may properly direct its officers to amend a return of service so as to conform to the facts. (*People v. Goldenson*, 76 Cal. 328.)

142. Where a justice's court has in fact obtained jurisdiction of a defendant by a regular service of a copy of the complaint and summons upon him, but the return of the officer making the service fails to show that a copy of the complaint was served, the court has power, after a judgment by default has been rendered, under which an execution sale of the defendant's property has been had, to permit the return to be amended so as to accord with the facts; and this may be done as against a grantee of the judgment debtor under a quitclaim deed made after the execution sale. (*Allison v. Thomas*, 72 Cal. 562.) Cited 75 Cal. 220; 19 Or. 347.

143. After a summons has been served on some of the defendants, and returned, it is competent to the court to order it delivered to the plaintiff for further service on other defendants in the same or another county. (*Hancock v. Preuss*, 40 Cal. 572.)

144. A redelivery of the summons without an order of the court is an irregularity, of which the opposite party may avail himself by direct attack; but such irregularity will not render the service of the summons void. (*Hancock v. Preuss*, 40 Cal. 572.)

145. A returned summons is *functus officio*, and the service of it cannot be made thereafter; and service of a copy of such summons more than eleven years after the filing of the complaint upon a street assessment, made upon the grantee of the land, who was never made a party to the suit, and who did not appear in the case, is void, and such service may be quashed upon his motion. (*Fanning v. Foley*, 99 Cal. 336.)

146. In a suit commenced before a justice of the peace, if the summons be returned by the officer with his indorsement thereon that no service has been made because defendant cannot be found, and on the return day thereof it is further made to appear by affidavit that the defendant conceals himself to

avoid service of process, the suit does not thereby abate, but the magistrate may continue the cause, issue a new summons, and make an order for its service by publication, and fix the return day of the new summons at a time sufficiently remote to have the service by publication completed before the return day, even if the period between the issuance of the new summons and its return day exceeds ten days. (*Seaver v. Fitzgerald*, 22 Cal. 86.)

Cited 34 Cal. 646.

Statute must be substantially followed in making return. See ante, 27.

Statement as to publication in return. See ante, 118.

Deposit in postoffice, return need not state. See ante, 118.

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Return, when defective. See Defaults, 65.

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SUNDAYS.

See Criminal Law, XXI, 51.

Sunday laws, constitutionality of. See Constitutional Law, VIII, 13, f.

1. Contracts made in this state on Sunday are not void because made on Sunday. (*Moore v. Murdock*, 26 Cal. 514.)

2. The court may, on Sunday, adjudicate the fact that a jury in a criminal case cannot agree, and may then continue the cause until the next term. (*People v. Lightner*, 49 Cal. 226.)

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Publication of summons on. See Summons, 106.

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10. *Power to Sue; Employing Counsel.*
11. *Actions Against.*
12. *Refunding Money Illegally Collected; Power to Set Aside Order.*
13. *Supervisory Control of Courts Over.*
14. *Fiduciary Relation of; Making Secret Profit; Actions Against for Allowing Illegal Claims.*
15. *Delegation of Powers.*
16. *Removal of.*

VI. Compensation and Extra Allowance.

Ordinances. See Ordinances.
San Francisco, supervisors in. See San Francisco, V, 1.

San Francisco, Political Code does not apply to supervisors of. See San Francisco, 18.
Los Angeles, power of supervisors of. See Los Angeles.

Water rates, power of supervisors to fix. See Water Companies, III.

Power of over tolls. See Bridges, 25.

Toll, duty of supervisors to fix rates of. See Turnpike Companies, VII.

Power to order election. See Elections, 8, et seq.

Cannot license nuisance. See Nuisances, 25.

Power to destroy wild animals. See Animals, I.

Cannot compel one imprisoned for fine to work on streets. See Contempt, 115.

Act conferring power to grant special privileges. See Constitutional Law, 401.

Fees of clerk, effect of new constitution on. See Constitutional Law, 89.

I. Qualifications; Election; Term of Office and Vacancy in; Supervisors of First Board.

1. When the charter of a city provides that the common council shall "judge of the qualifications, elections, and returns of their own members," the council possesses the exclusive authority to pass on the subject, and courts have no jurisdiction to inquire into the qualifications, elections, or returns of members of the council. (People ex rel. Vejar v. Metzker, 47 Cal. 524.)
Cited 82 Cal. 239, 241, 244.

Quo warranto to test right to office. See Quo Warranto, 7, et seq.

2. The act of 1868, providing for the election of supervisors in Sacramento county, repealed so much of the act of 1863 as authorized an election to be held for three of the districts in 1869, and the ballots cast at that election for supervisors for those three districts were void. (Christy v. Board of Supervisors of Sacramento County, 39 Cal. 3.)

Election, refusal to canvass returns for fraud. See Municipal Corporations, 17.

3. One who has held the office of supervisor is, after the expiration of his term, and the election and qualification of his successor, no longer an officer, either de jure or de facto, but if he attempts to act as such, is a mere naked usurper. (Trinity County v. McCammon, 25 Cal. 117.)

4. A person elected supervisor has the legal right to exercise and enjoy the office until his successor is duly appointed or elected. (Myers v. Board of Supervisors of Alameda County, 60 Cal. 287.)

Appointment of, review of. See Certiorari, III, 2, m.

5. Section 752 of the General Municipal Incorporation Act, approved March 13, 1883, providing for the election of officers of cities of the fifth class on the second Monday in April in each odd-numbered year, and that the members of the board of trustees are to hold for four years, and until their successors are elected, and containing a proviso that the first board of trustees "elected under the provisions of this act shall, at their first meeting, so classify themselves by lot as that three of their number shall go out of office at the expiration of two years, and two at the expiration of four years," must be so construed as to be in harmony with section 4 of the act providing that the trustees elected at the first election are to hold only till the next munic-

ipal election, and until their successors are elected and qualified; and the words "this act," in the proviso appended to section 752, must be read "this section" or "this chapter," to accord with the evident intention of the legislature, and to reconcile the conflict. (*Ruggles v. Board of Trustees of the City of Woodland*, 88 Cal. 430.)

6. The amendments to the Political Code contained in the county government bill (so called), having been adjudged unconstitutional, there is no law authorizing an appointment by superior judges to fill a vacancy in the office of supervisor; if there is power to appoint in such case it rests with the governor, under section 999 of the Political Code, or with the board of supervisors, under section 4115 of the Political Code. (*Myers v. Board of Supervisors of Alameda County*, 60 Cal. 287.)

7. It is difficult to see how section 20 of the act creating boards of supervisors (*Wood's Digest*, 694), is unconstitutional. But the question is not here decided. (*People ex rel. Packard v. Supervisors of Santa Barbara County*, 14 Cal. 102.)

8. Office of supervisor of first board of supervisors does not exist in the city and county of San Francisco, but that city is governed, as to the election of supervisors, by the Consolidation Act, which was not superseded by the constitution. (*People ex rel. Pixley v. Pond*, 89 Cal. 141.)

Ordinances where two boards of aldermen. See Ordinances, II, 5.

II. Residence of; Mileage.

9. While engaged in the performance of the duty of attending upon regular and special sessions of the board of supervisors, the official residence of each supervisor is at the county seat. (*Howes v. Abbott*, 78 Cal. 270.)

10. Supervisors in counties of the thirty-third class are only entitled to one mileage for each session of the board, and cannot charge mileage for daily visits to and from their homes during a particular session. (*Howes v. Abbott*, 78 Cal. 270.)

III. Meetings of; Notice of; Quorum; Estoppel of by Acts in Pais.

11. The board of supervisors of a county cannot settle with the county treasurer at a special meeting of such board, unless they have first given public notice of such meeting, and specified in such notice that such business will be transacted. (*El Dorado County v. Reed*, 11 Cal. 130.)

12. In order to give the amplest opportunity to the district attorney, or citizens who desire to do so, to contest the allowance of improper demands against the public treasury, the business of the supervisors is required to be transacted at the regular meetings required by law; or if at special meetings, public notice must be given of the business to be so transacted; and unless such notice be given, the acts of the supervisors are a nullity. (*El Dorado County v. Reed*, 11 Cal. 130.)

Regular meetings, what are. See Irrigation Districts, 13.

13. The majority of a quorum of a board of supervisors, a quorum being present, can perform any act which a majority of the board could perform if all were present. (*People ex rel. Flint v. Harrington*, 63 Cal. 257.)

14. If an act of the legislature authorizes the board exercising the corporate authority of a city to convey its lands, a majority of the members of such board may make the conveyance. (*San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106.)

15. Where the charter of a city vests the corporate powers in a "board of trustees to consist of five members, who shall be elected," etc., and the law provides that "at all meetings of the board a majority of the trustees shall constitute a quorum to do business," a majority of those elected can organize and act at the first meeting, as well as at any subsequent meeting. (*City of Oakland v. Carpenter*, 13 Cal. 540.)

16. A deliberative body, like the board of supervisors, cannot be bound by acts in pais; the best and only evidence of its intentions is to be drawn from the record of its proceedings. (*Phelan v. San Francisco*, 6 Cal. 531.) Cited 7 Cal. 380, 388; 5 Or. 323.

Continuity of regular meeting. See post, IV.

Individual members cannot contract. See post, 56, 57.

Order for payment of judgment as an estoppel. See post, 50.

IV. Minutes and Records of Proceedings.

17. The record of the proceedings of a board of supervisors under their seal is prima facie evidence of such proceedings. (*People v. Bircham*, 12 Cal. 50.)

18. The general rule that every public document which is required by law to be executed by a public officer must be verified by his official signature does not extend to the proof of the records of a corporate board which exercises powers municipal and quasi legislative. (*People v. Eureka Lake etc. Co.*, 48 Cal. 143.)

19. The chairman and clerk of the corporate board, exercising powers municipal and quasi legislative, sign the record of its proceedings, not as certifying to their own official action, but as witnesses that the record is the record made up by the clerk, under the direction of the board. (*People v. Eureka Lake etc. Co.*, 48 Cal. 143.)

20. The statute requiring the chairman and clerk of a board of supervisors to sign the record of its proceedings does not invalidate such record as proof of the action of the board if the clerk and chairman fail to sign, but has the effect merely of putting the party who desires to prove the official action of the board to some additional trouble in establishing the handwriting of the entries, their contemporaneous character, and the official custody from which the book was produced. (*People v. Eureka Lake etc. Co.*, 48 Cal. 143.)

21. The effect of the statute requiring the clerk and chairman of the board of supervisors to sign the record of its proceedings is

merely to make their signatures evidence identifying the minutes. (*People v. Eureka Lake etc. Co.*, 48 Cal. 143.)

22. Section 19 of the County Government Act, providing that the records and minutes of the board of supervisors must be signed by the chairman and clerk, merely has the effect to make their signatures evidence identifying the minutes; and their failure to sign the minutes does not render the record inadmissible as proof of the action of the board, in meeting and adjourning, for the purpose of showing the continuity of the session of the board at a regular meeting; but if the handwriting of the entries, their contemporaneous character, and the official custody from which the record is produced are proved, the minutes are competent to show the action of the board. (*County of San Diego v. Seifert*, 97 Cal. 594.)

23. Failure of clerk properly to authenticate or record official acts of the board of supervisors does not affect their validity. The power of the board to act exists independently of any action of the clerk, and the validity of an exercise of it does not depend upon the diligence of the clerk. (*County of San Luis Obispo v. White*, 91 Cal. 432.)

Records of, evidence to contract. See Evidence, 383.

Mandamus to correct records of supervisors. See Mandamus, II, 13, i.

V. Powers, Duties, and Liabilities of.

1. Nature of Powers, Generally.

24. Board of supervisors is special tribunal with mixed powers, administrative, legislative, and judicial. (*Waugh v. Ohauncey*, 13 Cal. 11.)

Cited 23 Cal. 303, 495; 46 Cal. 24; 59 Cal. 702; 7 Nev. 397.

25. Board of supervisors is body with limited jurisdiction, and its jurisdiction must appear in the record of its proceedings. (*Finch v. Tehama County*, 29 Cal. 453.)

Cited 5 Nev. 319; 6 Nev. 97; 9 Nev. 89; 12 Nev. 31; 19 Nev. 418.

26. Supervisors exercise judicial, legislative, and executive powers, from the necessity of the case, in matters relating to the police and fiscal regulations of counties. (*People v. El Dorado County*, 8 Cal. 58.)

Cited 10 Cal. 345; 23 Cal. 303; 24 Cal. 127; 25 Cal. 97; 29 Cal. 85; 46 Cal. 23; 59 Cal. 702; 72 Cal. 434; 7 Nev. 397; disapproved 34 Cal. 527, 531, 541.

27. It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout this state, to transfer from the courts of sessions to the boards of supervisors the general and special powers and duties of a civil character which had before the passage of that act been vested in such court. (*People v. Bircham*, 12 Cal. 50.)

Cited 46 Cal. 24; doubted 34 Cal. 528.

28. It was not the design, in this manner, to repeal any law, general or special, before existing; but as, under the decision of *Burgoyne v. Supervisors*, 5 Cal. 9, a question of the constitutionality of those laws which conferred duties and powers, not of criminal

cognizance, was made, the legislature meant to remove the difficulty by transferring all these functions to the boards of supervisors. (*People v. Bircham*, 12 Cal. 50.)

29. The act of March 13, 1883—section 4045 of the Political Code, relating to the powers of supervisors—was superseded and repealed by the County Government Act of March 14, 1883. (*Santa Clara County v. Southern Pac. R. R. Co.*, 66 Cal. 642.)

Cited 86 Cal. 257.

Ayuntamiento, powers over land. See Mexican Lands, II, 2.

Jurisdiction to hear contested election case. See Elections, 144, et seq.

Canvassing returns for county seat. See Elections, 96, 97.

Conclusiveness of decisions. See Irrigation Districts, 25, et seq.

Powers on formation of reclamation district. See Swamp and Overflowed Lands, 237.

Sacramento, supervisors, powers of. See Sacramento, 4, 6, 8, 9.

Committee of, power to act. See Streets, 288.

Delegating police powers to. See Constitutional Law, 171.

2. Acts Must be Authorized by and Follow Statute.

30. No order made by a board of supervisors is valid or binding unless it is authorized by law. (*Linden v. Case*, 46 Cal. 171.)

Cited 74 Cal. 337.

31. When municipal authorities of city act under authority derived from statute, they must follow strictly its provisions. (*Glass v. Ashbury*, 49 Cal. 571.)

3. Custody, Control, and Protection of Public Property.

32. Boards of supervisors are the guardians of the property interests of their respective counties, and in that relation occupy a position of trust, and are bound to the same measure of good faith towards the county which is required of an ordinary trustee towards his cestui que trust, or an agent towards his principal. (*Andrews v. Pratt*, 44 Cal. 309.)

Cited 55 Cal. 364.

33. The corporate powers of a county can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law; and the supervisors are the representatives of the county for the purpose of providing necessary county buildings and suitable rooms for county purposes, and of erecting and furnishing a courthouse, and selecting and designating rooms therein to be occupied by the different officers; and have continual power to assign and change the assignment of rooms in the courthouse. (*San Joaquin County v. Budd*, 96 Cal. 47.)

34. Boards of supervisors possess the power, as incidental to that of buying, selling, and leasing of property, and the management, care, and preservation thereof, as conferred by statute (Stats. 1855, sec. 9, p. 51), to take all legal measures necessary to that end, by suit or otherwise, and therein are vested with large discretionary powers. (*Hornblower v. Duden*, 35 Cal. 664.)

Power to erect county jail. See Prisons, 2. Bridges, control over by. See Bridges, I. Jurisdiction over opening of highways. See Highways, I, 3, b.

Power to grade streets. See Streets, XI, 3, a.

Duty to keep streets clean. See Streets, 29, 30.

Lease of public road as toll-road. See Turnpike Companies, 19.

4. Setting Apart and Transfer of Funds.

35. Board of supervisors has no power to set apart portion of revenue of the county, as a fund for current expenses. (*Laforge v. Magee*, 6 Cal. 285.)

36. Subdivision 20 of section 25 of the County Government Act, authorizing the supervisors to establish county funds, and to transfer moneys from one fund to another as the public interest may require, cannot be construed to authorize the transfer to a fund established by law, and expressly limited in the amount of its receipts; and as, under the Political Code, all the money used for road purposes must come from the road poll-tax and property road tax, and only a portion of the cost of constructing bridges can be paid from the general fund, an order of the supervisors transferring money temporarily from the county general fund to a particular road district fund, for payment of the road overseer of that district, for work and labor done and money expended, aside from the construction of bridges, is without authority of law, and mandamus will not lie to compel the county treasurer to obey such order. (*Potter v. Fowler*, 78 Cal. 493.)

5. Power and Duty Regarding Municipal and County Indebtedness.

a. Duty to Provide for Payment.

37. Supervisors of San Francisco have authority, and it is their duty to provide for the payment of judgments recovered against the city of San Francisco. They have no discretion except between two courses of procedure. They must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

38. There being no discretion as to the duty to be performed, there is none as to the use of the means required in performing it. If the means require the passage of an ordinance, the supervisors have no discretion to refuse to pass the ordinance. They have not in such case the right to vote at their option either for or against the ordinance. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

39. In imposing upon supervisors duty of providing for payment of city indebtedness, the legislature authorized them to take all the ordinary measures essential to its complete performance. The duty carries with it the means. The board can appropriate from the revenues or levy a tax, and the adjusting of the details is a mere matter of administration, which can be had under the direction of any of the officers of the corporation designated for that purpose. (*People ex rel. Frank v. San Francisco*, 21 Cal. 668.)

Claims against county, power and duty of. See Counties, VIII, 6, b.

Duty in relation to judgment against county. See Counties, 133, 134.

Claims of military companies. See Military Companies, 3, 4.

b. Creating Indebtedness; Aid to Public or Private Improvement.

Power to create county indebtedness. See Counties, 60.

40. Boards of supervisors are not empowered to create a debt or liability on the part of the county for any purpose except as provided by law. (*Foster v. Coleman*, 10 Cal. 278.)

Cited 74 Cal. 337; 80 Cal. 366; 87 Cal. 637; 9 Mont. 320; 6 Wash. 448.

41. Charter of San Diego gave no power to trustees to aid in construction of improvements partaking of a public character, and had the charter contained such a grant, the board could not, in the exercise of the power, contract to pay money, or to appropriate the revenues of the city to aid in constructing the works of a private corporation. (*San Diego Water Co. v. City of San Diego*, 59 Cal. 517.)

42. The contract being void, no subsequent acts of the officers of the city in ratification of it were binding on the city. (*San Diego Water Co. v. City of San Diego*, 59 Cal. 517.)

Mandamus to compel issuance of railway aid bonds. See Railroads, 18.

Cannot issue bonds. See Bonds, 27.

c. Presentation and Allowance of Claims.

43. If a board of supervisors enter into a contract for the erection of a county jail, the work and labor to be paid for in installments, on the certificate of the architect that a certain sum has been expended, an account giving the sum total of an installment, without "all the items of the claim," certified to by the architect, is a sufficient compliance with section 4072 of the Political Code to authorize the board of supervisors to allow the same. (*Babcock v. Goodrich*, 47 Cal. 488.)

44. The board of supervisors has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. (*McDonald v. Maddux*, 11 Cal. 187.) Cited 16 Cal. 34; 19 Cal. 184.

45. The order allowing the plaintiff's demand for gas furnished San Francisco under contract of May 24, 1869, was regularly published and passed, and was an action of the board which they were empowered to take by sections 71 and 74 of the Consolidation Act. They were not legally bound to allow the claim by reason of the contract of 1869, or of any renewal of that contract. But the gas had been furnished the city, and they were fully empowered to provide for its payment such sum as it was worth. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 588.)

46. The board of supervisors of the city and county of San Francisco are the auditing officers of unliquidated demands against the city and county, and it is their duty to allow such claims as are just in full, or in some less but exact amount. They cannot set aside an

amount out of which a less sum may be paid by any committee or officer. (*Spring Valley W. W. v. Ashbury*, 52 Cal. 126.)

47. The board of supervisors, in passing upon a claim against the county, act as a quasi judicial body, and their allowance and settlement of the claim is an adjudication, which is conclusive. (*Colusa County v. De Jarnett*, 55 Cal. 373.)

48. A board of supervisors of a county in allowing or disallowing a claim exercise judicial functions. (*Tilden v. Board of Supervisors of Sacramento*, 41 Cal. 68.)

49. Neither the auditor nor this court has power to review the judgment of the supervisors with reference to the amount allowed a gas company as to the actual value of the gas furnished and the repairs made. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 588.)

50. The order of the board of supervisors directing the payment of the judgment for injuries caused by a mob operates as an estoppel upon the city and county, as against an assignee for value, who purchased the claim, relying upon the action of the board. (*Bank of California v. Shaber*, 55 Cal. 322.)

51. Each time a claim is presented by a gas company, which is allowed in whole or in part by the board of supervisors, the latter employ their legislative function of deciding it to be expedient for the city to pay at the rates named in the bill, and also enter into a fresh contract to pay the sum allowed. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 588.)

52. When the account of a deputy assessor for sixteen hundred and fifty dollars was audited and allowed by the board, and ordered to be paid, the order being in the following words: "Ordered, the sum of four thousand one hundred and twenty-five dollars be paid out of the fund for current expenses, to equal sixteen hundred and fifty dollars, in cash, at the rate of forty cents per dollar—October 29, 1856"; and in pursuance of such order the county auditor drew his warrant for four thousand one hundred and twenty-five dollars upon the treasurer, and delivered it to the deputy assessor, who presented it to the treasurer, and by him it was indorsed and registered in its order of presentation, among the legal warrants against the county, held, that the order was made without authority, and was void, and the fact that the market or cash value of county warrants was only forty per cent of the nominal amount, and the object of the action of the board was to give that which was at the time an equivalent to cash, did not justify the action of the board. (*Foster v. Coleman*, 10 Cal. 279.)

53. A resolution of a board of supervisors, after it has disallowed a claim, reciting that the services on which it is based have been performed by the claimant, but that the board has doubts as to its legality, and directing the district attorney to enter the appearance of the board in any court in which the claimant may commence an action to require the board to allow the claim, which resolution

is not agreed to or accepted by the claimant, is revocable at the pleasure of the board. (*Tilden v. Board of Supervisors of Sacramento*, 41 Cal. 68.)

54. In a proceeding in the superior court of Fresno county to review the action of the board of supervisors of that county in rejecting portions of each claim presented for constable's fees, where the case was submitted upon an agreed statement of facts which did not show upon what ground they were rejected, the superior court was authorized to presume that they were rejected upon any ground not negated by the statement, and that they were properly rejected because in excess of the fifteen hundred dollar limit fixed by section 188 of the County Government Act. (*Green v. County of Fresno*, 95 Cal. 329.)

Allowance of demands at special meeting. See ante, 12.

Illegal allowance, liability for. See post, V, 14.

Presentation of claims before suit. See Municipal Corporations, XV.

Account, want of authentication, objection when to be taken. See Appeals, 2392.

Claim for taxes illegally paid, time for presentation. See Taxation, 570.

Allowance of several claims by single vote. See San Francisco, 70.

Fraudulent claim, presenting to. See Criminal Law, XXI, 28.

Claims against counties, conclusiveness of actions of supervisors. See Counties, VIII, 6, b.

Compelling action on claims. See Mandamus, II, 13, a.

Compelling supervisors to issue warrants. See Mandamus, II, 13, a.

Compelling supervisors to pay judgment. See Mandamus, II, 13, a.

6. Change of Boundaries of Supervisors' District.

55. The clause in the act creating boards of supervisors in this state, providing that the said boards "shall have authority at their last session before the general election in each year to change the boundaries of the (supervisor) districts in their said respective counties," is merely directory, and does not prohibit such change at any other session. (*Tuohy v. Chase*, 30 Cal. 524.)

7. Contracts.

Acts of interested supervisors. See post, V, 14.

56. Individual members of the common council of the city of San Francisco were not, by the charter of 1851, invested with any power to improve the city property, and any directions given or contracts made by them upon the subject had the same, and no greater, validity than like directions given and like contracts made by any other residents of the city assuming to act for the corporation. (*Zottman v. San Francisco*, 20 Cal. 98.)

57. Contract made by individual members of the common council of the "city of San Francisco," a municipal corporation, in a manner not authorized by its charter, and in disregard of the forms therein directed to be

observed in the making of its contracts, is not the ground of any claim against the city. (*Zottman v. San Francisco*, 20 Cal. 96.) Cited 9 Mont. 320.

58. Where a contract, which the board of supervisors is authorized to make, is entered into between the supervisors and a company, or individuals, the corporation is as much bound by it as any other person by his contract. If, however, under pretense of carrying into effect a legislative power conferred, the board shall enter into such a contract as was evidently not intended to be authorized, or such as shall amount to a cession of the right of future legislation, the contract is invalid. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 585.)

59. Act providing it shall be duty of board to proceed and let contract for a local improvement within a certain time, and prescribing what the improvement shall be, leaving nothing to the discretion of the board, is mandatory on the board. (*People ex rel. Ferguson v. Supervisors of San Francisco*, 36 Cal. 595.)

60. Effect of proviso in twelfth section of act of 1860, concerning roads and highways in the counties of Humboldt, Napa, and Siskiyou, is to limit the power of contracting, in reference to roads and highways, to the mode there pointed out, and this limitation applies as well to the board of supervisors as to the overseer, and a contract made in any other manner is not binding upon the county. (*Murphy v. Napa County*, 20 Cal. 497.) Cited 15 Nev. 44.

61. Prior to the enactment of section 4047 of the Political Code (April 1, 1878), there was no limitation upon the general powers of the board of supervisors to contract either for printing or publication. (*Maxwell v. Supervisors of Stanislaus County*, 56 Cal. 114.)

62. The board of supervisors of a county has no power to contract for any of the county printing, without the ten days' public notice that such contract will be let to the lowest bidder which is required by section 4047 of the Political Code. (*Maxwell v. Board of Supervisors of Stanislaus County*, 53 Cal. 389.)

63. Conceding that a purchase by the court of sessions of a lot of land for a courthouse was not void, but only voidable, the subsequent action of the board of supervisors of the county in taking care of and preserving the property is not a ratification of the purchase which will bind the county. (*Phelan v. San Francisco*, 6 Cal. 531.)

64. The provision of the County Government Act requiring the board of supervisors of a county to publish notice of their intention to make a purchase of real property for the benefit of the county in some newspaper of general circulation published in the county, etc., is mandatory, and operates as a limitation upon the power of the board to make any purchase of real property unless the publication is made as directed. (*Winn v. Shaw*, 87 Cal. 631.)

65. The fact that no newspaper published in the county is willing to publish the notice

for the price fixed by the supervisors, and that all the newspapers published in the county have combined to charge higher rates for advertising than the board are willing to pay, cannot affect or alter the jurisdiction of the board, or confer upon it power to purchase real property without making the publication required by the statute. (*Winn v. Shaw*, 87 Cal. 631.)

66. The question as to the validity of a contract between newspapers adopting a uniform schedule of prices for advertising and printing, including all county work, is not involved in an action to prevent an illegal payment for land purchased by the supervisors without the publication of any notice. (*Winn v. Shaw*, 87 Cal. 631.)

67. Under sections 71 and 74 of the Consolidation Act the supervisors of San Francisco have power by "order" duly published to contract for the lighting of streets. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 583.)

68. Power conferred upon the supervisors "by resolution or order" to provide for lighting the streets includes a power to enter into an appropriate contract for carrying into effect the major power. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 584.)

69. In the absence of an express limitation as to the period of time for which a contract may be made by the board of supervisors, the court is not prepared to declare that such a contract for five years would be unreasonable. It may therefore be assumed, for the purposes of this decision, that the contract of 1879, fixing the rates for gas for five years, is valid as an independent contract, unless prohibited by express statutory provision. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580.)

70. The proviso of the first section of the act of April 3, 1876 (Stats. 1875-76, p. 854), prohibits the making of any contract by the supervisors of San Francisco for any purpose "binding said city for a longer period than two years"; and unless this proviso was repealed by the subsequent act of February 25, 1878 (Stats. 1877-78, p. 111), the contract of 1879, fixing the rates for gas for five years was one which the supervisors were not empowered to make, and any claim based upon such contract one which they had no authority to allow. It is, however, unnecessary to decide in this case whether or not the proviso was repealed. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 586.)

71. Power given board to reject all bids is a power to be used to effectuate, not to defeat, the legislative will. (*People v. Board of Supervisors*, 50 Cal. 561.)

72. County is corporation, and is proper party plaintiff to object to contract made by the board of supervisors for building a jail. (*People ex rel. Smith v. Myers*, 15 Cal. 33.)

73. When a taxpayer might object to a contract made by the board of supervisors for building a jail, stated. (*People ex rel. Smith v. Myers*, 15 Cal. 33.)

Void contract cannot be ratified. See ante, V, 5, b.

Contracts of municipal corporations. See *Municipal Corporations*, XI.

Limiting hours of labor in contracts. See Municipal Corporations, XI, 3; Public Works. Supervisors cannot authorize erection of school on public square. See Schools, IV.

Deed by trustees of town, recitals in. See Deeds, 374, 375.

Power to contract for printing delinquent tax list. See Taxation, 583.

Right to rescind contract. See Counties, 47.

Statute authorizing contract for map, whether mandatory. See Statutes, 191, 192.

Mandamus to compel awarding contract to lowest bidder. See Taxation, 580.

8. Fixing and Allowing Compensation of Officers.

74. The board of supervisors have no authority of law to fix the compensation due to any county officer; and a tax collector, who has collected taxes under section 3770 of the Political Code and retained one-half of the amount under an order of the board of supervisors allowing the same, is liable to an action by the district attorney in the name of the county, under section 8 of the County Government Act, to recover the money so retained, with twenty per cent damages for the use thereof. (County of Orange v. Harris, 97 Cal. 600.)

75. Supervisors possess no power to allow county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer. Such a claim is not authorized by law, and the power of the board to allow accounts against the county is confined to those "legally chargeable." (People ex rel. Raun v. Supervisors of El Dorado County, 11 Cal. 170.) Cited 19 Cal. 490; 23 Cal. 126; 46 Cal. 174; 74 Cal. 337; 14 Nev. 70; 5 Or. 248.

Power of over salaries in San Diego. See Offices and Officers, 158, 159.

Power to fix compensation of officers. See Offices and Officers, 135.

Delegating power to fix compensation of officers to. See Constitutional Law, 168.

Gift by common council to officer. See Offices and Officers, 169.

Statutory compensation, supervisors cannot change. See Treasurers, 15.

Have no power over salary of district attorney. See District Attorneys, 9.

Contract for additional compensation. See District Attorneys, 12.

9. Appointment of Officers; Powers in Relation to, Generally.

76. Supervisors may appoint a collector of license taxes, and the bond given by that officer is an official bond and should be made payable to the state. (People v. Stacy, 74 Cal. 373.)

Power to declare office vacant. See Offices and Officers, 220.

Duty to appoint road overseer. See Highways, 121.

May appoint license collector. See Bonds, 71.

Filling of vacancies is appointment and not election. See Offices and Officers, 18.

Appointment by, may be revoked. See Offices and Officers, 242.

City and county attorney cannot act against wishes of. See City and County Attorney.

Fire commissioners, supervisors cannot overthrow. See Fire Department.

Cannot employ person to sell county bonds. See Bonds, 39.

Ratification by supervisors of contracts of court of sessions. See Jurisdiction, 145, et seq.

Approval of bonds by. See Bonds, 89, et seq.

Requiring new bonds. See Bonds, III, 8.

10. Power to Sue; Employing Counsel.

77. The act of 1851 creating the board of supervisors of San Francisco county, and authorizing the board "to sue and defend on behalf of the county," did not authorize the board to bring suits on behalf of the county in its own name; nor did it render the board liable to be sued directly for a claim against the county. (Hastings v. San Francisco, 18 Cal. 49.)

78. Where the charter of a city authorizes the city council "to make by-laws and ordinances, not repugnant to the constitution and laws of the United States, or of this state; to make appropriations for objects of city expenditure; to purchase, receive, and hold, for the use of the city, real and personal estate; and to pass such other by-laws and ordinances for the regulation of said city as they may deem necessary," the authorities may employ attorneys to protect the interests of the city in litigation. (Smith v. Mayor of Sacramento, 13 Cal. 531.)

Cited 35 Cal. 670; 67 Cal. 254; 88 Cal. 512, 513; 7 Nev. 293; 1 Wash. 537.

79. And this is true, even if the charter provides for a city attorney to attend to the business of the city; other counsel may be employed when necessary. (Smith v. Mayor of Sacramento, 13 Cal. 531.)

80. The board of supervisors of a county have a right to decline the services of a district attorney when tendered in a civil action in which the county is interested, pending in another county, and have a right to employ other counsel. (Herrington v. Santa Clara County, 44 Cal. 496.)

81. Board of supervisors of a county may employ counsel, other than the district attorney, to transact the legal business of the county, if in the judgment of the board the public interest will thereby be subserved. (Lassen County v. Shinn, 88 Cal. 510.)

82. The employment by the supervisors of a county of special counsel to collect money due the county from the state, appropriated by the state for the support of aged indigent persons, is within the discretion and judgment of the supervisors, and is not open to review by the courts. (Lassen County v. Shinn, 88 Cal. 510.)

83. Boards of supervisors have power to employ other counsel than the district attorney to assist in or to conduct the prosecution or defense of any suit to which the county is a party, which power extends equally to suits to which it is a party upon the record, and to those in the prosecution or defense of which

it has, or is supposed to have, some interest. The judgment and discretion of the board in the exercise of this power are not open to review by the courts. (*Hornblower v. Duden*, 35 Cal. 664.)

Cited 67 Cal. 254; 88 Cal. 512; 7 Nev. 293; 8 Nev. 188; 1 Wash. 537.

84. Appropriation by a city council of five thousand dollars for special counsel is legal. (*Smith v. Mayor etc. of Sacramento*, 18 Cal. 531.)

85. If, in the exercise of their judgment and discretion, the board of supervisors conceive that the interests of the county are involved in a certain question, and thereupon take legal measures, by suit or otherwise, to advance or protect those interests, the expense thus incurred becomes a legal charge against the county, notwithstanding the courts might ultimately hold that the board had adopted the wrong remedy, or were entitled to no remedy whatever. (*Hornblower v. Duden*, 35 Cal. 664.)
Cited 88 Cal. 513.

86. The fact that the attorneys employed by the supervisors were engaged for a contingent fee, and knew of a decision of the supreme court which would insure success, of which the district attorney and supervisors were ignorant, and that one of the attorneys represented to the supervisors that it was very uncertain whether any thing could be collected, and there were considerable risks in the undertaking, is not ground for equitable relief against the payment of the contingent fee. (*Lassen County v. Shinn*, 88 Cal. 510.)

San Jose, power of supervisors of to sue. See San Jose.

11. *Actione Against.*

87. Supervisors cannot be sued in their official character, in ordinary common-law actions, for claims against the public, county, or village they represent, without express statutory provision. (*Hastings v. City and County of San Francisco*, 18 Cal. 49.)

88. Liability to suit has no necessary connection with ability to sue. Boards of supervisors and bodies like them, without any legislative provision, by general law, are subject, with certain exceptions, to mandamus to enforce the performance of the duties devolved upon them, and to the writ of certiorari for the review of their acts when partaking of a judicial character, and in other ways are within the control of judicial proceedings. (*Hastings v. City and County of San Francisco*, 18 Cal. 49.)
Cited 52 Cal. 137.

89. Where a board of supervisors consists of three members, at least two of them should be made defendants, in an action brought to enjoin the board from purchasing property for the use of the county. (*Trinity County v. McCammon*, 25 Cal. 117.)

90. In such case, if the complaint does not aver that at least two members of the board are about to make an order for the purchase, and for a warrant to be drawn on the treasury for payment, it does not state facts sufficient to authorize an injunction to be granted. (*Trinity County v. McCammon*, 25 Cal. 117.)

91. To charge supervisors on their ratification of purchase by the court of session, it should be shown that they acted with a full knowledge of the facts. (*Phelan v. San Francisco*, 6 Cal. 531.)

92. Finding that defendant was a member of "the board of supervisors" and participated in "the proceedings" which resulted in an unlawful contract, does not fix upon him a liability for resulting damages. Non constat, that he favored the unlawful contract. (*Moulton v. Parks*, 64 Cal. 166, 178.)

Personally liable for neglect. See Railroads, 19.

Power to sue supervisors. See ante, 77.

Action against, statute when begins to run. See Statute of Limitations, 190.

12. *Refunding Money Illegally Collected; Power to Set Aside Orders.*

93. It is unnecessary to pass upon the question whether it was competent for the board of supervisors in the exercise of functions, either ministerial or legislative, to set aside an order improvidently and perhaps unjustly entered, but the court would feel much hesitation in holding that such power did not exist. (*Bixler v. Board of Supervisors of Sacramento County*, 59 Cal. 698.)

Revoking order. See ante, 53.

94. Section 3804 of the Political Code does not authorize the board of supervisors of a county to order a license tax erroneously or illegally collected to be refunded by the county treasurer. (*O'Brien v. Colusa County*, 67 Cal. 503.)

Duty to refund money illegally collected. See Taxation, 537.

13. *Supervisory Control of Courts Over.*

95. The supervisors of a county are a quasi political corporation, and as such the district courts of this state, by virtue of their general jurisdiction as superior courts, have a supervisory power and control over their proceedings, to the exercise of which appellate power is not necessary. (*People ex rel. Church v. Hester*, 6 Cal. 679.)
Cited 34 Cal. 527, 528, 536.

Actions against supervisors. See ante, V, 11.

Acts of, review of. See Certiorari, III, 2, n.

Acts of, enjoining. See Injunctions, II, 11.

Legislation not arrested. See Prohibition, 35.

Acts not arrested unless in excess of jurisdiction. See Prohibition, 33.

Prohibiting fixing of water rates. See Prohibition, 34.

14. *Fiduciary Relation of; Making Secret Profit; Action Against for Allowing Illegal Claims.*

96. The board in which the corporate authority of a city is vested is intrusted with its property in a fiduciary capacity, and its members cannot bargain with reference to it with a corporation in which they hold stock. (*San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106.)

Distinguished 59 Cal. 25.

97. If an act of the legislature, authorizing

the board exercising the corporate authority of a city to convey its lands to a corporation, vests the board with any discretion in the matter, a member of such board, who is a stockholder or director in the corporation, cannot act officially in the board in relation to the matter, or in making the conveyance, and if he does, and his vote or signature to the deed was requisite to complete the conveyance, the deed will be set aside as a cloud on the title. (*San Diego v. San Diego etc. R. R. Co.*, 44 Cal. 106.)
 Cited 44 Cal. 318; 49 Cal. 292; 55 Cal. 364; 67 Cal. 312; 73 Cal. 159; 77 Cal. 640; 81 Cal. 320, 519; 87 Cal. 602; 93 Cal. 29; distinguished 15 Nev. 302.

98. If defendant, as member elect of the board, neither resigning nor qualifying, took advantage of his position to advance his personal interests at the expense of those of the corporation, it was a fraud for which equity will hold him responsible. (*City of Oakland v. Carpenter*, 13 Cal. 540.)

99. If defendant, by conspiracy with others, procured them and himself to be elected to the board of trustees, for the purpose of defrauding the town of property and franchises for his benefit, the whole transaction is illegal. (*City of Oakland v. Carpenter*, 13 Cal. 540.)

100. In such a case a ratification by a subsequent board, fraudulently elected by defendant's efforts would not validate the transaction. (*City of Oakland v. Carpenter*, 13 Cal. 540.)

101. A member of board cannot be interested in or receive pay for work done on any contract growing out of or connected with public works or improvements. (*Domingos v. Board of Supervisors*, 51 Cal. 608.)

102. Under section 7 of the County Government Act, making the supervisors and any other officer authorizing, or aiding to authorize, or auditing or allowing, any claim in violation of the act, liable in person to the person damaged by such illegal authorization to the extent of his loss by reason of the non-payment of the claim, does not make such officers personally liable to one who never had a legal claim against the county, nor to his assignee. (*Bank of Santa Cruz County v. Bartlett*, 78 Cal. 301.)

103. In an action against the members of a board of supervisors of a county to recover the amount of certain illegal claims alleged to have been unlawfully allowed and ordered paid by them in their official capacity out of the county treasury, the complaint must aver the nature of the claims, in order that it may be determined whether the acts complained of are illegal. A mere allegation that the members of the board "misappropriated, wrongfully, unlawfully, and illegally allowed and paid out, large sums of money," and that the demands "were wrongfully, unlawfully, and without authority of law allowed and ordered paid," states only a legal conclusion, and is insufficient. (*Hedges v. Dam*, 72 Cal. 520.)

104. An action against supervisors to recover the amount of illegal claims alleged to have been paid by them should be brought

in the name of the county as the real party in interest, and the district attorney is the proper person to prosecute it. But conceding that a taxpayer has the right, in the absence of an express statutory authorization, to prosecute the action, the complaint must then allege facts showing a refusal or neglect on the part of the district attorney to institute it. (*Hedges v. Dam*, 72 Cal. 520.)

Interest in franchise, effect on validity of franchise. See *Railroads*, 204.

Fraud of, how pleaded. See *Irrigation Districts*, 22.

Entering into unlawful contract, liability for. See *ante*, 92.

15. Delegation of Powers.

105. The board of supervisors of San Francisco cannot by resolution transfer its appropriate functions to its clerk. (*Meuser v. Risdon*, 36 Cal. 239.)

106. The board of supervisors of a county has power to contract for the collection of a debt due the county; but in the exercise of that power it has no authority to delegate to others, whom it employs for that purpose, the power to determine whether to commence a suit in the name of the county, and to retain attorneys to manage the prosecution thereof, nor to abdicate its control of such a suit, or make its compromise or settlement dependent upon the consent of strangers. (*Scollay v. Butte County*, 67 Cal. 249.)
 Cited 15 Cal. 119.

107. The board of supervisors have no lawful authority to delegate to persons not members of that board the power to fix and determine upon the amounts to be paid by the city and county for gas, or to alienate from the board its power of final determination with regard to such amounts; and the provision of the contract of May 24, 1869, for the renewal of that contract was therefore void. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 582.)

108. Power to provide for lighting streets is a governmental power to be employed by the legislative department of the local government; such as cannot be ceded away, nor used in such manner as shall control or embarrass future legislation. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 584.)

109. Adoption by order, duly published, of the sums agreed upon by a member of the board, a representative of a gas company, and a third person by them selected, is, in effect, the fixing by the board of supervisors of the sums to be paid by a city in a legal and binding manner. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 583.)

110. Resolution of supervisors adopting the gas rates fixed by a commission and adopting and confirming the report of the commission is to be read as if the report referred to were incorporated in it; and thus read, it fixes the rates which the city and county agreed to pay. Thus read, the final determination with respect to the rates to be paid was exercised by the board of supervisors, and not by the commission. (*San Francisco Gas Light Co. v. Dunn*, 62 Cal. 580, 583.)

Powers cannot be delegated. See Municipal Corporations, 98.

16. Removal of.

111. The act of March 30, 1874, in so far as it provides for the removal and punishment of a member of a board of supervisors for malfeasance in office, is inconsistent with section 55 of the County Government Act of March 14, 1883, which provides a different mode of punishment, with different penalties for the same unlawful acts, and was therefore repealed by the latter act. (*Fraser v. Alexander*, 75 Cal. 147.)
Cited 93 Cal. 40.

VI. Compensation and Extra Allowance.

112. A supervisor is not entitled to any remuneration for services rendered the county as a supervisor, except his per diem and mileage, as fixed by law. (*Andrews v. Pratt*, 44 Cal. 309.)
Cited 67 Cal. 812; 81 Cal. 320.

113. If a board of supervisors sell the stock owned by the county in a railroad corporation, in pursuance of a law authorizing such board to do so, its individual members are not entitled to any extra pay for the services thus rendered. (*Andrews v. Pratt*, 44 Cal. 309.)

SUPPLEMENTAL PLEADINGS.

1. Where the plaintiff, in an action to foreclose mortgages upon real property, has, upon notice to the defendant, obtained leave to file a supplemental complaint asking judgment under covenants contained in the mortgages for moneys paid out for the insurance of the property, a judgment obtained by default thereafter, without additional service of the supplemental complaint, is erroneous, and will be modified upon appeal to the extent of the relief granted upon the supplemental complaint. (*Galliano v. Kilfoy*, 94 Cal. 86.)

2. When an order is made for the service of summons by publication, and a summons is issued, and a supplemental complaint is afterward filed and a summons issued thereon, the original action becomes merged in the action as supplemented, and the court will not acquire jurisdiction of the persons of absent defendants by publication of the original summons; but the summons issued on the supplemental complaint must be served by publication. (*McMinn v. Whelan*, 27 Cal. 300.)

3. Permission to file a supplemental complaint is in the discretion of the court, though such discretion is not arbitrary, and is limited so as not to allow the substitution of a new and independent cause of action by way of supplemental complaint; but it is no objection to a supplemental complaint that different or additional relief is asked for. (*Jacob v. Lorenz*, 98 Cal. 332.)

4. Where a supplemental complaint setting up a new cause of action is filed in an action of divorce, the action as to the new ground of complaint must be considered as being commenced when the supplemental complaint was filed. (*Valensin v. Valensin*, 73 Cal. 106.)

5. If party has no cause of action at time of its commencement, he cannot maintain it by

filing a supplemental complaint founded upon matters which have subsequently occurred. (*Wittenbrock v. Bellmer*, 57 Cal. 12.)

6. In an action of claim and delivery for house seized under attachment, it is not error to refuse to allow the plaintiff to file a supplemental complaint setting up that the judgment obtained in the action in which the attachments were issued was barred by the statute of limitations, not at the time of the taking by the sheriff, but at the time of the proposed filing of the amended pleading, many years after the taking and after the sheriff had gone out of office. (*Paulson v. Nunan*, 72 Cal. 243.)

7. Where the owner of a mineral patent has washed away a great portion of the ditch, pending the suit to enjoin such action, the ditch-owner may by supplemental complaint claim damages for the portion washed away, and seek an injunction to restrain further injury to the ditch. (*Jacob v. Lorenz*, 98 Cal. 332.)

8. In an action to recover personal property, the defendant justified as sheriff under an attachment at the suit of B. & H. against one E., who was alleged to be the owner of the property, and before the trial was permitted to file an amendment to his answer, setting up that the property had been replevied by the plaintiff. The court refused leave to the plaintiff to file a supplemental complaint, setting up that after he replevied the property part of it was again seized by the defendant under another attachment. On the trial evidence to prove the facts set up in the amendment to the answer was admitted, and evidence to prove the facts stated in the proposed supplemental complaint rejected. Held, there was no error. (*Carroll v. Sprague*, 59 Cal. 655.)
Cited 13 Cal. 585.

9. Supplemental complaint cannot be filed after final judgment, or to set up a new cause of action. Such a right can be exercised only with reference to matter which may be consistent with and in aid of the case made by the original complaint, and which occurred between the filing of the original complaint and the trial or judgment in the action. (*Gleason v. Gleason*, 54 Cal. 135.)
Cited 98 Cal. 337.

Power to allow supplemental pleadings after decision on appeal. See Appeals, 3189.

Misjoinder of parties appearing at trial taken advantage of by. See Parties, 73.

Making new parties by. See Mortgages, 609, 610.

Supplemental complaint, error in allowing not prejudicial, when. See Appeals, 2048.

Assignment, supplemental complaint attacking for fraud. See Assignments for the Benefit of Creditors, V, 5.

Allegation of representative capacity of substituted executor need not be pleaded by. See Parties, 119.

Supplemental complaint, effect of filing. See Statute of Limitations, X, 1.

Order denying leave to file supplemental complaint is not appealable. See Appeals, 268.

10. Motion to file supplemental answer is

addressed to sound legal discretion of the court; and its ruling, in allowing it, will not be regarded as error, unless there should be an abuse of discretion. (*Harding v. Minear*, 54 Cal. 502.)

Cited 60 Cal. 249, 253; 80 Cal. 77; 98 Cal. 337.

11. A supplemental answer, although presented to the clerk for filing and marked as filed, does not become a pleading, so as to constitute part of the judgment-roll, until an order permitting it to be filed has been obtained. (*Wood v. Brush*, 72 Cal. 224.)

12. If a supplemental answer contains a recital that it was filed by leave of the court, and it is a part of the judgment-roll brought up by the plaintiff on his appeal, the appellate court will presume that there was an order of court allowing it to be filed. (*Roper v. McFadden*, 48 Cal. 346.)

13. The failure of the defendant to appear upon the hearing of his motion for leave to file a supplemental answer will be considered an abandonment of the motion. (*Wood v. Brush*, 72 Cal. 224.)

14. In an action to determine an adverse claim to land, asserted by the defendant under a tax sale thereof made two years prior to the time of the trial, it is not an abuse of discretion for the court, on the day of the trial, to require the defendant to pay twenty dollars and costs as a condition to the leave granted them to file a supplemental answer setting up title acquired by a tax deed made to them on that day. (*Greenwood v. Adams*, 80 Cal. 74.) Cited 98 Cal. 337.

15. If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact cannot be introduced, unless it is pleaded as a defense in a supplemental answer. (*McMinn v. O'Connor*, 27 Cal. 238.)

Cited 30 Cal. 473; 37 Cal. 129, 153.

16. In an action of partition the court below found that the plaintiffs were tenants in common with the defendants, but rendered judgment for the latter on the ground that they were in the adverse possession of the land at the time the suit was commenced; but the judgment was reversed in this court, and the cause remanded with directions to make partition. Intermediate the judgment of the lower court and the reversal, the defendants recovered judgment in an action of ejectment for the same land brought by the plaintiffs against them. Held, the judgment subsequently recovered can be pleaded in the partition suit. (*Martin v. Walker*, 60 Cal. 94.)

17. The court below, under the circumstances stated in the opinion, refused leave to the defendant to file a supplemental answer setting up a release by the plaintiff of his claim. Held, the court should have permitted the defendant to plead the release. (*McKinstry, J., and Ross, J., dissenting.* (*Seehorn v. Big Meadows and Bodie Wagon Road Co.*, 60 Cal. 240.)

18. Upon an application filed May 7, 1880, for a writ of mandamus to the county treasurer to compel him to issue to the plaintiff a warrant for services due him as district attorney, the

answer alleged that the defendant had executed a warrant for the sum claimed, and the same had been levied upon and seized by the sheriff under an attachment and execution regularly issued against the plaintiff; and on the 30th of May, while a demurrer to the answer was still undecided, the defendant asked leave to file a supplemental answer, setting up that the warrant had been sold by the sheriff under the execution, and that the plaintiff was present at the sale and made no objection, and received and retained the balance of the proceeds after the satisfaction of the judgment, but the court refused to allow the supplemental answer to be filed. Held, that the matters set forth in the supplemental answer showed a ratification by the plaintiff of the levy and sale, and that there was no unreasonable delay in making the motion to file the supplemental answer. (*Grady v. Bramlet*, 59 Cal. 105.) Cited 60 Cal. 251.

19. A mortgagee made defendant to a suit to foreclose mechanics' liens, who alleges priority of lien, and pleads that he has commenced an action to foreclose the mortgage, making the plaintiffs parties defendant, may, if he obtains a decree of foreclosure of his mortgage pendente lite, set up such decree by way of supplemental answer upon a retrial of the mechanics' lien suit, and the question as to its effect may be then tried and determined. (*Bewick v. Muir*, 83 Cal. 373.)

20. A tax title acquired by the defendant in an action to quiet title pendente lite is not available as newly discovered evidence warranting a new trial, and can only be set up by way of supplemental answer. Nor can a conveyance by plaintiff of all his interest to other parties, pendente lite, constitute ground for a new trial, the transferee having the right either to continue the cause in the name of the original plaintiffs or to be substituted as plaintiff. (*Miller v. Lucio*, 80 Cal. 257.)

21. In suit to enjoin certain parties from maintaining and continuing a dam and for damages, if the dam is swept away pending the action, and is rebuilt under the act of March 28, 1868, the defendants will not be able to defend under this act unless they set up the defense by way of supplemental answer. (*Moulton v. Parks*, 64 Cal. 166, 177.)

22. In a suit to enjoin certain parties from maintaining and continuing a dam, and for damages for its detention, no judgment should have been rendered against the defendants who had no connection with the erection or maintenance of the dam prior to the commencement of the action. If, after the commencement of the action, the dam was swept away, and the subsequent rebuilding connected them with the original unlawful act, there should have been a supplemental pleading setting forth the facts. (*Moulton v. Parks*, 64 Cal. 166, 177.)

Remedy against purchaser from mortgagor. See Mortgages, 419.

Transfer of interest must be taken advantage of by. See Parties, 100.

Title acquired pendente lite. See Pleading and Practice, XI, 9.

Title acquired pendente lite must be set up

by supplemental answer. See Ejectment, 241, et seq.

Supplemental answer, transfer by plaintiff or to defendant must be set up by. See Ejectment, 203.

Supplemental answer, pleading discharge in bankruptcy by. See Bankruptcy and Insolvency, 355.

Supplemental answer showing expiration of right to possession. See Ejectment, 250.

Tender after suit commenced must be pleaded. See Tender, 15.

Replevin, supplemental answer in. See Replevin, 77.

Payment puis darrein continuance. See Payment, 79.

SUPPLEMENTAL PROCEEDINGS.

As a substitute for creditor's bill. See Equity, 57.

Creditors' bills. See Equity, III, 3, e.

1. Section 720 of the Code of Civil Procedure, providing that the judge may, by order, authorize a judgment creditor to institute and maintain an action against an alleged debtor of the judgment debtor, is not unconstitutional on the alleged ground that the judgment debtor has under it no notice of the supplementary proceeding after judgment affecting his rights of property, or that his debtor may be compelled to pay the debt twice. (*High v. Bank of Commerce*, 95 Cal. 386.) Cited 99 Cal. 275.

2. Proceedings supplementary to execution, by which a judgment debtor is required to appear before a court or referee to answer concerning his property, are but a substitute for a creditor's bill at common law, and are purely judicial. (*McCullough v. Clark*, 41 Cal. 298, cited 99 Cal. 275, 5 Col. 170; *Pacific Bank v. Robinson*, 57 Cal. 520, cited 99 Cal. 275.)

3. A defendant in an action against whom a writ of attachment has been issued cannot be compelled to attend before the judge or a referee, and submit to an examination as to the condition and situation of his property, nor can he be compelled to deliver up his property. (*Ex parte Rickleton*, 51 Cal. 316.)

4. Where an execution has been returned unsatisfied, an order directing the judgment debtor to appear before a referee to answer concerning his property is not void because the affidavit of the judgment creditor on which it was issued was not filed until the filing of the report of the referee, if the judgment debtor, after being served with the affidavit and order, appears before the referee and submits to the examination without objection. (*Collins v. Angell*, 72 Cal. 513.)

5. In supplementary proceedings under section 714 of the Code of Civil Procedure, after an execution has been returned unsatisfied, the judgment creditor is entitled to an order directing the judgment debtor to appear and answer concerning his property, without making any affidavit therefor. (*Collins v. Angell*, 72 Cal. 513.)

6. When the plaintiff proceeded, under section 239 of the Practice Act, to examine his

judgment debtor as to a judgment held by him against A., and, after examination, obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding. (*Adams v. Hackett*, 7 Cal. 187.)

Cited 8 Cal. 544; 9 Cal. 26; 57 Cal. 522; 99 Cal. 275; 5 Col. 170.

7. The act concerning proceedings supplementary to execution provides for two cases: (1) When the debtor has property which he refuses to apply, etc., in which case he is required to be summoned etc.; and (2) where any person or corporation has the property of, or is indebted to, the judgment debtor, in which case such person or debtor of the judgment debtor must be summoned. Per *Murray, C. J.*, dissenting. (*Adams v. Hackett*, 7 Cal. 187.)

8. A judgment is not properly within the meaning of the act, which, being in derogation of the common law, must be strictly construed; and the case is not altered because the debtor of the judgment debtor does not complain that he was not summoned. (*Adams v. Hackett*, 7 Cal. 187.)

9. Supplementary proceedings, whether had before or after the return of the execution unsatisfied, are not in the nature of a new action, and an order rendered therein in favor of the judgment creditor, directing the judgment debtor to assign certain property in satisfaction of the judgment, will not be reversed, although the judgment creditor states in his affidavit for the order of examination that he had assigned the judgment and only has a contingent interest therein. (*Collins v. Angell*, 72 Cal. 513.)

10. In such proceedings it is proper to order the execution debtor to make an assignment to a receiver of his patent right to an invention. (*Pacific Bank v. Robinson*, 57 Cal. 520.) Cited 99 Cal. 275.

11. Sections 241, 242, and 243 of the Practice Act, relating to proceedings supplementary to execution, do not authorize the court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action. (*Hathaway v. Brady*, 26 Cal. 581.) Cited 12 Nev. 335, 336.

12. If, pending a litigation to recover a money judgment, gold coin of the defendant which is in the custody of the sheriff is by consent of parties loaned out, and a note of the borrower is taken therefor payable in gold coin, the court cannot, after plaintiff recovers judgment, and while the note is outstanding in the hands of third parties and not under the control of the court, make an order, in

proceedings supplementary to execution, that the borrower pay over the money in gold coin. The mode of enforcing a contract payable in coin is, under the statute, by an action or proceeding upon the contract itself. (*Hathaway v. Brady*, 26 Cal. 581.)

13. In proceedings supplementary to execution the court has no jurisdiction to make orders relating to persons who are not parties to the proceeding, nor has it power to make an order that one who has, by consent of plaintiff and defendant, borrowed money deposited with the sheriff by defendant to release an attachment, and given his note to a third party therefor, payable when plaintiff recovers judgment, shall pay the money to the plaintiff, when the person who holds the note is not a party to the proceeding, and the note is still in his hands, and not under the control of the court. (*Hathaway v. Brady*, 26 Cal. 581.)

14. In proceedings supplementary to execution the court has power, when it has all the parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment debtor, or to such third person as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt. (*Hathaway v. Brady*, 26 Cal. 581.)

15. In supplementary proceedings an order directing the judgment debtor to assign all his right, title, and interest in certain letters patent of the United States cannot be assailed on the ground that it does not appear that he has any property therein when the evidence on that point is conflicting. (*Collins v. Angell*, 72 Cal. 513.)

16. If a judgment debtor is examined concerning his property before a court or referee, on proceedings supplementary to execution, the order made by the tribunal before which the examination takes place, concerning the subject matter, is binding, and estops the parties from again litigating the same matter in another form of action. (*McCullough v. Clark*, 41 Cal. 298.)
Cited 99 Cal. 275.

17. Upon proceedings supplemental to execution, where it appears that certain property claimed by the judgment creditor to be the property of the judgment debtor was conveyed to a third party upon the same day that the affidavit was filed for the institution of the supplementary proceedings, the court has no jurisdiction to take possession of the property by a receiver, but can only make an order authorizing the judgment creditor to institute an action against the parties claiming it, for its recovery and subjection to the satisfaction of the debt, and forbidding its transfer until such action could be commenced and prosecuted to judgment. (*McDowell v. Bell*, 86 Cal. 615.)
Cited 3 Wash. 366.

18. Orders in such proceedings directing that the property so conveyed be subjected to the satisfaction of the judgment, and that a receiver take possession thereof, are in excess of the court's jurisdiction, and a writ of pro-

hibition will lie to restrain their enforcement. (*McDowell v. Bell*, 86 Cal. 615.)

19. The superior court has jurisdiction to make an order on proceedings supplementary to execution against a judgment debtor, that a garnishee found to be indebted to the judgment debtor do pay to the plaintiff the amount of such indebtedness, and such order is, in effect, a judgment on which execution may issue, and which may be appealed from, and which cannot be assailed collaterally. (*Bronzan v. Drobaz*, 93 Cal. 647.)

20. Proceedings supplemental to execution can reach choses in action arising from torts committed on the property of the judgment debtor which might be reached by a creditor's bill; and the court in the supplemental proceedings may authorize a suit by the judgment creditor to recover such choses in action. (*Staples v. May*, 87 Cal. 178.)

21. Allegations in a complaint against a garnishee, in an action by a judgment creditor, authorized in proceedings supplementary to execution against the judgment debtor, that the assignor of the plaintiff "recovered a judgment" in the superior court, "which judgment was duly entered," etc., and that the order authorizing the suit was "duly made," are sufficient as against a general demurrer. (*High v. Bank of Commerce*, 95 Cal. 386.)
Cited 99 Cal. 275.

22. In an action upon a judgment rendered against a garnishee upon proceedings supplementary to execution against a judgment debtor, it is sufficient to aver in the complaint that the judgment sued upon was duly given and made, and that no part of it has been paid, and it need not aver that no appeal was taken from the judgment, nor that plaintiff was authorized by an order of court to institute the action. (*Bronzan v. Drobaz*, 93 Cal. 647.)

23. In proceedings supplementary to the execution, the denial of the debt, or the adverse claim to the property by the garnishee, contemplated by the Practice Act, is a claim or denial in good faith, and not one of mere pretense. (*Parker v. Page*, 38 Cal. 522.)
Cited 51 Cal. 503; 50 Cal. 414; 12 Nev. 336; 3 Wash. 334.

24. When it is evident that the garnishee is acting in bad faith in denying his indebtedness or asserting his claim, the referee may treat it as fraudulent, and disregard it. (*Parker v. Page*, 38 Cal. 522.)

25. Each party may call and examine witnesses. (*McCullough v. Clark*, 41 Cal. 298.)
Cited 99 Cal. 275.

26. In supplementary proceedings, the judgment debtor is not entitled, under section 386 of the Code of Civil Procedure, to apply for leave to interplead the judgment creditor with other persons, to compel them to litigate their respective claims to the property ordered to be assigned. (*Collins v. Angell*, 72 Cal. 513.)

27. Where costs of the supplementary proceedings were allowed against the garnishee in the referee's report, but were not allowed by the court in its order of confirmation, they cannot be recovered in an action upon the

judgment rendered in the supplementary proceedings, requiring the garnishee to pay to the judgment creditor the amount of his indebtedness to the judgment debtor. (*Bronzan v. Drobaz*, 93 Cal. 647.)

Appealability of orders on. See Appeals, II, 24.

Orders after final judgment, review of. See Certiorari, III, 2, 1.

28. If a party, in proceedings supplementary to execution, is dissatisfied with an order made by the court or referee, his only remedy is by appeal. (*McCullough v. Clark*, 41 Cal. 298.)

Cited 99 Cal. 275; 11 Mont. 226.

29. If a court or referee, on proceedings supplementary to execution, orders property of the judgment debtor to be delivered up to the sheriff to be sold on the execution, the judgment creditor is estopped by the order from maintaining an action against the sheriff for selling the property. (*McCullough v. Clark*, 41 Cal. 298.)

Proceeding against receiver. See Receivers, 29.

Enforcement of interest in invention against receiver, in supplementary proceedings. See Inventions, 3.

Supplementary proceedings to bind partner by judgment. See Partnership, 199.

Execution against stock and exchange board. See Executions, 90.

Garnishment of debt secured by mortgage, enforcement of in. See Attachments, 275.

Defeating anticipated order in. See Contempt, 69.

SUPPLEMENTARY ACTS.

See Statutes, X.

SUPPLIES.

Vessels, supplies to. See Shipping, VIII.

SUPPORT.

See cross-reference under Maintenance.

SUPREME COURT.

Appeals to. See Appeals.

1. A false order entered by the clerk of the supreme court by mistake stands upon the same principle as an order procured by fraud. (*Vance v. Peña*, 36 Cal. 328.)

2. The proceedings of the supreme court are not enrolled, and the minutes of the chief justice may be used to correct a mistake of the clerk. (*Vance v. Peña*, 36 Cal. 328.)

3. The state treasurer is not justified in refusing to pay a warrant of the controller, drawn to the order of the individual who is the clerk of the supreme court, and made payable out of the appropriation for the expenses of that court under section 47 of the Code of Civil Procedure, merely because the warrant omits to describe the payee by his official designation, nor because the various items of expense allowed by the board of examiners, for the payment of which the warrant was intended, had not been actually paid by the clerk to the parties to whom they were due. (*National Bank of D. O. Mills & Co. v. Herold*, 74 Cal. 603.)

4. A warrant of the state controller, drawn to the order of the clerk of the supreme court in payment of the expenses of the court, is prima facie good. (*National Bank of D. O. Mills & Co. v. Herold*, 74 Cal. 603.)

Jurisdiction of. See Appeals, I.

Application for mandamus to supreme court. See Mandamus, III, 2.

Stipulations in. See Stipulations, VI.

Restraining proceedings of supreme court. See Injunctions, II, 2, a.

Of the United States, appeals to. See Appeals, XIV.

Records of as evidence. See Evidence, 244.

Error in record, how corrected. See Courts, 8.

Chief justice cannot act as trustee of state library. See State Library, 2, et seq.

SUPREME COURT COMMISSION.

1. The act of February 15, 1889, providing for the appointment by the supreme court of five commissioners, to be known as commissioners of the supreme court, to assist the court in the performance of its duties, under such rules and regulations as the court may adopt, is constitutional and valid, and does not vest such commissioners with judicial power. The power to examine causes and report facts or conclusions to the court for its judgment is not judicial. It is the inherent power not only to decide, but to make binding, orders or judgments, which constitutes judicial power. The whole exercise of the judicial power is by the court, the commissioners acting only in an intermediate capacity, as auxiliary to the court in the ascertainment of certain facts and law necessary to its enlightenment in giving the proper decision and judgment. (*People ex rel. Morgan v. Hayne*, 83 Cal. 111.)

2. The objection that the commissioners may, by their reports and opinions, improperly influence the court in the rendition of its judgments, does not go to the constitutionality of the law. (*People ex rel. Morgan v. Hayne*, 83 Cal. 111.)

SUPREME COURT REPORTER.

Treating the act of February 26, 1881, providing for the appointment of a deputy supreme court reporter, as making an appropriation for the payment of his salary, such appropriation terminated with the fiscal year ending June 30, 1883, and the controller is not authorized to draw a warrant in payment of the salary of that officer subsequently accruing, unless a specific appropriation therefor has been made. (*Baggett v. Dunn*, 69 Cal. 75.)

Cited 80 Cal. 225.

Salary of. See Constitutional Law, 268.

SURETYSHIP.

I. Conditional Signing of Bond; Failure of Cosurety or Principal to Sign.

II. Justification of Sureties.

III. Discharge of Sureties on Official Bonds.

IV. Rights and Liabilities Between Surety and Oblige.**1. Liabilities of Sureties.**

- a. Sureties on Contracts, Attachment or Injunction Suits; on Appeal.
- b. Sureties of Administrator or Officer of Private Corporation.
- c. Sureties on official Bonds.
- d. Where Blanks Filled Without Authority; Rule that Surety is Favored; Void Bonds.

2. Judgment Against Principal, Effect of on Surety.**3. Actions Against Sureties.**

- a. When Lie.
- b. Demand.
- c. Pleading; Venue.
- d. Parties.
- e. Evidence and Variance.
- f. Estoppel from Bond; Recitals in, Conclusiveness.
- g. Judgment.

4. Right of Obligees to Securities Given to Surety.**5. Exoneration of Surety.**

- a. Change or Amendment of Bond.
- b. Forbearance; Failure to Sue or to Present Claim Against Estate.
- c. Tender of Performance or Payment.
- d. Change of Contract; Extension of Time; Release or Loss of Property.
- e. Nonperformance of Conditions; Fraud of Obligees.
- f. Judgment Against or Release of Part of Sureties; Release of Principal.

V. Rights of Surety Against Principal.**VI. Rights of Surety Against Cosurety.****VII. Rights Between Surety and Third Person.****VIII. Surety Corporations.**

Bail, liability of sureties. See Bail, IX.

Bonds. See Bonds.

Guaranty. See Guaranty.

Married woman as surety. See Husband and Wife, III, 7.

Contract to pay debt of another. See Statute of Frauds, I, 8.

Death of principal, discontinuance of action. See Dismissal, 70.

Becoming surety as consideration. See Contracts, 28.

I. Conditional Signing of Bond; Failure of Cosurety or Principal to Sign.

Surety on building contract, failure of all to sign, effect of. See Contracts, 44.

1. Where several persons are named in the body of an instrument as parties thereto, it is not necessarily invalid as against those who have signed it, because others named have not signed. Such a result would follow where it appeared on the face of the instrument or by proof that the person sought to be charged signed upon the consideration that other per-

sons named would also sign. (*Kurtz v. Forquer*, 94 Cal. 91.)

2. Sureties signing official bond without affixing any condition or limitation to their liability are jointly and severally liable thereon after its acceptance and approval, although a person named in the body of the bond as surety did not sign it, and although as to one of the sureties signing no sum was stated in the bond for which he was bound. (*People v. Stacy*, 74 Cal. 374.) Cited 88 Cal. 550.

3. In an action against the sureties on an official bond, if the defendants allege in their answer that they signed with the express understanding that the bond should be signed by certain other persons, naming them, without stating that this understanding was with the obligee, it will be presumed that the understanding was with the principal in the bond. (*Tidball v. Halley*, 48 Cal. 810.)

4. A joint and several bond, conditioned for the faithful performance by the principals named therein of a building contract with the obligee, purporting to be the bond both of the principals and of the sureties, but signed by the sureties only is not rendered invalid as against them by the omission of the principals to sign, they being already bound by the contract referred to in the bond, and the bond having been delivered by the sureties to the obligee without the signatures of the principals. (*Kurtz v. Forquer*, 94 Cal. 91.)

5. If sureties on an official bond sign with an express understanding with the principal in the bond that certain other persons shall sign as sureties, and that unless such other persons sign, it shall not be delivered, a delivery of the bond to the obligee, without the signature of such other persons does not render it invalid as to the sureties who do sign. (*Tidball v. Halley*, 48 Cal. 810.) Cited 2 Mont. 564.

II. Justification of Sureties.

6. Sureties upon appeal bond cannot avoid their liability thereon by failing to justify after an exception to their sufficiency by the adverse party, and their undertaking to be bound, if the appeal is withdrawn or dismissed, applies to a dismissal of the appeal resulting from their failure to justify. (*Mofat v. Greenwalt*, 90 Cal. 368.)

7. To suit on a recognizance for the appearance of a party charged with crime, the sureties cannot set up as a defense the fact that the amounts in which they justified were insufficient under the statute. The justification is no part of their contract. (*People v. Shirley*, 18 Cal. 121.) Cited 87 Cal. 273; 38 Cal. 603; 90 Cal. 371.

Approval of bond without justification, effect of. See Highways, 37.

Justification of sureties on appeal bonds. See Appeals, V, 6, k. A.

Justification of sureties, time for. See Injunctions, 324, 325.

Time for justification, excusing delay. See Injunctions, 325.

Residence of in giving security for costs in slander. See Slander, 62.

Justification, using expression "just debts" instead of "debts." See Bonds, 73.

III. Discharge of Sureties on Official Bond.

8. County judge in 1861 had no jurisdiction to discharge sureties on the official bond of a county treasurer, or to approve of a new bond. (*People v. Evans*, 29 Cal. 429.)

9. The sureties on the official bond of a county treasurer can be discharged from further obligation on the same only upon proceedings had before the board or officer which, at the time of the discharge, has power to approve of the official bond of such officer. (*People v. Evans*, 29 Cal. 429.)

Failure to present claim to executor. See post, 109.

IV. Rights and Liabilities Between Sureties and Obligor.

1. Liabilities of Sureties.

a. Sureties on Contracts, Attachments or Injunction Suits; on Appeal.

Sureties stand on precise terms of contracts. See post, IV, 5, d.

Surety executing mortgage and taking security, liability of. See post, IV, 4.

10. Sureties of party who covenants in writing to purchase meat of another for a fixed time at a fixed price, and pay him during the time a fixed rent for a slaughterhouse, and to pay him liquidated damages for failure to fulfill the contract, are liable with the principal upon all the covenants of the principal contained in the contract. The clause with regard to damages has no reference to the rent of the building and meat sold and delivered. (*Lightner v. Menzel*, 35 Cal. 452.)

Notes, sureties on. See Bills and Notes, VI.

Setoff pleaded by principal, not available on appeal to surety when. See Appeals, 1998.

11. The liability of a surety on an attachment bond is on his contract. He is not liable as a trespasser for a seizure of property attached by the sheriff, even if the bond was void. (*McDonald v. Fett*, 49 Cal. 354.) Cited 82 Cal. 169.

12. An action upon an undertaking upon attachment is an action upon contract, and the measure of damages, in an action against the sureties, is the amount which will compensate for the detriment proximately caused to the party aggrieved, or the proximate consequences naturally and ordinarily resulting from the effect of the writ. (*Elder v. Kutner*, 97 Cal. 490.)

13. The impairment of the credit of an attachment debtor whose real property has been attached, and his inability to sell or mortgage the land levied upon, are not the proximate consequence of the attachment, and the sureties upon the attachment bond are not liable in damages therefor. A motion to strike such matter from the complaint, in an action upon the attachment bond, should be granted. (*Elder v. Kutner*, 97 Cal. 490.)

14. An action upon an undertaking, conditioned to pay the amount of any judgment that shall be recovered in an attachment suit, will be sustained, although judgment was rendered against only one of several defendants. (*McOutcheon v. Weston*, 65 Cal. 37.)

15. In an action against the sureties on an attachment bond, the questions of motive and probable cause for the attachment are immaterial, and the fact that the attachment was malicious does not affect their liability. (*Elder v. Kutner*, 97 Cal. 490.)

16. In an action against the sureties on an attachment bond, counsel fees for defending the attachment suit cannot be recovered, in the absence of an allegation that they have been actually paid. An allegation that the plaintiff "engaged an attorney to represent him therein, and incurred attorney's fees" in the amount sought to be recovered, is not sufficient. (*Elder v. Kutner*, 97 Cal. 490.)

17. An undertaking given under section 540 of the Code of Civil Procedure, after reciting the issuing of the attachment, and that the undertaking was given to prevent the levy of the writ, provided that if the plaintiff in the attachment suit should recover judgment, the sureties would pay to him on demand the amount of the judgment, etc., not exceeding the amount named in the undertaking as the penalty. The plaintiff recovered judgment. Held, that the sureties were liable to the plaintiff upon the undertaking for the amount of the judgment. (*McOutcheon v. Weston*, 65 Cal. 37.)

18. Where, upon release of an attachment against a corporation, a bond has been given to secure the payment by the corporation of all sums due and to become due under its contracts with the plaintiffs for the sale and delivery of showcards, labels, and lining for boxes, the sureties on the bond are liable for labels prepared and offered for delivery, which the corporation did not take, but left in the hands of the plaintiffs, and are also liable for the expense incurred in the preparation of plates, which were a necessary ingredient in the printing of the labels contracted for and which were useless to the plaintiffs, if the corporation refused, after the expense was incurred, to allow the labels to be printed and delivered. (*Crocker v. Field's Biscuit and Cracker Co.*, 93 Cal. 532.)

19. The fact that the plaintiff in the action in which the injunction was issued recovered judgment for part of the property sought to be recovered therein does not absolve the sureties upon the undertaking from liability for the damages sustained by the party enjoined, upon dissolution of the injunction. (*Rice v. Cook*, 92 Cal. 144.)

20. An undertaking executed upon the issuing of an injunction, to the effect that the sureties will pay to the defendant such damages as he may sustain by reason of the injunction if the trial court should finally decide that the plaintiff was not entitled thereto, is broken by a judgment of the court totally dissolving the injunction, and the defendant is entitled to maintain an action upon the bond after such dissolution. (*Rice v. Cook*, 92 Cal. 144.)

21. If the plaintiff in an action to obtain a perpetual injunction restraining the commission of trespasses, at the time of commencing suit obtains a preliminary injunction, and on the trial it is made perpetual, and the judgment is afterward reversed and the action dismissed, the sureties on the injunction bond are not liable for any damages accruing after the entry of the decree making the injunction perpetual. (*Webber v. Wilcox*, 45 Cal. 301.) Cited 80 Cal. 622-24; 90 Cal. 638.

22. When a bond is given in pursuance of an order that an injunction issue upon the filing of the bond, the sureties are not liable for damages arising to the defendant from his obedience to a writ of injunction issued several days prior to the date of the bond, no writ having issued after the filing of the undertaking. (*Carter v. Mulrein*, 82 Cal. 167.)

Appeal bond, sureties on. See Appeals, V, 6, k.

Appeal bonds, liability of sureties on. See Appeals, V, 6, k.

Appeal from inferior court, liability of sureties. See Appeals, XIII, 3, c.

Entering judgment against sureties on appeal bonds. See Appeals, V, 6, k, E.

Entry of judgment against sureties, notice of. See Appeals, V, 6, k, C.

Not liable on unnecessary bond to stay execution. See Appeals, 1781.

b. Sureties of Administrator or Officer of Private Corporation.

23. The sureties on the bond of an administratrix are not responsible for her acts or default in the application of the funds of an estate after they have, by order of the probate court, been turned over to her as a trustee, to be held and managed by her in trust in pursuance of the will of the deceased. (*Barker v. Stanford*, 53 Cal. 451.)

Executors or administrators, liability of surety of. See Executors and Administrators, XVI.

24. By-laws which define duties of secretary of savings bank enter into and form part of the contract of the sureties upon the bond of the secretary, which is conditioned that he shall faithfully perform the duties of his office so long as he shall be continued in said office, and do all things required of him by the by-laws of the corporation. (*Humboldt Savings and Loan Society v. Wennerhold*, 81 Cal. 528.)

25. The sureties on a bond given by the secretary to the corporation, conditioned for the faithful performance of his duties, are liable for moneys stolen from him where he had failed to turn it over to the treasurer with due diligence. The violation of duty on his part in failing to pay the moneys over constitutes a breach of the bond. (*Odd Fellows' Mut. Aid Assn. v. James*, 63 Cal. 598.)

26. The sureties upon the bond of the secretary of a savings bank are not liable for the misappropriation by him of moneys belonging to borrowers from the bank, which have been secured by note and mortgage to the bank, and placed upon special deposit in bags marked with the borrowers' names, and sub-

ject to their call. (*Humboldt Savings and Loan Society v. Wennerhold*, 81 Cal. 528.)

27. When the by-laws of a savings bank provide that the secretary shall collect moneys due to the society, and keep on hand all the moneys, securities, or properties received by him on account of the society until the same are disposed of under the direction of its board of directors, and that he shall not use, loan, or otherwise dispose of any funds of the society, the liability of the sureties on his bond is not confined to the misappropriation of moneys collected by him from loans, interest, assessments, or rents due to the society, but extends to the misappropriation by him of moneys paid into the bank by depositors. Works, J., and Beatty, C. J., dissenting. (*Humboldt Savings and Loan Society v. Wennerhold*, 81 Cal. 528.)

28. A bond executed by an official for the faithful performance of his duties during a particular term of office, and for any succeeding terms for which he might afterward be elected, is presumptive evidence of a consideration for the undertaking of the sureties to be responsible after the expiration of the first term; and for a defalcation subsequently occurring, an action may be maintained against the sureties on the bond. (*Metropolitan Loan Assn. v. Esche*, 75 Cal. 513.)

29. When the bond of the secretary of a savings bank is expressly conditioned that he shall faithfully perform the duties of his office so long as he shall continue in office as secretary, the fact that he was appointed, by a board of directors which was elected for only one year will not limit the liability of the sureties to that year, but it will continue throughout the term of his actual holding, if his appointment is general and unlimited and no duration of his term is fixed by statute or by the by-laws of the corporation. (*Humboldt Savings and Loan Society v. Wennerhold*, 81 Cal. 528.)

30. In June, 1881, the defendant Allen was elected secretary of the corporation plaintiff for the term of one year and until his successor should be elected and qualify. He thereupon executed to the plaintiff a bond with sureties in the penal sum of ten thousand dollars, to secure the safe-keeping and payment to it of all moneys that might come into his possession as secretary, and not paid out in the due course of business. The by-laws of the corporation authorized the board of directors to remove at pleasure all officers and fix their terms of office. In June, 1882, Allen was re-elected, and the action was brought on the bond against him and his sureties to recover moneys alleged to have been misappropriated by him after his re-election. Held, that the action could not be maintained. (*Fresno Enterprise Co. v. Allen*, 67 Cal. 605.) Cited 81 Cal. 532.

c. Sureties on Official Bonds.

31. Sureties upon official bonds are only responsible for official acts, and not for private debts. (*Hill v. Kemble*, 9 Cal. 71.)

32. Sureties on the sheriff's official bond stipulate for his official and not his personal dealings. (*Schloss v. White*, 16 Cal. 65.) Cited 78 Cal. 220.

33. The eighth section of the act concerning official bonds, which provides that every such bond shall be obligatory upon the principal and sureties therein, for the faithful discharge of all duties which may be required of the officer by any law enacted subsequently, applies only to the duties properly appertaining to his office as such, and not to new duties belonging to a distinct office, with the execution of which he may be charged. (*People v. Edwards*, 9 Cal. 286.)

Cited 31 Cal. 291; 32 Cal. 148; 68 Cal. 313.

34. The liability of the sureties on the bond of an assignee in insolvency for converting to the use of the estate the property of another than the insolvent is not the same as that of the sureties on a sheriff's bond, when the sheriff seizes, under process, the property of another than the debtor. The duties of the assignee are wholly private, and the creditor and debtor are alone interested in the amount and sufficiency of his bond. But neither the sureties of such assignee nor of a sheriff are liable for the wrongful seizure or detention of property or money of another not taken under process. (*Best v. Johnson*, 78 Cal. 217.)

35. The collection of a wharfinger of public money arising from dockage, wharfage, etc., and his neglect to pay them over to the board of harbor commissioners, is a clear violation of duty, and a breach of the obligation of his bond. (*People v. Huson*, 78 Cal. 154.)

36. The sureties of a sheriff are not liable for the penalty imposed upon sheriffs by section 4179 of the Political Code, for a neglect to levy upon property. The sureties are liable only for actual damages sustained. (*Glascock v. Ashman*, 52 Cal. 494.)

Cited 79 Cal. 256.

37. The sureties on the bond of the sheriff, by the terms of the bond, became liable to respond in damages in a sum not exceeding the amount specified therein for any wrongful act or default of their principal in his official capacity. (*Sam Yuen v. McMann*, 90 Cal. 497.)

38. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid by order of court on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to, the arrangement. Plaintiff had judgment in replevin. Held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale, this agreement between him and plaintiff being no part of the sheriff's official duty; that the

sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. (*Schloss v. White*, 16 Cal. 65.)

39. As it is no part of the official duty of a notary to receive money from or for anybody, his sureties are not liable for money fraudulently obtained and retained by him. (*Heidt v. Minor*, 89 Cal. 115.)

40. Where a notary public, who was also a real-estate agent and engaged in negotiating loans, by false representations procured money upon forged mortgages, to which he had appended his certificate of acknowledgment, and then fraudulently retained the money, his sureties are liable only for the loss occasioned by reason of his certificates of the due acknowledgment of the mortgages, and not for the amount of the money loaned and fraudulently retained by him. (*Heidt v. Minor*, 89 Cal. 115.)

41. In an action for damages against the sureties of a notary for the fraudulent act of the notary in attaching to counterfeit mortgages certificates of their due acknowledgment, upon the faith of which the mortgagee loaned a sum of money, the measure of damages is the value of the mortgages if they had been valid, to be determined in view of the value of the property apparently mortgaged. (*Heidt v. Minor*, 89 Cal. 115.)

42. The bond of the city assessor and clerk of the city of San Jose was conditioned that he should well and truly and faithfully perform the duties of the office according to the laws and ordinances and regulations passed and approved by the mayor and common council of the city. No law, ordinance, or regulation was passed by the mayor and common council authorizing the assessor and clerk to collect taxes. Held, that the sureties on the bond are not liable for a failure of the officer to pay over taxes collected by him, and that section 3820 of the Political Code, imposing a duty on assessors to collect taxes under certain circumstances, does not extend the liability of the sureties. (*City of San Jose v. Welch*, 65 Cal. 358.)

43. Money paid to the tax-collector of the city and county of San Francisco, by a claimant of outside lands, in satisfaction of an assessment levied thereon in pursuance of order No. 800 of the board of supervisors of the city and county, is received by the tax-collector in his official capacity, and the sureties on his official bond are liable for his default in not returning the money to the claimant upon a demand made after a judicial determination that the claimant was not entitled to the land. (*Lawrence v. Doolan*, 68 Cal. 309.)

44. Section 13 of the act of March 30, 1874, amending the act of March 27, 1868, incorporating the town of Redwood City, and providing that the marshal thereof shall be ex officio tax-collector, and, as such, shall be vested with the same power and authority conferred on tax-collectors of state and county taxes, adds new duties to the office of marshal, but does not create a new office; and for a default

of such officer as collector of taxes, the sureties on his official bond as marshal are liable. (*Town of Redwood City v. Grimmenstein*, 68 Cal. 512.)

45. Under the provisions of the County Government Act and Political Code, if the same person is both treasurer and tax-collector, and he settles his accounts as tax-collector with the auditor, and receives a certificate stating the amount due from him as tax-collector, which certificate is afterwards found in the treasury, the presumption is that the money was deposited in the treasury with the certificate, and, in the absence of evidence as to when a defalcation occurred, that it occurred after the money was so deposited; and the sureties of the treasurer are liable. (*Butte County v. Morgan*, 76 Cal. 1.) Cited 76 Cal. 607.

46. If a county treasurer receipts to persons who owe the state for land, without receiving the money, but with an understanding that such persons will pay him the money when he requires it to make a settlement, and the treasurer soon after dies, and such persons pay the money to his successor in office, who credits it to the account of the deceased, the treasurer's bondsman cannot be holden for the money, for the payment to the successor in office is a liquidation of the demand. (*People v. Jacob*, 49 Cal. 540.)

47. The sureties upon the official bond of a county treasurer are not responsible for a loss resulting from the payment of a genuine auditor's warrant in due form, without notice, actual or constructive, of any fraud or infirmity in the claim upon which the warrant was based. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

48. Where the treasurer of the city and county of San Francisco, in violation of his official duty, paid a warrant illegally presented by the owner of a lot taken for the improvement of Dupont street under the act approved March 23, 1876, after another warrant payable to the owner or owners of the same lot had been substituted therefor by the street commissioners, upon discovery that another person owned a leasehold interest in the lot, and such payment was made out of money which the treasurer had set apart for payment of the substituted warrant, such illegal payment was a misappropriation of the fund so set apart, for which the sureties on his official bond for the term in which the payment was made are liable to the owner of the leasehold interest for any deficiency in payment therefor caused by exhaustion of the street fund. (*Priet v. De la Montanya*, 85 Cal. 148.) Cited 5 Wash. 556.

49. The fact that the street fund was exhausted during the second term of the treasurer does not relieve the sureties on his official bond from liability for misappropriation of the fund specially appropriated to the payment of such substituted warrant during the first term, it not appearing that the amount was made good by the treasurer, or that there was any misappropriation of funds during the second term for which his sureties for that

term could be made liable. (*Priet v. De la Montanya*, 85 Cal. 148.)

50. The sureties of a county treasurer are liable for public money received by him as treasurer after the expiration of his term, so long as he remains in possession of the office, and until he delivers it over to his successor. (*Placer County v. Dickerson*, 45 Cal. 12.) Cited 67 Cal. 510; 5 Wash. 555.

Treasurer's sureties, liability not lessened by what irregularity. See Clerk of Court, 8.

51. Where the same person is elected and acts as county treasurer during three successive terms, and it is afterward discovered that money deposited with him had been misappropriated, it will be presumed, in the absence of evidence to the contrary, that this misappropriation took place at the end of his last term, and the sureties on his last official bond are liable therefor. (*Heppe v. Johnson*, 73 Cal. 265.)

Liability of, where officer elected to new term. See Bonds, 107.

52. In the fall of 1857, L. was elected treasurer of Butte county for two years, and entered upon the duties of his office in October of that year, giving a bond, with sureties, for the performance of his duties during the period for which he was elected, and until the election and qualification of his successor. In 1859, the legislature extended his term to the first Monday in January, 1860. Held, that the sureties are not responsible for the official conduct of the treasurer during the time for which the term was extended; that the legislature had no power to extend their liability beyond the precise terms of their contract. (*Brown v. Lattimore*, 17 Cal. 93.) Cited 64 Cal. 223; 5 Wash. 554, et seq.

53. The provision inserted in such bond, making sureties liable for the discharge of official duties imposed by law subsequently to the execution of the bond, only applies to such duties as may be required to be performed during the period of liability fixed by the bond, and does not authorize an extension of that period. (*Brown v. Lattimore*, 17 Cal. 93.)

54. Sureties on bond given by deputy for faithful performance are only liable for the acts of the deputy during the term of the principal officer for which the appointment was made, and the fact that the breach occurred during such term must be alleged in the complaint. (*Hubert v. Mendheim*, 64 Cal. 213.)

Cited 67 Cal. 508; 5 Wash. 556.

Surveyor general, sureties of not liable for acts as collector. See Bonds, 105.

Superintendent of streets, liability of sureties for neglect. See Streets, 62.

Mail contractor, sureties of, liability on absconding of. See Mail Contracts.

Approval by wrong officer does not affect liability. See Bonds, 92.

Wharfinger's bond, liability on. See Harbor Commissioners, 16.

d. Where Blanks Filled Without Authority; Rule that Surety is Favored; Void Bonds.

55. A surety who signs a bond with the expectation and understanding that his prin-

cipals were seeking to obtain a charter party of a steamer and expected to charter one from the managing owner thereof, who was known to all the parties as such owner, is estopped, as against such owner who receives the bond in good faith, without knowledge or reason to suspect that it was not properly executed, to deny that the bond was a valid instrument because the blanks for the names of the steamer and the managing owner were not filled up when he executed it, but were filled in by his principals without express authority. (*Dolbeer v. Livingston*, 100 Cal. 617.)

56. Sureties are favored in the law. (*People v. Buster*, 11 Cal. 215.)

Void bond, liability of sureties on. See *Attachments*, II, 7.

Void bond, surety not estopped. See *Mechanics' Liens*, 422.

Liability on bond not a statutory bond. See *Appeals*, V, 6, k, B.

2. Judgment Against Principal, Effect of on Surety.

57. Where the surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety. (*Pico v. Webster*, 14 Cal. 202.)

58. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor, the court of sessions having declared the bond forfeited for nonappearance, the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. (*People v. Wolf*, 16 Cal. 385.)

Cited 18 Cal. 499; 37 Cal. 273; 5 Utah, 173.

59. Sureties on a bond, given by the party in the original suit, to perform any decree that might be rendered therein, stand in no better position. They are not parties to said suit, but are bound absolutely by the decree, subject to the single exception, that, if the decree be procured by collusion between plaintiff, their principal, and the defendant, they are not bound. (*Riddle v. Baker*, 13 Cal. 295.)

Cited 14 Cal. 204; 38 Cal. 601; 11 Nev. 74.

60. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties; and a judgment against the officer, in a suit to which they were not parties, is not evidence against them. (*Pico v. Webster*, 14 Cal. 202.)

61. As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless they have had their day in court, or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule. (*Irwin v. Backus*, 25 Cal. 214.)

62. That the sureties had notice of the suit against the principal amounts to nothing, unless it was notice according to the statute, or unless they appear voluntarily as parties to the record. (*Pico v. Webster*, 14 Cal. 202.) Cited 7 Nev. 173.

63. In an action against the sureties on an administrator's bond for a breach of the bond by the principal, the proceedings taken in the

probate court in passing on an account rendered by the administrator, and a decree rendered therein directing the administrator to pay over a sum found remaining in his hands, are admissible in evidence against the sureties, although the sureties were not parties to the same. (*Irwin v. Backus*, 25 Cal. 214.)

Cited 32 Cal. 120-123, 130; 38 Cal. 601; 56 Cal. 585; 60 Cal. 600; 91 Cal. 635; 7 Nev. 173; 20 Or. 77; distinguished 32 Cal. 153; 33 Cal. 170.

64. Such decree is equally conclusive upon the administrator and his sureties; and upon the refusal of the administrator to obey the same, the liability of the sureties attaches, and they cannot go behind the decree to inquire into the merits of the matter therein passed on. (*Irwin v. Backus*, 25 Cal. 214.)

65. The sureties may show in defense either that the bond was not made, or that the decree was not made, or that the same has been obeyed, or that the same was obtained by fraud or collusion. (*Irwin v. Backus*, 25 Cal. 214.)

Judgment, sureties whether bound by. See *Judgments*, X, 10, g; *Sheriffs*, 183, 184.

Surety of administrator is concluded by decree of distribution. See *Estates of Deceased Persons*, 578.

Defense of indemnity to principal, judgment on, conclusiveness of. See *Judgments*, 349.

Revival of judgment against sureties. See *Appeals*, 794.

Surety on replevin bond, right of appeal. See *Appeals*, 399.

Application of doctrine of law of the case to sureties. See *Law of the Case*, VI.

3. Actions Against Sureties.

a. When Lie.

66. An action will not lie against the sureties on the bond of the guardian of an infant until the account of the guardian has been settled by the probate court. (*Graff v. Mesmer*, 52 Cal. 636.)

67. Where an administrator dies without rendering an account, jurisdiction to compel an accounting vests in the appropriate court of equity; and it would seem that the adjustment of the account by that court is a prerequisite to an action against the sureties. (*Chaquette v. Ortet*, 60 Cal. 594.)

Cited 65 Cal. 230, 574; 67 Cal. 84.

Actions on injunction bond, when lie. See *ante*, 20.

b. Demand.

68. Where demand is necessary to fix liability of sureties to an undertaking, it is part of the contract, and must be made before the commencement of an action for the breach of the undertaking, and averred in the complaint. It cannot be made after the commencement of the action except as the basis of a new action. (*Morgan v. Mensies*, 65 Cal. 243.)

Cited 78 Cal. 445; 12 Mont. 13.

69. It is not necessary to allege or prove demand upon principal, in order to maintain an action against the sureties on a bond

given for the purpose of taking possession of property sought to be condemned for public use, under section 1254 of the Code of Civil Procedure, although the promise of the bond is that the plaintiff in the condemnation proceedings will pay all such damages or compensation as may be awarded to the defendants, or either of them. (*Coburn v. Brooks*, 78 Cal. 443.)
Cited 98 Cal. 43; 12 Mont. 13.

c. Pleading; Venue.

Actions against sheriff and bondsmen, joinder of. See Joinder and Severance of Actions, I, 2, h.

Misjoinder, complaint against sureties asking to have security applied to debt. See Bail, IX, 3, a.

Complaint in action against sureties, when defective. See Attachments, 67.

70. In an action upon an undertaking conditioned for the payment of any judgment which a plaintiff in an attachment suit shall recover, the judgment is sufficiently pleaded by an averment that it was recovered, entered, and docketed. (*McCutcheon v. Weston*, 65 Cal. 37.)

71. An allegation in a complaint, in an action against the sureties upon an undertaking on appeal from the judgment of a justice's court, that the defendant in the action in that court "appealed to the superior court" from the judgment is a sufficient averment of the ultimate fact that the appeal was taken. The several acts performed in taking the appeal are probative facts, and should not be alleged. (*Moffat v. Greenwalt*, 90 Cal. 368.)

72. In suit on a statutory undertaking given to release property attached, and reciting the fact of a levy of the writ, the complaint need not aver or set out the facts which authorized the issuing of the attachment. The recital of the levy estops defendants from denying it, and the levy is sufficient without averment of the previous proceedings. (*McMillan v. Dana*, 18 Cal. 339.)

73. Where defendant in attachment applies to the court under sections 136 and 137 of the Practice Act for a discharge of the attachment, and an undertaking is executed by D. & R., reciting the fact of the attachment, and that, "in consideration of the premises, and in consideration of the release from the attachment of the property attached as above mentioned," they undertake to pay whatever judgment plaintiff may recover, etc., and the court makes an order discharging the writ and releasing the property. Held, in suit against the sureties on the undertaking that the complaint need not aver that the property was actually released and delivered to the defendant; that, as the consideration for the undertaking was the release of the property, and as the complaint avers such release, in consequence and in consideration of the undertaking, by order of the court, which is set out, the actual release and redelivery of the property to defendant is immaterial, the plaintiff having no claim on it after the undertaking was given and the order of release made. (*McMillan v. Dana*, 18 Cal. 339.)
Cited 2 Nev. 152; 5 Utah, 173.

74. In action against sureties on official bond of sheriff as ex officio tax-collector, an averment in the answer of the sureties, that the undersheriff collected and receipted for the taxes without right or authority of law, is the statement of a mere conclusion of law. The admission that the undersheriff received them is not contravened or qualified by a denial that the tax-collector received them, or withheld the taxes collected by him from the treasury of the county, there being no averment that he paid over, or denial that he withheld, the money collected by the undersheriff. (*People v. Otto*, 77 Cal. 45.)

Demand, pleading. See ante, IV, 3, b.

Motion for change of venue where several sureties on bond are sued. See Venue, II, 7, b.

d. Parties.

Sheriff's sureties as parties. See Sheriffs, 138, 139.

Principal and surety, actions against. See Statute of Limitations, VI, 4, l.

Parties in actions against sureties of sheriff. See Sheriffs, IV, 3, t.

75. One or more of sureties jointly and severally liable on official bond may be joined as defendants in an action on the bond, at the election of the plaintiff, under section 383 of the Code of Civil Procedure. (*Heppe v. Johnson*, 73 Cal. 265.)

76. In an action on a bond, the personal representative of a deceased obligor may be joined as a defendant with the surviving co-obligors, after the claim on which the action is founded has been presented to and disallowed by him. (*Lawrence v. Doolan*, 68 Cal. 309.)

77. The statute makes official bonds joint and several, and the administrator of a deceased officer need not be joined in suit against the sureties on such bonds. (*People v. Jenkins*, 17 Cal. 500.)

78. When administrator gives two bonds, one when letters are issued, and the other when real estate is about to be sold, and the condition of each of the two bonds is the same, and the burden of the sureties in each is the same, the sureties on the two bonds, in an action on them, may be made joint defendants in the same action. (*Powell v. Powell*, 48 Cal. 235.)
Cited 65 Cal. 387.

e. Evidence and Variance.

79. In an action against the sureties upon an official bond, to recover money received by the officer in his official capacity, which he neglected to pay to the estate, as his official duty required, where the plaintiff introduced account-books required to be kept by the secretary of the board, of which the officer was a member, for the purpose of showing that he had not paid the money as required, because the books did not contain any account of such payment, which they should have contained if such payment had been made, the defendants may show that the books were incorrectly kept, and that there were many other omissions therein which were false and fraudulent, for the purpose of discrediting the books as evidence.

(People ex rel. Board of State Harbor Comms. v. Fairfield, 90 Cal. 186.)

80. In an action upon a joint and several bond conditioned for the faithful performance of a building contract, the building contract referred to in the bond is admissible in evidence against the sureties. (Kurtz v. Forquer, 94 Cal. 91.)

81. The receipts of a county treasurer given to a tax collector for public money, after the expiration of his term, but before he has delivered possession of the office to his successor, are prima facie evidence to charge the sureties on his official bond. (Placer County v. Dickerson, 45 Cal. 12.)
Cited 78 Cal. 158; 5 Wash. 555.

82. Receipts signed by an officer showing his collection of public moneys are admissible as prima facie evidence to charge the sureties on his official bond. (People v. Huson, 78 Cal. 154.)

83. The admission of the receipt of money by the principal in an official bond is evidence against his sureties. (Butte County v. Morgan, 76 Cal. 1.)

84. Where the complaint in an action upon a joint and several bond averred the execution of the bond by the principals and sureties named therein, but an exhibit of the bond attached to the complaint, and made part thereof, shows the omission of the principals to sign the bond, and corresponds to the bond given in evidence, and the case was fully tried upon its merits, the variance between the allegation and the evidence is not so material as to justify a reversal of a judgment against the sureties, although the complaint might have been successfully assailed by a special demurrer upon the ground of ambiguity. (Kurtz v. Forquer, 94 Cal. 91.)

f. Estoppel from Bond; Recitals in, Conclusiveness.

85. Where the bond of an executor recites that by an order of the probate court duly made and entered, the executor was appointed as such, the sureties upon the bond are estopped from denying that the order appointing the executor was duly made and entered. (Moore v. Earl, 91 Cal. 632.)

86. In suit upon the official bond of county assessor, who had received a certificate of election, given bond, and entered upon his duties, neither the principal nor the sureties can deny the official character of the assessor. They are estopped by the bond. (People v. Jenkins, 17 Cal. 500.)
Cited 78 Cal. 157; 91 Cal. 636; 6 Nev. 370.

87. Sureties on official bond of wharfinger, which recites his appointment by the state harbor commissioners, are estopped to deny the fact of such appointment. (People v. Huson, 78 Cal. 154.)

88. The recitals in statutory undertakings given to release attachment have the same effect and are to be construed in the same way as bonds making the same recitals, and are conclusive of the facts stated. (McMillan v. Dana, 18 Cal. 339.)
Cited 57 Cal. 159.

89. The sureties on a statutory undertaking

given to release property attached, reciting the fact of the levy, the release of the property, and promises to pay the judgment, etc., cannot, when sued on the undertaking, question either the fact of the levy or whether the property was subject to it. (McMillan v. Dana, 18 Cal. 339.)

90. Whether these rules as to the effect of statutory undertakings would be different if the undertakings varied from the statute in merely formal matters, query? (McMillan v. Dana, 18 Cal. 339.)

Insufficient justification or failure to justify. See ante, II.

g. Judgment.

91. The judgment in an action on a bond, where the representatives of a deceased obligor are joined, if against the personal representative, must provide that it be paid by him in due course of administration. (Lawrence v. Doolan, 68 Cal. 309.)
Cited 1 N. Dak. 471.

92. A judgment in an action against the sureties on an official bond, for a defalcation of the principal, should first fix the amount of the defalcation, and then proceed with a separate judgment against each of the sureties for the full amount for which he made himself liable in the bond and costs, and then close with a proviso that each judgment shall be satisfied by the collection or payment of the amount of the defalcation and costs. (People v. Rooney, 29 Cal. 642, cited 73 Cal. 270, 9 Mont. 442; Heppe v. Johnson, 73 Cal. 265.)

Gold coin judgment against. See Judgments, 49.

Form of judgment on official bond. See Bonds, 136.

4. Right of Obligees to Securities Given to Surety.

93. If surety has a counter bond or security from the principal debtor, the creditor will be entitled to the benefit of it, and may, in equity, subject such security to the satisfaction of his debt, so far as it can be done without trenching upon the rights of the surety himself. (Van Orden v. Durham, 35 Cal. 136.)

94. Where D., as surety for H., executed a mortgage on his lands to secure the payment of notes executed by H. alone, the mortgage containing no covenant on the part of D. to pay said notes, but on the contrary, expressly providing that D. should not incur any personal cost or liability, and afterward took a mortgage or conveyance of other property from H., the principal, to indemnify himself against any loss he might sustain by reason of his mortgage to secure said notes of H., held (1), that the holders of the notes might subject the premises mortgaged by D. to the payment of the notes, or (2), that they might abandon the mortgage and subject the said property of the principal in the hands of D. to the payment of the notes, or (3), that they might have the property mortgaged to secure the notes sold, the proceeds applied to their satisfaction, and if any balance remained, subject the surplus of any property of H., the principal, in the hands of D., that might

remain after fully compensating D. for any loss or damage resulting to him by reason of the appropriation of the property mortgaged by him, to the satisfaction of the notes of H., but (4), that the holders of the notes are not entitled to appropriate both the property mortgaged to secure the notes and that conveyed or mortgaged by the principal, H., to the surety, D., for the indemnity of the latter. (*Van Orden v. Durham*, 35 Cal. 136.)

95. The limit of the liability of D., in the case stated, is his own property mortgaged, together with any surplus remaining in his hands from the securities received by him for his own indemnity, after fully indemnifying himself out of the latter for the damage resulting from the mortgage of his own property to secure the notes of H. (*Van Orden v. Durham*, 35 Cal. 136.)

96. D. should not be personally charged with costs in this action to foreclose the mortgage, and subject the securities in his hands to the payment of the notes, unless he either made an unsuccessful defense against the foreclosure of his own mortgage, or unless some surplus of the securities beyond the property mortgaged is found in his hands subject to be applied to the payment of the notes; nor should the mortgaged lands be charged with the costs of any unsuccessful attempt to obtain more than the rights of the noteholders justified under D's mortgage. (*Van Orden v. Durham*, 35 Cal. 136.)

97. Where money or property is deposited by a surety, on a recognizance in a criminal case, with a trustee, to secure his cosureties on the recognizance, the people have no claim on the money or property in case the recognizance is forfeited, nor does the money stand in place of a recognizance. (*Skidmore v. Taylor*, 29 Cal. 619.)

98. In such case, if the cosureties consent that the trustee holding the money and property deliver it to the surety who deposited it, he cannot justify a refusal on the ground that a judgment has been recovered against the sureties on the recognizance. (*Skidmore v. Taylor*, 29 Cal. 619.)

5. Exoneration of Surety.

a. Change or Amendment of Bond.

99. If, after part of the sureties on an official bond sign the same, the penal sum is changed, and, as changed, it is approved and filed for record, the sureties who sign before the change are not liable. (*People v. Kneeland*, 31 Cal. 288.)

100. If, after an official bond has been executed by a part of the sureties, the penal sum is changed, and, as changed, it is executed by other sureties, the sureties signing after the change are not liable in an action brought on the bond as it was before the change. (*People v. Kneeland*, 31 Cal. 288.)

Liability on substitution of bond. See *Guardian and Ward*, 28.

b. Forbearance; Failure to Sue or to Present Claim Against Estate.

101. Failure of holder of note to sue when requested by surety does not operate to dis-

charge the liability of the latter. (*Hartman v. Burlingame*, 9 Cal. 557.)
Cited 24 Cal. 165; 77 Cal. 60; 4 Mont. 493, 496; 8 Or. 250.

102. If the surety desires to protect himself, he must pay the debt and proceed against the principal, or apply to a court of equity to compel the holder to proceed against the principal. (*Hartman v. Burlingame*, 9 Cal. 557.)

Cited 28 Cal. 543.

103. Where a promissory note is executed jointly by two persons, and one of them is surety for the other, and at a time when the principal on the note is solvent the surety makes demand on the creditor to proceed at once and collect the debt from the principal, and the creditor fails to sue the principal, who afterward becomes insolvent, the surety is not thereby released from his liability on the note. (*Dane v. Corduan*, 24 Cal. 157.)

Cited 28 Cal. 543; 32 Cal. 577; 34 Cal. 231; 42 Cal. 500, 507; 77 Cal. 477; 87 Cal. 618; 4 Mont. 493, 494.

104. A and B executed a joint promissory note to C; B was surety for A. B brought an action against C, after the maturity of the note, to compel him at once to proceed and collect the amount due on the note from A, the principal, and obtained a decree requiring C to commence legal proceedings against A for the collection of the note, upon B's tendering to him a sufficient amount to pay reasonable costs and expenses, or be forever debarred from collecting the same from B. B deposited with the clerk and sheriff a sufficient amount to pay their costs, and tendered to C the services of an attorney employed by B. C refused to commence the action, and A subsequently became insolvent. Held, that this was not a compliance with the conditions of the decree by B, the surety, and that he was not released from his liability on the note. (*Dane v. Corduan*, 24 Cal. 157.)

105. Mere passiveness of board of supervisors in not bringing defaulting county assessor to settlement does not discharge him or his sureties. (*People v. Jenkins*, 17 Cal. 500.)

Cited 77 Cal. 60.

106. Neglect to sue contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. (*Sacramento v. Kirk*, 7 Cal. 419.)

107. Mere neglect to sue the principal will not exonerate a surety. (*Humphreys v. Crane*, 5 Cal. 173.)

Cited 9 Cal. 23; 24 Cal. 165; 26 Cal. 543; 77 Cal. 60; 4 Mont. 497.

108. The liability of a surety is not affected by the failure to present a claim against the estate of the principal debtor. The debt of the principal, although barred, is not extinguished. (*Bull v. Coe*, 77 Cal. 54.)

109. The liability of surety on an official bond is not discharged by the failure of the county to present its claims arising on the bond to the executor of the estate for allowance, within the period fixed for notice to creditors. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

110. If one of the sureties on an undertaking on appeal dies before suit, the respondent does not forfeit his right of action against the other sureties by failing to present his claim against the estate of the deceased surety. (*Hathaway v. Davis*, 33 Cal. 161.)

Discharge of surety by extension of time. See Bills and Notes, 228.

c. Tender of Performance or Payment.

111. Whenever the liability of the sureties is fixed by the rendition of a judgment in favor of the plaintiff, the sureties have a right to tender the plaintiff the full amount of the judgment, and if he refuses to receive the same, the sureties are discharged from their obligation on the undertaking. (*Hayes v. Josephi*, 26 Cal. 535.)
Cited 29 Cal. 128; 32 Cal. 171; 34 Cal. 36; 37 Cal. 226; 57 Cal. 417.

112. If principals in bond to sheriff to release goods from attachment tender to the plaintiff in the attachment suit the full amount of his debt and costs, and the plaintiff refuses to receive the tender, the sureties are discharged from their obligation on the bond; and for the purpose of discharging the sureties, it is not necessary that such tender be paid into court, or kept good. (*Curiac v. Packard*, 29 Cal. 194.)

113. The sureties upon a bond given by a lessee to secure the payment of rent are discharged by a tender of rent by an assignee of the term, although such rent was not deposited in compliance with the provisions of section 1500 of the Civil Code, and notwithstanding the assignment was made in violation of a covenant not to assign the lease without the written consent of the lessor. (*Randol v. Tatum*, 98 Cal. 390.)

114. Under section 2839 of the Civil Code, providing that an offer of performance be "duly made as provided in this code," no reference is had to section 1500 in regard to the deposit of a tender, which relates not to an offer of performance of a contract, but to the absolute extinguishment of a debt, and such deposit is no part of the offer which exonerates a surety. (*Randol v. Tatum*, 98 Cal. 390.)

115. If a note be paid either by the principal or the surety, it is extinguished as to the surety. (*Neylan v. Green*, 82 Cal. 128.)

Effect of tender. See post, VII.

Tender discharges liability. See Appeals, 767.

d. Change of Contract; Extension of Time; Release or Loss of Property.

116. Sureties are entitled to stand on precise terms of contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. (*Tarpey v. Shillenberger*, 10 Cal. 390.)
Cited 63 Cal. 543; 1 Mont. 370; 6 Mont. 183.

117. A surety has a right to stand on the precise terms of his contract. He can be held to no other or different contract. (*People v. Buster*, 11 Cal. 215.)
Cited 29 Cal. 435; 31 Cal. 77; 63 Cal. 543; 68 Cal. 90, 91; 82 Cal. 169; distinguished 17 Cal. 608, 609.

118. Sureties on the sheriff's official bond in this state stipulate for his official, not his personal, dealings, and are entitled to stand on the precise terms of their contract. (*Schloss v. White*, 16 Cal. 65.)
Cited 78 Cal. 220.

119. Liability of sureties is limited by terms and conditions of their contract, and cannot be extended by implication beyond its terms. (*Elder v. Kutner*, 97 Cal. 490.)

120. Sureties on injunction bond are entitled to stand upon the precise terms of their contract. (*Carter v. Mulrein*, 82 Cal. 167.)

121. The liability of sureties upon an official bond depends upon the terms and conditions of the bond; and the obligation being strictissimi juris, nothing will be taken by construction against the obligors. (*Heidt v. Minor*, 89 Cal. 115.)

122. True meaning of cases holding that surety may stand upon precise terms of his contract is, that no strained construction is to be given to his obligation, and that you cannot go beyond the fair import of the terms he employs in order to fasten upon him a liability; but a rational interpretation must be given to the language of his contract so as to reach the meaning of the terms used. (*People v. Breyfogle*, 17 Cal. 504.)
Cited 63 Cal. 543.

123. The sureties on a bond for the faithful performance of the duties of an agent are released from liability for the subsequent defaults of the agent, if the principal and agent, without the knowledge or consent of the sureties, materially alter the terms of the contract of agency, or if the principal continues the agent in his employ after knowledge that he has misappropriated money coming into his hand as agent. (*Roberts v. Donovan*, 70 Cal. 108.)
Cited 93 Cal. 13.

124. The fact that after the election and qualification of a county treasurer a law is passed by which his duties are changed or his salary is reduced does not impair his official bond, or discharge his sureties from responsibility for his acts after the change is made. (*Sacramento County v. Bird*, 31 Cal. 66.)

125. L. as principal, and the defendant with one B. as sureties, executed a bond to the plaintiff to secure the performance of an agreement between the plaintiff and L. as its agent for the sale of sewing machines, consigned by the plaintiff to him. The agreement provided that L. should not, at any one time, have on consignment more than six machines. The bond provided that the agreement might be varied or modified by the mutual agreement of the plaintiff and L., as to the manner of carrying on the business, or as to the compensation of L., or as to the period of which L. shall report to and pay the plaintiff for the machines sold, or as to the territory on which the machines shall be shipped or sold, without affecting the liability of the obligors on the bond. The agreement was subsequently, without the consent of the defendant, changed so as to permit the assignment to L. of more than six machines, and that he might have more than six at the same time. Held, that the clause in the

bond continuing the liability of the sureties, notwithstanding a change in the contract "as to the manner of carrying on the business," did not authorize the change by which L. was to have more than six machines at the same time. (*Victor Sewing Machine Co. v. Scheffler*, 61 Cal. 530.) Cited 70 Cal. 110.

126. Where a contractor agrees with the owner to erect for him a building and furnish the materials and deliver the same discharged of all liens, and, by the terms of the contract, the owner is to pay seventy-five per cent of the contract price each month as the work progresses, and the other twenty-five per cent when the work is completed, and a third person becomes surety for the contractor; if the owner, during the progress of the work, pays the contractor more than the seventy-five per cent, the surety is discharged from his liability. (*Bragg v. Shain*, 49 Cal. 131.) Cited 91 Cal. 233; 14 Nev. 310.

127. If, in an action against the executors of an estate, brought by the legatees to recover a judgment for money found to be in the hands of the executors, and adjudged to be paid to the legatees by the probate court, a judgment is entered by consent of the parties under a stipulation in writing, and made a part of the judgment, payable in installments thereafter, the sureties, not consenting to the arrangement, are released from their liability on the executor's bond. (*Fordyce v. Ellis*, 29 Cal. 96.)

Assignment of judgment, effect on liability of sureties. See Appeals, V, 6, k, F.

Alteration, effect of on liability of sureties. See Alteration of Instruments, 7.

128. Sureties are not discharged by contract for extension of time which is not obligatory. (*Barber v. Burrows*, 51 Cal. 473.)

129. If a written contract for the extension of time within which to complete a building is intended to be signed by the owner, the contractor, and the persons who became sureties for the contractor for the fulfillment of his agreement, and is signed only by the owner, contractor, and one of the sureties, it is not obligatory, and does not release the sureties from liability for damages resulting from the failure of the contractor to fulfill his agreement. (*Barber v. Burrows*, 51 Cal. 404.)

130. A sheriff by appealing from a judgment rendered against him for the conversion of property wrongfully taken under execution, and by giving a stay-bond pending the appeal, does not grant such an extension to an execution creditor who has given a bond to indemnify the sheriff from all damages sustained by him by reason of his enforcing the execution as to discharge the sureties on the bond. (*Oaks v. Scheifferly*, 74 Cal. 478.)

131. February 26, 1855, Page, Bacon & Co., were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six, and eight months from date, the debt to be paid in equal installments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instru-

ment dated February 26, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the installments and at the different times in said agreement and certificate set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13, 1856, P., B. & Co. issued to plaintiff certificates for his indebtedness in installments at two, four, six, and eight months from that date. Held, that defendant is not liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff, having taken certificates, dated March 13, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. (*Gross v. Parrott*, 16 Cal. 143.)

132. Where, by the terms of an undertaking to prevent the levy of an attachment, the parties thereto undertook to pay, on demand, any judgment which the attaching creditor might recover against the attachment debtor, they are not, as between themselves and the attaching creditor, released from liability by reason of the sheriff having attached property prior to the giving of the undertaking and subsequently released it, nor because the judgment in the attachment suit was entered by consent and execution stayed for sixty days by stipulation of the parties. (*Preston v. Hood*, 64 Cal. 405.) Cited 65 Cal. 38.

133. Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued and levied upon property of the principal sufficient to satisfy the same. After the levy the sheriff, under the directions of the plaintiff in execution, took the principal's note for the amount of the judgment, and released the levy. Subsequently, a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff. Held, that the release of the levy of the first execution and the taking of the principal's note discharged the surety. (*Morley v. Dickinson*, 12 Cal. 561.) Cited 23 Cal. 100; distinguished 14 Cal. 666.

134. The contract, until rescinded by the return of the note, was sufficient to postpone any right to enforce the execution, although the note may have been given in fraud. (*Morley v. Dickinson*, 12 Cal. 561.)

135. If, pending an appeal from a judgment for plaintiff in ejectment, the plaintiff sells or leases a part of the premises recovered, the sureties on an undertaking to stay a writ of restitution pending the appeal, are not released from their liability on the same. (*De Castro v. Clarke*, 29 Cal. 11.)

136. Where a principal has left a sufficient fund in the hands of the obligee to meet the obligation, and instead of retaining it in his hands he pays it back to the principal, the surety is discharged from liability. (*Kiessig v. Allspaugh*, 91 Cal. 231.)

137. The surety is also exonerated if the payee of the larger note having a judgment lien upon the land of the indorser, which, if sold at its real value, would have realized a sufficient amount of money to pay the judg-

ment, united with the indorser to sell and convey the land at private sale for less than its real value. (*Montgomery v. Sayre*, 100 Cal. 182.)

Discharge of by attachment. See Bills and Notes, 232.

Surety is discharged by levy on sufficient property to satisfy execution. See Executions, 386, et seq.

e. Nonperformance of Contracts; Fraud of Obligee.

138. In a bond of a surety company guaranteeing the payment of all losses suffered by an employer through the fraud or dishonesty of his employee, a provision that the employer is to notify the surety "of any act of omission or commission on the part of the employee which might involve a loss for which the company is responsible hereunder" does not render it necessary that the employer notify the company of every act of laches or delay or inefficiency on the part of the employee which ultimately may create a loss to the employer, but only that the company be notified of acts which may create a loss for which it is responsible; that is, a loss arising from fraud or dishonesty. Mere laches or inefficiency of the employee in the business, which is consistent with integrity, is not required to be communicated. (*Pacific Fire Ins. Co. v. Pacific Surety Co.*, 93 Cal. 7.)

139. Where such condition was contained in a bond of indemnity of a surety company given to an insurance company, indemnifying the latter against acts of fraud or dishonesty upon the part of its general agents, and the contract between the general agents and the insurance company, which had its office in a distant state, required the agents to remit the money collected for any one month within fifty days from the end of such month, but the agents failed to remit such money until from sixty to one hundred days after the end of such month, partly because of the tardiness of their subagents to collect and remit to them, and partly because of their own tardiness and neglect, but without any wrongful or fraudulent intent on their part, which action the company acquiesced in as a substantial compliance with their contract, the failure of the company to give notice to the surety company of such delay is not a substantial violation of the condition of the bond. (*Pacific Fire Ins. Co. of New York v. Pacific Surety Co.*, 93 Cal. 7.)

140. A certificate furnished by the insurance company to the surety company, at the request of the latter, stating that the agent was not in arrears or default, and never had been to its knowledge, was not fraudulent, although at the time the certificate was made the premiums due the day previous had not been paid and although payment of premiums had been delayed before from ten to seventy days, where the acts of the agent were treated as a substantial compliance by the insurance company with the terms of the contract, and the delay was not attributable to dishonesty or lack of integrity of the agent, but to the wide field of the agency and the difficulty in making collections, the time for the return of

which had been practically waived and extended by the company. (*Pacific Fire Ins. Co. of New York v. Pacific Surety Co.*, 93 Cal. 7.)

141. If the obligee in a bond given to secure the faithful performance of the duties of an agent knows at the time of the execution of the bond that the agent is a defaulter, and conceals the fact from the sureties, such concealment is a fraud upon the sureties, and discharges them from liability on the bond. (*Guardian Fire and Life Ins. Co. v. Thompson*, 68 Cal. 208.)

f. Judgment Against or Release of Part of Sureties; Release of Principal.

142. In an action upon joint and several official bond of a county officer, an objection by some of the sureties that judgment had previously been rendered against the other sureties is untenable. (*Hunter v. Byrant*, 98 Cal. 247.)

143. Prior to the adoption of section 1543 of the Civil Code, a release of one co-surety released the others, and as to a contract of co-suretyship entered into before the section was adopted, a release of one after its adoption releases the others. (*Spencer v. Houghton*, 68 Cal. 82.)

144. In the case of sureties on the official bond of a county treasurer, they all contract together and with reference to the common responsibility; the discharge of one of the obligors affects the contract as to all, and amounts to a release of all as to all future acts of such official. (*People v. Buster*, 11 Cal. 215.)

145. Official bonds in this state are joint and several, and the discharge of one or more sureties under the statute without notice to the others, or without any notice, does not operate as a discharge of the others, though the bond is thereby reduced to a sum less than that required by law. (*People v. Otto*, 77 Cal. 45.)

146. A release of some of the sureties on a treasurer's official bond by proceedings in insolvency, and a failure of the county judge to summon the treasurer to show cause why he should not execute an additional bond, does not release the remaining sureties from future liability on the bond. (*Sacramento County v. Bird*, 31 Cal. 66.) Cited 77 Cal. 49.

147. Where the note of a surety is given to secure payment of a larger note both by the maker and indorser of the larger note, the surety is exonerated, if the payee has released such indorser from all liability under a deficiency judgment rendered against the indorser, after foreclosure of a mortgage given by the maker to secure the larger note. (*Montgomery v. Sayre*, 100 Cal. 182.)

V. Rights of Surety Against Principal.

148. A surety upon a promissory note, upon being compelled to pay the same, becomes the equitable assignee of the note, and entitled to enforce its payment according to its tenor and effect, as the holder thereof, and also to foreclose a mortgage given to secure

him from liability on the note. (*Waldrip v. Black*, 74 Cal. 409.)

149. Where a judgment was recovered against a surety upon an undertaking on appeal, and the surety settled the judgment by paying a portion thereof, such payment did not operate an assignment of the judgment against the defendant in the action in which the appeal was taken, so as to authorize the surety to recover the whole amount of such judgment. (*McDermott v. Mitchell*, 53 Cal. 616.)

150. Sureties who have been compelled to pay debt of principal have legal demand for reimbursement, which they may enforce against the principal by personal action if he be alive, or against his estate if he be dead. But in either case reimbursement can only be had for what had been expended. (*Estate of Hill*, 67 Cal. 238.) Cited 83 Cal. 550.

151. After the death of the principal, a judgment obtained against the sureties cannot be enforced by them as a claim against his estate until they have paid it. (*Estate of Hill*, 67 Cal. 238.)

152. A surety cannot claim reimbursement from the principal on account merely of note given by the surety, unless such note has operated to extinguish the debt of the principal to the original creditor. (*Stone v. Hammell*, 83 Cal. 547.)

153. A note given by one surety, by way of contribution to a co-surety who has satisfied the principal debt, even if accepted as payment by the co-surety, cannot confer a right of action against the principal, if the liability of the principal to reimburse the co-surety for his advances is barred by the statute of limitations. (*Stone v. Hammell*, 83 Cal. 547.)

154. Surety paying debt, for which several persons are liable in distinct proportions as principals, cannot maintain a joint action against the principals for the amount thus paid, but his remedy is by a several action against each upon the implied assumption of each to reimburse what was thus paid for him. (*Chipman v. Morrill*, 20 Cal. 130.)

155. C., in the case above stated, having paid the whole of a judgment, recovered upon the note; held, that it was not a case for contribution between parties who have sustained a common loss upon a common liability, but that M. and W. are each severally liable upon an implied contract to repay C. one-fourth of the judgment. (*Chipman v. Morrill*, 20 Cal. 130.)

156. In an action by a surety on a promissory note against his principal for reimbursement, the suretyship not appearing on the face of the note, complaint which avers that the plaintiff signed the note as a surety only, and for the accommodation of the defendant, need not allege a request from the defendant to the plaintiff to pay the same. (*Clanton v. Coward*, 67 Cal. 373.)

157. In an action by a surety on a promissory note to foreclose a mortgage given to secure him from liability thereon, a judgment in favor of the plaintiff will not be re-

versed for want of a sufficient allegation in the complaint of the plaintiff's suretyship, when the language of the mortgage, as set out in the complaint, is sufficient to show, in the absence of any proof to the contrary, that the plaintiff was a surety, and no demurrer was interposed pointing out any special defects in the complaint. (*Waldrip v. Black*, 74 Cal. 409.)

158. Where A executes a promissory note to B bearing interest at three per cent per month, and C, D, and E sign the note as sureties for A, and B afterward recovers judgment on the note against A, the maker, and the sureties, and the sureties pay the judgment, in an action by the sureties against the maker for the money thus paid they can only recover judgment for the amount of money paid, with interest at the rate of ten per cent per annum from the time of payment. (*Smith v. Johnson*, 23 Cal. 63.) Cited 14 Nev. 197.

159. A surety upon a promissory note, after paying the same, is not entitled to reimbursement to any greater extent than the amount of the principal and interest that he has been obliged to pay, together with legal interest upon the gross sum so paid from the date of its payment. (*Waldrip v. Black*, 74 Cal. 409.) Cited 86 Cal. 458.

160. The general rule is, that a surety can recover of the principal only the amount or value which the surety has actually paid. (*Stone v. Hammell*, 83 Cal. 547.)

161. Mrs. L., defendant, when a feme sole, contracted a debt, upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid, by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid. Held, that she cannot defend on the ground that the paper on which the first suit against her was brought expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her; the judgment of the supreme court, being conclusive so long as it stands, cannot be attacked collaterally on the ground that the parties to it did not prosecute the appeal, but must be set aside, if at all, by direct proceeding impeaching it for fraud. (*Bostic v. Love*, 16 Cal. 69.)

162. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed, the undertaking being executed for the benefit of the appellant, the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. (*Bostic v. Love*, 16 Cal. 69.)

Principal and surety, actions between. See Statute of Limitations, VI, 4, 1.

Rights of sureties against homestead. See Homesteads, X, 4.

Rights of surety after payment. See Homesteads, 167.

Trust for benefit of sureties, release of sureties terminates. See Trusts and Trustees, 253.

VI. Rights of Surety Against Cosurety.

163. A surety who has satisfied the principal obligation is entitled to contribution from his cosureties. (*Taylor v. Reynolds*, 53 Cal. 686.)
Cited 75 Cal. 264.

164. In the case of sureties on the official bond of a county treasurer, they all contract together, and with reference to the common responsibility. In case of a breach or loss, each surety has his recourse for contribution on his fellows. (*People v. Buster*, 11 Cal. 215.)

165. The plaintiffs and defendant, and others, who were sureties on the bond of a public administrator, promised and agreed to pay to one F., to whom their principal had become liable, as his successor in the administration of an estate, the amount of the liability, promising and agreeing, each with each and all the others, that they would so pay in certain definite proportions. The plaintiffs, having paid the whole amount, brought their action against the defendant to recover the amount that he should have paid. Held, that under the contract alleged there was no obligation resting upon the plaintiffs to pay the defendant's part of the amount, and therefore their payment was voluntary, and gave rise to no cause of action against the defendant. (*Curtis v. Parks*, 55 Cal. 106.)

166. When an administrator gives two bonds, one when letters are issued, and the other when real estate is about to be sold, and each bond contains the same condition, and the sureties assume a common burden, they are liable to contribution inter sese. (*Powell v. Powell*, 48 Cal. 235.)
Cited 9 Mont. 161.

167. One of four sureties having paid common debt, two of sureties being insolvent, may sue the remaining surety for his half of the debt, without joining the insolvents as parties. (*Burroughs v. Lott*, 19 Cal. 125.)

168. The liability of the cosurety to contribution is primary, and not conditional upon the inability of the surety to recover from his principal. (*Taylor v. Reynolds*, 53 Cal. 686.)

169. Neither notice of the satisfaction of the principal obligation, nor demand for contribution, is required before the commencement of the action for contribution. (*Taylor v. Reynolds*, 53 Cal. 686.)

170. An application under section 709 of the Code of Civil Procedure, by a surety who has paid more than his share of judgment, for execution against his cosureties, must be upon notice. (*Davis v. Heimbach*, 75 Cal. 261.)

171. Courts of equity and courts of law have concurrent jurisdiction in enforcing contribution between co-sureties. The jurisdiction of courts of equity is based upon the principle that equality of burden is equity; that of courts of law is based upon the im-

plied promise of each surety to contribute his share, if necessary, to make up the common loss. (*Chipman v. Morrill*, 20 Cal. 130.)

172. If one of two sureties dies, and his executor pays all the money for which both became liable, without having the claim allowed in the probate court, he, as executor, can recover the demand for a contribution from the other surety. (*Dussol v. Bruguere*, 50 Cal. 456.)

173. If one of several sureties dies, his executor may be joined with a part of the sureties in an action against another for a contribution. (*Dussol v. Bruguere*, 50 Cal. 456.)

174. When several are sureties, and all but one pay the whole sum for which all became liable, those who pay may maintain a joint action for contribution against the one who failed to pay his proportion, provided they jointly paid the money. (*Dussol v. Bruguere*, 50 Cal. 456.)

175. Whether the objection that insolvent sureties are not parties can be taken except by demurrer for nonjoinder, all the facts and the defects appearing on the face of the complaint, query? (*Burroughs v. Lott*, 19 Cal. 125.)

176. In an action upon contract to recover the money agreed to be contributed in reimbursement of one-half the amount of judgment paid, evidence is admissible to prove that the land bid in by the purchaser at the sheriff's sale was mortgaged to the extent of six thousand dollars, and that a homestead had been declared upon it by the principal debtor before the levy of the execution upon it, as tending to show that the bid at the sale in satisfaction of the judgment was contemplated by the contract, and was not a breach of the contract to pay the judgment. (*Snyder v. Clark*, 100 Cal. 414.)

177. Upon an application, under section 709 of the Code of Civil Procedure, by surety to enforce contribution, the applicant cannot have a contract set aside by which he was bound to pay the whole judgment. (*Davis v. Heimbach*, 75 Cal. 261.)

Actions for contribution, limitation of. See Statute of Limitations, VI, 4, 1.

Action for contribution, court should find on issue in answer as to security held by plaintiff. See Findings, 176.

Sureties, right of to intervene. See Intervention, 13.

VII. Rights Between Surety and Third Person.

178. M. sued L. and attached his property, R. and J., as securities, signed an undertaking on behalf of L. to procure a release of the attached property; R. signed at the request of S; S. deposited with R. a sum of money to secure him against any loss or damage which he might sustain by reason of his signing the undertaking. Held, that the relation of principal and surety did not exist between S. and R., and that if a suit was brought on the undertaking, R. could not retain out of the money deposited by S. any costs and expenses incurred in defending the action. (*Solomon v. Reese*, 34 Cal. 28.)

179. In such case, if S. and J. tender to M. the amount of his judgment against L., and he refuses it, their liability to him ceases, and S. may recover his money back. (*Solomon v. Reese*, 34 Cal. 28.) Cited 57 Cal. 417.

Issuance of execution by sureties, ratification by principal. See Executions, I, 4.

VIII. Surety Corporations.

180. The act of March 12, 1885, providing that a corporation organized under the laws of any of the United States for the purpose of making and guaranteeing bonds and undertakings required by law may be accepted as a sole and sufficient surety on such bonds and undertakings, is not in conflict with article IV, section 25, subdivision 3, of the constitution, prohibiting the passage of special laws regulating the practice of courts of justice; and an undertaking on appeal, given in pursuance of the act, is valid. (*Cramer v. Tittle*, 72 Cal. 12.)

181. Sections 1056 and 1057 of the Code of Civil Procedure, providing that any corporation duly organized for the purpose of becoming a surety upon bonds or undertakings, and which shall have a paid-up capital of not less than one hundred thousand dollars, may become and shall be accepted as sole and sufficient surety upon such bonds or undertakings, and exempting such corporations from annexing to their undertakings the usual affidavit required of natural persons, and providing that no such corporation shall be accepted as surety when its liabilities shall exceed its assets, as ascertained in the manner provided in section 1056, do not make the acceptance of such corporation as sole and sufficient surety upon an undertaking imperative, no matter what the disparity between its amount and the amount of the corporate assets, but it may be required, upon exception to its sufficiency as surety under section 948 of the Code of Civil Procedure, to show surplus assets equal to the amount of its undertaking. (*Fox v. Hale etc. Co.*, 97 Cal. 353.)

182. An undertaking upon appeal, executed by a foreign surety corporation, and signed in behalf of the corporation surety by its second vice-president and its assistant secretary, with the seal of the corporation affixed, will not be declared void, as not being properly signed, where there is nothing to show that such officers were not authorized to sign and deliver it. (*Gutzeit v. Pennie*, 95 Cal. 598.)

183. A motion to dismiss an appeal upon the ground that the undertaking was executed by a foreign surety corporation which had not filed with the secretary of state a designation of some person residing in this state upon whom service of process could be made, as required by the act of April 1, 1872 (Stats. 1871-72, p. 826), will be denied, where it appears from the certificate of the insurance commissioner of this state that the surety corporation is duly authorized to transact business in this state. (*Gutzeit v. Pennie*, 95 Cal. 598.)

184. Section 1056 of the Code of Civil Procedure, giving the insurance commissioner

the same jurisdiction and powers to examine the affairs of a surety corporation as he has in other cases, and requiring him to file similar statements and issue similar certificates, and section 616 of the Political Code, providing that the commissioner is not authorized to issue such a certificate to a foreign insurance company until it has first filed in his office "the name of an agent and his place of residence in this state, on whom summons and other process may be served in all actions or other legal proceedings," apply to a foreign surety company, and when such a corporation has filed with the insurance commissioner the designation required by section 616, that is all that is required of it in the manner of naming an agent upon whom process may be served, to entitle it to do business in this state, although the failure to file such designation with the secretary of state might deprive it of the benefit of the statute of limitations, as provided by the second section of the act of April 1, 1872. (*Gutzeit v. Pennie*, 95 Cal. 598.)

185. There is presumption that insurance commissioner properly performed his official duty in issuing the certificate, and such certificate is prima facie evidence that the surety company has complied with section 616 of the Civil Code, though it does not expressly so state. (*Gutzeit v. Pennie*, 95 Cal. 598.)

SURFACE WATER.

See Easements.

Preventing flow in grading streets. See Streets, 180, et seq.

SURGEONS.

See Physicians.

SURPLUSAGE.

Pleadings, surplusage in. See Pleading and Practice, VII, 3.

Verdict, surplusage in. See Verdict, II.

Word in will repugnant to clear intent. See Wills, 194.

SURPRISE.

Excusable, setting aside default. See Defaults, IX, 9, c.

New trial for. See New Trial, IV, 20.

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Circumstances not constituting, in execution sale. See Executions, 179.

SURRENDER.

Premises, surrender of. See Landlord and Tenant, XIII, 2.

Lease, surrender of. See Landlord and Tenant, XI.

SURVEYING LOTS.

San Francisco, surveying lots in. See San Francisco, XII.

SURVEYOR GENERAL.

1. The federal office of surveyor general is a "lucrative office," and the office of controller of state an "office of profit," under the twenty-first section of the fourth article of

the constitution of this state. (People ex rel. Melony v. Whitman, 10 Cal. 38.)

2. It is the duty of the surveyor, under the Political Code, and also under the law existing before the adoption of the codes, to collect a fee of five dollars from each applicant for land, and his failure to do so is a non-performance of duty, and a breach of his official bond, for which he and his sureties are liable. (People v. Gardner, 55 Cal. 304.)

Qualification by, necessity of. See Offices and Officers, 43.

Certified copies of records of. See Evidence, II, 7, c.

Lines of counties run by, conclusiveness. See Counties, 31.

Construction of statute providing for traveling expenses. See Attorney General, 8.

Duty and power in land contests. See Public Lands, XVII, 5.

Duty to hear land contest. See Public Lands, XVII, 5.

Reference of land contest. See Public Lands, XVII, 5.

Duty to obey judgment in land contest. See Public Lands, XVII, 13.

Mandamus against. See Mandamus, II, 12, f.

Action on official bond of. See Bonds, 105.

SURVEYORS.

County surveyors, right to purchase public lands. See Public Lands, XIV, 9.

Contract with, when void. See Contracts, 173.

Testimony of. See Boundaries, II, 8, a.

County surveyor is agent for sale of swamp lands. See Swamp and Overflowed Lands, 68.

Power to approve survey or refer contest. See Swamp and Overflowed Lands, 55.

SURVEYS.

See Surveyor General.

1. A witness who is not a county surveyor may be admitted to testify to a survey which he has made, although he is not called to rebut or explain a survey made by a county surveyor. (Doherty v. Thayer, 31 Cal. 140.)

2. In an action of ejectment, where there is a conflict of surveys of the land in controversy, it is not prejudicial error to refuse to allow the defendant to answer a question as to whether, in running his line of survey, it fell north or south of a certain wharf, where it appeared that he was not possessed of any knowledge where the true line ran. (Burdell v. Taylor, 89 Cal. 613.)

3. An official map of a town plat which, by reference to monuments established, or by some other mode, refers to a survey, is presumed to correctly represent the survey as actually made; but if there is a discrepancy between the map and the survey in the field, the survey must prevail, if the position of the points and lines established by the survey can be proved. (O'Farrel v. Harney, 51 Cal. 125.)

Cited 77 Cal. 78; 80 Cal. 80.

Maps. See Maps.

Conflict between map and survey, survey controls. See Deeds, 175.

Control in case of contradiction. See Deeds, 175, 176.

Conflicting boundaries in. See Boundaries, 59, 60.

Description by reference to. See Deeds, VI, 4; Insurance, II, 1.

As evidence. See Evidence, III, 6.

Boundaries, surveys as evidence of. See Boundaries, II, 8, b.

Record of survey of land-office as evidence. See Evidence, III, 9, c.

As evidence of character of land. See Swamp and Overflowed Lands, 10, et seq.

Contradicting witness by means of map of survey. See Witnesses, 292.

Judicial notice of. See Judicial Notice, 55.

Parol evidence affecting. See Evidence, VII, 3.

Uncertain, defective, or ambiguous survey. See Boundaries, II, 5.

Roads, survey of. See Highways, I, 3, h.

Streets, survey of. See Streets, 3, et seq.

Land granted to railroad, survey of. See Railroads, 41.

Public land, survey of. See Public Lands, IV.

Swamp and overflowed lands, survey of. See Swamp and Overflowed Lands, IV.

Spanish grant, survey of. See Mexican Lands, I, 24.

San Francisco, conclusiveness of survey of. See San Francisco, III.

Pueblo, survey of, how made. See San Francisco, II, et seq.

Water front line, point of commencement of survey of. See San Francisco, 235.

Field notes. See Public Lands, 78.

SURVIVAL OF ACTIONS.

What actions survive. See Abatement, II.

Action for false imprisonment does not survive. See False Imprisonment, 9.

Executor may sue for trespass committed in deceased's life. See Executors and Administrators, 262.

SURVIVORSHIP.

1. Murder of husband and wife, perpetrated at the same time, is a calamity within the meaning of section 1963 of the Code of Civil Procedure. (Hollister v. Cordero, 76 Cal. 649.)

2. When there is nothing to show which expired first, and husband and wife have perished in the same calamity, both being between the ages of fifteen and sixty, the husband is presumed to have survived. (Hollister v. Cordero, 76 Cal. 649.)

3. When both husband and wife perish in the same calamity, no presumption of survivorship of the wife arises from the fact that an order of a probate court granting letters of administration upon her estate recites that she was "the surviving wife" of her husband. In a proceeding by her administrator to set aside the probate of her husband's will, it is error to refuse evidence aliunde upon the question of survivorship. (Sanders v. Simcich, 65 Cal. 50.)

Right of. See Cotenancy, I.

Rights of survivor. See Homesteads, XV, 3.

Right of survivor in community property.
See Husband and Wife, II, 3, d.

SUSCOL GRANT.

Right arising out of. See Mexican Land, I, 21.

SUSPENSION OF ALIENATION.

See cross-references under Alienation.

In grant of public land. See Public Lands, 353.

SUTTER COUNTY.

Levee district, supervisors cannot erect. See Swamp and Overflowed Lands, 178.

SUTTER GRANT.

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Construction of and rights arising out of. See Mexican Lands, I, 21.

Deed by Sutter includes site of Sacramento. See Deeds, 273, 274.

SWAMP AND OVERFLOWED LANDS.

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II. Tide Lands and Salt Marsh Lands, What are; Inclosure of Beach.

III. Ownership of; Grant to State and Object of; Construction of Statutes; Title, When Passes to; Duty of State.

IV. Survey of.

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VII. Agreement to Purchase for Another.

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a. Power of State Over; Construction and Constitutionality of Statute.

b. Petition.

c. Nature of; Creation by Special Act; Evidence of Existence of.

d. Organization Cannot be Colaterally attacked.

e. By-laws.

f. Boundaries of; What may be Included.

g. Estimate of Work; Approved Plans; Warrants and Approval of.

h. Right to Erect and Maintain Levee; Conditional Liability of Members on Contract.

i. Reorganization.

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k. Assessments.

A. Statutes Governing; Construction and Constitutionality of.

B. Commissioners, Appointment, View, and Report of.

C. How Levied; Description of Land; Effect of Omission of Land.

D. Actions on; Parties; Pleadings; Joinder of Actions; Summons; Action, When Barred.

E. Validity; Evidence.

F. Payment; Interest; Counsel Fees.

L. Additional Assessments.

Spanish grant covering swamp land. See Mexican Lands, I, 20.

Railroad grant covering swamp and overflowed land. See Railroads, 68.

Streets on water front. See Streets, II.

Extending streets into tide waters. See San Francisco, XI.

Wharves built into tide water. See Wharves, III.

Wing-dam obstructing reclamation is a private nuisance. See Watercourses, XI, 2.

Owner of swamp and overflowed land cannot obstruct navigation. See Watercourses, 17.

I. What Lands are Swamp and Overflowed; Determination of and Evidence as to.

1. If land is not susceptible of cultivation in grain or other staple productions, by reason of overflow, it is "swamp and overflowed," and the fact that after the annual overflow a crop of grass will spring up which will make hay does not prevent it from being "swamp and overflowed." (Keeran v. Griffith, 31 Cal. 461.)

2. In order to render lands "swamp and overflowed," within meaning of act of Congress of September 28, 1850, they must have been usually rendered unfit for successful cultivation prior to September 28, 1850, by reason of the overflow. (Thompson v. Thornton, 50 Cal. 142.)

3. Test by which question whether land is "swamp and overflowed" land, must be determined is not whether it may be profitably cultivated, but whether it may be successfully cultivated. (Wright v. Carpenter, 47 Cal. 436.)

4. If land subject to overflow was, September 28, 1850, such that, annually, after the subsidence of the water, a crop of either wheat, rye, barley, oats, corn, buckwheat,

peas, or beans could be raised on it, it was not swamp and overflowed within the meaning of the act devoting such land to the states. (*Keeran v. Allen*, 33 Cal. 542.) Cited 47 Cal. 437; 50 Cal. 145; 73 Cal. 67.

5. The bed of a river through which the water has ceased to flow because of a change in the course of the river is not swamp and overflowed land within the meaning of the act of Congress of September 28, 1850, nor within the meaning of the state statutes allowing such land to be appropriated; and a patent issued therefor, upon an application for its purchase as swamp and overflowed land, is void. (*Edwards v. Rolley*, 96 Cal. 408.)

6. Government of United States has no right to determine by ex parte survey of its own what are and what are not swamp and overflowed lands in this state. (*Kernan v. Griffith*, 27 Cal. 88.)

7. Neither the general government or the state, while proceeding separately to determine whether land is swamp and overflowed, is bound by the acts of the other. (*Keeran v. Griffith*, 31 Cal. 461.)

8. The fact whether a given tract of land is swamp, or overflowed, or dry land, cannot be determined by the separate decision of either the state or the United States, but must be settled by evidence given in the course of judicial proceedings. (*Kernan v. Griffith*, 27 Cal. 88.)

9. Until general government and state concur in determining what lands are "swamp and overflowed," the question whether a given subdivision is "swamp and overflowed," as between parties claiming adversely under the state and general government, is to be determined not upon official certificates or patents of either the state or general government, but upon evidence of the actual condition of the land September 28, 1850, the date of the grant to the state. (*Keeran v. Griffith*, 31 Cal. 461.)

10. In the trial of an issue between one claiming under the state and a pre-emption claimant, as to whether a particular tract of land is swamp and overflowed, the approved plat of the survey by the United States is admissible in evidence to show the lines of the legal subdivisions, but not to prove that the lands are swamp and overflowed. (*Robinson v. Forrest*, 29 Cal. 317.) Cited 31 Cal. 464.

11. One who claims a tract of land under a patent issued to him by this state, conveying the same as swamp and overflowed land, is not bound, in an action of ejectment brought by him against one claiming under the Homestead Act, by a survey of the United States designating the same as high land, but may introduce evidence of the real character of the land. (*Kernan v. Griffith*, 27 Cal. 88.) Cited 28 Cal. 603; 29 Cal. 319, 322; 33 Cal. 545; 34 Cal. 584; 47 Cal. 182.

12. Under section 4 of the act of Congress of July 23, 1866, quieting land titles in California, the plat of the survey of a township, having lands represented thereon as swamp and overflowed, upon being approved by the

United States surveyor general for California, is conclusive between the state and the United States as to the character of the lands so represented, and vests the title thereto in the state, as of the 28th of September, 1850, the date of the passage of the Swamp Land Act; and this result follows, although the commissioner of the general land-office has neglected to certify the land over to the state as swamp and overflowed, as required by the act of July 23, 1866. After the plat has been so approved, the United States land department has no power to determine that the land represented thereon as swamp and overflowed is not of that character, or to dispose of the same under the homestead or pre-emption laws. (*Tubbs v. Wilhoit*, 73 Cal. 61.)

Cited 88 Cal. 277.

13. Map of the United States survey, approved by the surveyor general of the United States, which designates a particular subdivision of land as high land, is not evidence tending to show that the land was not "swamp and overflowed" as against one claiming under the state. (*Keeran v. Griffith*, 31 Cal. 461.)

14. In trying the issue whether land is swamp or overflowed, if the same has not been cultivated, evidence may be introduced to show that crops may be raised on land in the neighborhood similarly situated. (*Keeran v. Allen*, 33 Cal. 542.) Cited 34 Cal. 584, 586.

15. In ejectment under a United States patent, defendant cannot show that the part of the land covered by the patent of which he was in possession was swamp and overflowed land, unless he shows that the greater part of any legal subdivision was wet and unfit for cultivation. (*Hogaboom v. Ehrhardt*, 58 Cal. 231, 233.)

16. In an action to recover possession of land, where one of the parties claims the same by virtue of some right or title derived from the United States, and the other claims the same as a purchaser from the state as swamp and overflowed land, the party claiming under the United States has a right to introduce oral testimony to show that the land is not swamp and overflowed. (*Thornton v. Thompson*, 28 Cal. 602.)

17. If the validity of a certificate of purchase of land from the state, as swamp and overflowed, is put in issue and tried in an action in which the state is not a party, and if the question whether the land is swamp and overflowed is also put in issue and tried in the same action, and it is adjudged that the certificate is invalid, and that the land is not swamp and overflowed, the judgment estops the parties and their privies from afterward proving that the land is swamp and overflowed, and therefore the property of the state. (*Clink v. Thurston*, 47 Cal. 21.)

Decree as to character of, who bound by. See *Mexican Lands*, 155, 156.

Patent as evidence that land is swamp and overflowed. See post, 154, 155.

Estoppel to dispute nature of lands. See *Certiorari*, 186.

II. Tide Lands and Salt Marsh Lands, What are; Inclosure of Beach.

Ownership of. See post, III.

18. The descriptive phrase "tide lands," in the legislation of this state, applies to land covered and uncovered by the ordinary tides, which the state owns by virtue of its sovereignty. (*Rondell v. Fay*, 32 Cal. 354.) Cited 69 Cal. 126; 12 Or. 502.

19. The words "tide lands," as used in the act of May 14, 1861, entitled "An act to provide for the sale of marsh and tide lands of this state," mean such lands only as are covered and uncovered by the tide, and does not include lands permanently submerged. (*People ex rel. Teschemacher v. Davidson*, 30 Cal. 379.) Cited 32 Cal. 364; 15 Cal. 261; 12 Or. 503.

20. By designation "usual" or "ordinary high-water mark," as applied to tide waters, is meant the limit reached by the neap tides—that is, those tides which happen between the full and change of the moon twice in every twenty-four hours. (*Teschemacher v. Thompson*, 18 Cal. 11.) Cited 26 Cal. 354; 69 Cal. 126; 75 Cal. 399, 402.

21. The term "salt marsh lands," in the legislation of this state, applies to a certain class of swamp and overflowed lands held by the state under the Arkansas Act. (*Rondell v. Fay*, 32 Cal. 354.)

22. A beach, upon tide water, may constitute a portion of the inclosure of a tract of land. (*Brumagim v. Bradshaw*, 39 Cal. 24.)

Tide-land commissioners, salaries of. See Controller, 14.

Beach and water lots in San Francisco. See San Francisco, XIV, 10.

Tidal stream as boundary. See Boundaries, 91.

III. Ownership of; Grant to State and Object of Construction of Statute; Title, When Passes to; Duty of State.

23. Land which state owns by virtue of its sovereignty is such as is covered and uncovered by the ebb and flow of the neap or ordinary tides. (*Ward v. Mulford*, 32 Cal. 365.) Cited 69 Cal. 126.

24. From the date of the treaty of 1848 the tide lands in California—unless they had been reserved by Mexico for military purposes, or otherwise disposed of by her—were held by the United States in trust for the future state; and upon the admission of California the legal title thereto vested in the state. (*Le Roy v. Dunkerly*, 54 Cal. 452.)

25. Lands below ordinary high-water mark belonged to the Mexican government by virtue of its sovereignty, and were no part of the pueblo lands of San Francisco, but passed to the state of California immediately upon its admission to the Union; and the government of the United States had no power to grant such lands to the city of San Francisco. (*United Land Assn. v. Knight*, 85 Cal. 448.)

26. The right of the state to lands under water, where the tide ebbs and flows, is

founded upon her sovereign control over the easement, or the right of navigation. (*Guy v. Hermance*, 5 Cal. 73.) Cited 64 Cal. 499; 69 Cal. 126.

27. Where the right of the state to land under water where the tide flows is destroyed the right of the state ceases, except to prosecute for purpresture, and have the easement restored. (*Guy v. Hermance*, 5 Cal. 73.)

28. On the formation of this state, the title to water property passed to this state. (*Chapin v. Bourne*, 8 Cal. 294.) Cited 69 Cal. 126.

29. Whether this state has inchoate title to lands within her limits called swamp lands depends entirely upon the question whether they are swamp lands within the meaning of the act of Congress of September 28, 1850. (*Kile v. Tubbs*, 23 Cal. 431.)

30. Lands which are swampy or subject to such periodical overflows as to injure or destroy the crops belong to the state by virtue of the act of Congress of September 28, 1850, commonly called the "Arkansas Act." (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.) Cited 32 Cal. 364; 40 Cal. 473; 46 Cal. 107; 73 Cal. 67; 15 Or. 261.

31. Section 1 of the act of Congress of September 28, 1850, commonly called the Swamp Land Act, is a grant in presenti to each state of the swamp and overflowed lands within its limits. The provision made in the second section of the act for a patent is for the purpose of furnishing to the grantee documentary evidence that the land was swamp and overflowed, and a further assurance of title. (*Tubbs v. Wilhoit*, 73 Cal. 61.) Cited 57 Cal. 375.

32. The act of Congress of September 28, 1850, granting to California the swamp and overflowed lands within the state, vested in said state the absolute ownership of all of said lands then undisposed of. (*Kernan v. Griffith*, 27 Cal. 88.) Cited 27 Cal. 327; 45 Cal. 668; 73 Cal. 63; 4 Or. 287; 5 Or. 57-59; 16 Or. 542.

33. The doctrine that the state, under the act of 1850, became the absolute owner of all the swamp land within her limits undisposed of is true as a general proposition, but some modification of this will be required when its application is sought in respect to certain portions of those lands situated adjacent to the line dividing such lands from the dry land. (*Robinson v. Forrest*, 29 Cal. 317, 323.) Cited 81 Cal. 594.

34. The object of the federal government in donating the swamp lands to the several states was to promote the speedy reclamation of the lands, and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity. (*Kimball v. Reclamation Fund Com.*, 45 Cal. 344.) Cited 73 Cal. 133.

35. Rights of the state under the grant of September 28, 1850, do not depend upon nor are they limited by the decisions of the state courts with respect to controversies upon the public lands of the United States. Those decisions do not enter into nor operate upon

the subsequent legislation of Congress in such manner as to require that the legislation, or its affirmance of rights recognized by the state courts as existing between occupants upon the public lands of the United States, be construed as an attempt to deprive the state of its vested rights. (*Lux v. Haggin*, 69 Cal. 255.)

36. Act of Congress of March 12, 1860, to extend provisions of act of September 28, 1850, granting swamp lands, relates only to lands which were in fact swamp and overflowed, and cannot be applied to lands confirmed to the state of California by the act of July 23, 1866, because selected by the state as swamp and overflowed. (*Sacramento S. B. v. Hynes*, 50 Cal. 195.)

37. Act of Congress passed July 23, 1866, validating selections of lands as swamp and overflowed theretofore made by the state of California, requires the commissioner of the general land-office to certify over to the state all such lands, after the performance of the several official acts therein mentioned, to wit, after the surveyor general of the United States has made and forwarded to the commissioner approved plats of all townships surveyed by the state, as swamp and overflowed, in accordance with the United States surveys. (*Sacramento S. B. v. Hynes*, 50 Cal. 195.)

38. Phrase "legal subdivisions," as used in act of Congress passed September 28, 1850, relating to swamp and overflowed lands, refers to the smallest subdivision under the Congressional system of surveys. (*Robinson v. Forrest*, 29 Cal. 317.)
Cited 45 Cal. 668; 70 Cal. 496; 76 Cal. 233; 88 Cal. 593.

39. Immediately upon the passage of the act of Congress of September 28, 1850, this state became the owner, with absolute power of disposition, of all swamp lands within her limits which had not been disposed of. (*Summers v. Dickinson*, 9 Cal. 554.)
Cited 27 Cal. 89, 327; 45 Cal. 668; 4 Or. 287; 5 Or. 57, 58; qualified 29 Cal. 322.

40. The language of the act of Congress conveyed to the state a present interest in the lands. The description of "swamp and overflowed lands" is sufficient to give the state a present prima facie right. (*Owens v. Jackson*, 9 Cal. 322.)
Cited 16 Or. 542.

41. The state of California became the owner of the swamp lands described in the complaint herein on the 28th of September, 1850, under the act of Congress of that date, commonly known as the Arkansas Act. (*Lux v. Haggin*, 69 Cal. 255.)
Cited 73 Cal. 63.

42. Title of state in no way depends upon patent. The act itself operated as a conveyance. (*Summers v. Dickinson*, 9 Cal. 554.)

43. Title of state in no way depends upon the issuance of a patent to the state by the United States. (*Kernan v. Griffith*, 27 Cal. 88.)

44. The state of California does not acquire a legal title to the swamp lands within her limits until they have been certified to the

state by the general land-office, and a patent issued to the state therefor by the United States. (*Kile v. Tubbs*, 23 Cal. 431.)

45. The title to swamp and overflowed lands never vests in the state until the commissioner of the general land-office certifies them over to the state as swamp and overflowed; and ejectment by one claiming title to such lands acquired from the state cannot be maintained against persons in possession under the United States patents, without showing such certification. (*Wright v. Roseberry*, 63 Cal. 252.)
Cited 63 Cal. 309.

Issuing of patent is not necessary to vest title. See post, 62.

46. Under the Swamp Land Act of Congress of September 28, 1850, and the act of July 23, 1866, to quiet land titles in California, the plat of the survey of the township approved by the United States surveyor general of California showing any subdivision of land in said township to be swamp and overflowed is conclusive between the state and the United States, and vested the title thereto in the state as of the twenty-eighth day of September, 1850, and the federal land department had no jurisdiction thereafter to order a hearing as to the character of said land, or to determine that the same was not swamp and overflowed, or to make alterations in the approved plat or survey, or to issue a patent for any portion of the land shown by the original approved plat to be swamp and overflowed. (*Wilhoit v. Tubbs*, 83 Cal. 279.)

47. In a suit in ejectment between a plaintiff claiming the land as swamp and overflowed, purchased by him from the state, and a defendant claiming it under the United States as dry land, the township plats from the land-office are admissible in evidence on behalf of the plaintiff, as tending to prove that the land had been surveyed, and that the title had vested in the state under the act of Congress of July 23, 1866. (*Thompson v. Thornton*, 50 Cal. 142.)

48. In the absence of other evidence, the date of the approval by the surveyor general of the United States of the plat of a township containing swamp and overflowed lands must be treated as the date of the segregation of the lands as swamp and overflowed. (*Garfield v. Wilson*, 74 Cal. 175.)
Cited 96 Cal. 118.

49. The land in controversy was surveyed by the county surveyor of San Joaquin county upon an application to purchase made by the assignor of the plaintiff. The surveyor made a plat and field-notes of the land, in accordance with the United States survey of the township, section, and quarter section, described the land as swamp and overflowed, and containing one hundred and sixty acres, and returned the plat and field-notes to the state surveyor general, who received and filed the same in his office on the 22d of October, 1865, and approved them on the 23d of November, 1865. Held, that the plats and surveys were not the segregation maps and surveys referred to in section 4 of the act of Congress of July 23, 1866, and in section 2488 of the United States Revised Statutes, and did not

vest the title of the United States to the land in the state. (Heath v. Wallace, 71 Cal. 50.)

50. In accepting the grant of swamp lands, the state of California was bound to carry out in good faith the objects for which it was made. The legislature has, at all times, recognized the binding force of this obligation. (Kimball v. Reclamation Fund Com., 45 Cal. 344.)

Shore belongs to state by virtue of sovereignty. See Public Lands, III, 1.

IV. Survey of.

51. In surveying swamp and overflowed lands, the county surveyor is the agent of the state, and it is his duty to connect with the lines of the United States survey. (Mahon v. Richardson, 50 Cal. 333.)

52. The state surveyor general, in surveying swamp and overflowed lands, should conform his survey in the field to the surveys of the upland adjoining made by the United States; but if he does not do so, and the survey and stakes and marks in the field place a line between sections or subdivisions to the one side or the other of the United States survey, the courts will not inquire into the matter, but parties who purchase the lands on either side of the line are bound by this survey in the field. (Ringstorf v. Guth, 50 Cal. 86.)

53. Parties who purchase from the state adjoining subdivisions of swamp and overflowed lands are bound by the lines between the sections or subdivisions fixed by the survey made in the field by the state surveyor general, even if such lines do not coincide with the United States survey, or with the field-notes sent to the office of the surveyor general of the state. (Ringstorf v. Guth, 50 Cal. 86.)

54. Survey ought to fix lines with the requisite precision. (Hinckley v. Fowler, 43 Cal. 56.)

55. The surveyor general of this state, since the passage of the act of April 4, 1870, supplementary to the act of 1868, for the sale of state lands, has had no authority to approve of a survey of land as swamp and overflowed, nor to refer a contest between applicants for the purchase of such lands to the district court for trial, until six months after the land has been segregated as swamp and overflowed by authority of the United States or of this state by legislative enactment. (Cox v. Jones, 47 Cal. 412.)

56. A representation on the approved plat of a township survey that certain lands embraced therein are subject to periodical overflow is not equivalent to a representation that the land is swamp and overflowed, within the meaning of section 4 of the act of Congress of July 23, 1866, or of section 2488 of the United States Revised Statutes. (Heath v. Wallace, 71 Cal. 50.) Distinguished 73 Cal. 67.

57. Under section 3445 of the Political Code, the survey of swamp lands which have been segregated as such, but not sectionized, in order to be an official act by the county surveyor, acting as an officer of the state land-

office, must be made by the county surveyor for one desiring to purchase, and for that purpose; and the certified copy of the record of a survey, made by the county surveyor upon the application of another person, cannot be used as the basis of an application, in lieu of a certificate of a survey made at the applicant's request, as required by section 3445 of the Political Code. (Maddux v. Brown, 91 Cal. 523.)

58. Under sections 3 and 7 of the act of April 27, 1863, the duty of the county surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application for a survey are officially put before him. A survey made before this is done is but the survey of a private person and has no official sanction. (People v. Cowell, 60 Cal. 400.)

59. An appointment of a person as a deputy by a county surveyor, by the certificate signed by the surveyor as a private individual, and not in his official capacity, and which purports to appoint the deputy as a deputy to survey a certain tract of swamp land, instead of appointing him as the deputy surveyor of the county, and which was not filed until after the survey by such deputy, is void, and does not tend to prove that the survey was made by a deputy surveyor de facto. (Maddux v. Brown, 91 Cal. 523.)

60. Swamp and overflowed lands situated in township 5 north, range 5 east, Mount Diablo meridian, were purchased from the state prior to the completion of the government surveys. The lands were surveyed by the county surveyor under a statute of the state then in force. One of the lines described in the field-notes commenced at the southwest corner of section 1 and ran north eighty chains to the township line. A certificate of purchase was issued in accordance with this survey, and subsequently a patent was also issued in which reference was made both to the survey and field-notes. At the time of the survey the section lines had not been run, but the township lines referred to in the field-notes had been run and established. When the section lines were run the southwest corner of section 1 was located considerably more than eighty chains south of the township line. The question was as to the northern boundary of the lands so purchased. Held, that the township line constituted the boundary. (Rice v. McKune, 63 Cal. 124.)

Survey as evidence and conclusiveness of. See ante, 46, 47.

Survey of swamp land as evidence. See Evidence, III, 9, c.

V. Power to Sell.

61. The state of California, since the twenty-eighth day of September, 1850, has had the absolute power of selling the swamp and overflowed lands within its limits. (Kernan v. Griffith, 27 Cal. 88.) Cited 3 Or. 397.

62. This state has the right to dispose of the swamp and overflowed lands granted to her by the act of Congress of September 28, 1850, prior to the issuing of a patent from the United States, so as to convey to the patentee

a present title as against a trespasser. (*Owens v. Jackson*, 9 Cal. 322.)
Cited 27 Cal. 327; 29 Cal. 322; 45 Cal. 668; 5 Or. 57, 58.

63. The act of the legislature of 1858 did not forbid the sale of swamp and overflowed lands within the limits of five miles beyond the city and county of San Francisco, and where a certificate of purchase had issued under that act for lands within those limits, the act of 1868 and amendments thereto containing a prohibition against the sale of such lands do not defeat the rights of the purchaser, or those claiming under him, to a patent. (*Easton v. O'Reilly*, 63 Cal. 305.)
Cited 96 Cal. 411.

64. The act of April 21, 1858, for the sale of "swamp and overflowed lands," does not provide for the sale of any lands except those which fall within the description of the Arkansas grant of 1850. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)
Cited 62 Cal. 258, 259; 99 Cal. 308.

65. The proviso to the first section of the act of April 21, 1858, for the sale of "swamp and overflowed lands," refers only to the narrow channels, within the ebb and flow of the tide, which thread the "swamp lands" known as salt "marsh." (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)

66. The act of May 13, 1861, "for the reclamation and segregation of swamp and overflowed land," etc., provides only for the purchases to be made after the passage of the act, and the segregation of the lands in accordance with the nineteenth and twentieth sections of the act. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)

67. The act of April, 1859, amendatory of the act of April 21, 1858, for the sale of swamp and overflowed lands of this state, only refers to such lands as are offered for sale by the act of April 21, 1858, of which it is amendatory. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)
Cited 46 Cal. 107.

68. A county surveyor is, under the statute, one of the agents of the state for the sale of swamp and overflowed lands. (*Edwards v. Estell*, 48 Cal. 194.)

69. No provision has been made by law for the sale of the lands, owned by this state by virtue of its sovereignty, on the shore of the sea and its bays and inlets, which are usually overflowed by the neap tides. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)
Cited 99 Cal. 308.

70. The state can make no disposition of the lands it holds by virtue of its sovereignty prejudicial to the rights of the public to use them for navigation and fishery, but it may dispose of such lands for the purpose of promoting the interests of navigation or of reclaiming them from the sea, where it can be done without prejudice to the public right of navigation. (*Ward v. Mulford*, 32 Cal. 365.)

71. The words "tide lands," used in the act of May 14, 1861, entitled "An act to provide for the sale of the marsh and tide lands of this state," only refer to such tide lands as are subject to periodical overflow, but are susceptible of reclamation, so as to be made

valuable for agricultural purposes. (*People ex rel. Pierce v. Morrill*, 26 Cal. 336.)

72. Plaintiff claims title to portion of the lands sued for in this action of ejectment under state patent issued May 18, 1872. The premises embraced in the patent are below high-water mark, and include a wharf which extends into the water to such depth that vessels can be moored at it for receiving and discharging cargo. Held, (1) such tide lands were not subject to sale under the act of 1868; (2) but the curative act of March 27, 1872, validated sales of such lands, and the title of the state vested in the plaintiff under that act. (*Upham v. Hosking*, 62 Cal. 250.)
Cited 69 Cal. 126.

73. The act of March 28, 1868, for the sale of lands belonging to the state, does not authorize the sale of the beach of the ocean below high tide. (*Kimball v. Macpherson*, 46 Cal. 103.)
Cited 62 Cal. 258.

74. Nothing short of a very explicit provision in the law to that effect will justify the court in holding that the legislature intended to permit the shore of the ocean, between high and low water mark, to be converted into private ownership. (*Kimball v. Macpherson*, 46 Cal. 103.)

75. In action to restrain sale or other disposition of tide lands by the state, it is not enough to allege that she has no title, but it should be shown in what manner her title was lost, or for what reason she should be enjoined from selling and disposing of the land which, *prima facie*, is subject to her control. (*Farish v. Coon*, 40 Cal. 33.)

76. In action by state to cancel certificate of purchase of tract of tide land issued to the defendant, under the act of April 27, 1863, the court, in effect, found that the tract in controversy (which embraces some sixty-eight acres) is a portion of the frontage of the bay of Monterey, which for more than twenty-five years has been, and still is, used for commercial and maritime purposes, being that portion of the frontage of the bay at which sea going vessels trading with Santa Cruz touch and load and unload; that much the greater portion of the land was and is permanently beneath the waters of the bay, and that all of it, except some points and bluffs comprising not over one or two acres, was, at the date of the survey and application under which the appellant claims, covered by the waters of ordinary tides; that the whole of the tract (except the points and bluffs above referred to) was and is loose drifting sands, shifting with the action of the waves and winds; that none of the tract was, at the time of the survey and application, or is now, of any value for agricultural purposes; and that the cost of reclaiming it would greatly exceed its value when reclaimed for any purpose of tillage and agriculture. Held, the finding in effect is that the land was not reclaimable for agricultural purposes; and, applying this test, the judgment of the court below annulling and canceling the certificate must be affirmed. (*People v. Cowell*, 60 Cal. 400.)

Cited 62 Cal. 258; 91 Cal. 525; 12 Or. 350.

Certificate of purchase as swamp lands of tide land on Sacramento river. See post, 116.

Grant of beach and water lots to San Francisco. See San Francisco, XIV, 10, b.

Act forbidding injunction against commissioners to sell tide lands. See Constitutional Law, 292.

Tide lands not subject to location under state land warrant. See Public Lands, 459, et seq.

Mexican grant of tide land, effect of. See Mexican Lands, 195.

Alcalde grant of tide lands, what act does not confirm. See Mexican Lands, 523.

VI. Right of Purchase; Occupancy; Suitableness for Cultivation; Actual Settlers.

77. A county treasurer is not disqualified by reason of his office from applying for and purchasing swamp and overflowed land from the state, he not being an agent of the state for the sale of the lands, nor subject to the rule that one acting in a fiduciary capacity cannot deal with himself as an individual. (Miller v. Byrd, 90 Cal. 150.)

78. Act of 1870, supplementary to act of 1868, did not prohibit occupant of swamp and overflowed lands from purchasing the same after the expiration of ninety days from the time the plat of survey was filed in the United States land-office, if no other valid application has been made. (Christman v. Brainard, 51 Cal. 534.)

79. One may have preferred right of purchase by reason of his occupation and improvement without actually residing upon it. (McIntyre v. Sherwood, 82 Cal. 139.) Doubt 88 Cal. 461, 462.

80. Under the act of March 18, 1868 (Stats. 1867-68, p. 514), in relation to swamp and overflowed lands, one person was not allowed to purchase such lands, if in the occupation of another. (Christman v. Brainard, 51 Cal. 534.)

81. Evidence tending to prove that an applicant for the purchase of swamp lands determined to settle on the land at the time he examined the boundaries thereof, and then intended to proceed immediately to build a cabin, and to complete it within a reasonable time, and that he commenced to build the cabin as soon as he could get the lumber, and actually completed it within a week after his application, is sufficient to justify a finding that he settled on the land at the time of his application for its purchase. (McDonald v. Taylor, 89 Cal. 42.)

82. The fact that an applicant who testified that he was living upon swamp land suitable for cultivation removed his family therefrom temporarily, because of the ill health of a member of the family, does not show nor tend to show that he was not an actual settler upon the land. (Maddux v. Brown, 91 Cal. 523.)

Actual settler, priority of. See post, 157.
Effect of new constitution requiring sale to actual settlers, on certificate. See post, 115.

83. The state is not estopped from asserting that swamp lands granted to it by the act of

1850 are fit for cultivation within the meaning of the state constitution, and is not bound to apply, as between herself and purchaser, the test found in the Arkansas Act. (Fulton v. Brannan, 88 Cal. 454.) Cited 89 Cal. 387; 96 Cal. 118.

84. Swamp lands are unsuitable for cultivation, within the meaning of section 3 of article XVII of the constitution, only where the lands cannot be made fit for cultivation; or where, although they can be so reclaimed, it cannot be done without the co-operation of others, unless by an expenditure greater than can reasonably be expected from a settler upon a tract of three hundred and twenty acres; or where the lands are not fit for human habitation until reclaimed. (Fulton v. Brannan, 88 Cal. 454.)

85. In an action to determine the right to purchase swamp and overflowed lands, evidence is admissible in behalf of an actual settler on the land to show that the land in contest, although granted to the state as swamp and overflowed land, and purchasable as such, had been so far changed in its character by natural causes as to have become suitable for cultivation. (Dewar v. Ruiz, 89 Cal. 385.)

86. All swamp lands which at the time application was made for their purchase were fit for human habitation, and by ordinary farming processes can be made suitable for cultivation, can be sold only to actual settlers, and in quantities not exceeding three hundred and twenty acres. (Fulton v. Brannan, 88 Cal. 454, cited 88 Cal. 521; 89 Cal. 44, 77; 96 Cal. 118; McNeely v. Lynch, 88 Cal. 519, cited 96 Cal. 118.)

87. Swamp and overflowed lands granted to the state by the act of Congress of September 28, 1850, which are ready for occupation, and which by ordinary farming processes are fit for agricultural purposes, are within the meaning of section 7, article XVII, of the constitution, and can be sold only to actual settlers, and in quantities not exceeding three hundred and twenty acres. (McDonald v. Taylor, 89 Cal. 42.)

88. Under sections 2 and 3 of article XVII of the constitution, swamp and overflowed lands which have become fit for cultivation before the application to purchase can be sold only to actual settlers. (Goldberg v. Thompson, 96 Cal. 117; Belcher v. Farren, 89 Cal. 73.)

89. A settler upon land returned as swamp by the United States survey, who has applied for the land, and has proved that each legal subdivision thereof is suitable for cultivation, is entitled to judgment in his favor upon a contest of the right to purchase the land, as against the holder of certificate of purchase issued upon an application made prior to the survey to one who had never been an actual settler upon the land. (Wren v. Mangan, 88 Cal. 274.)

Possession of marsh land. See Forcible Entry and Unlawful Detainer, VI, 6, b, A.

Tide lands, possession of, statute does not run against state. See Statute of Limitations, 24.

Salt marsh land, possession of. See Quiet-ing Title, 38, et seq.

Adverse possession of public lands before issuance of patent. See Public Lands, 148.

Limitation of actions for overflowed land. See Statute of Limitations, VI, 3, d.

Purchaser of interest of city in beach and water lots. See Executions, 266.

VII. Agreement to Purchase for Another.

90. An agreement to acquire swamp and overflowed lands from the state, for the use and benefit of a person other than the applicant, is void under the act of April 27, 1863. The parties to such an agreement are in *pari delicto*, and after the certificate of purchase has come into the possession of the party for whose benefit the application to purchase was made, the applicant cannot maintain an action to compel its specific delivery to him. (*McGregor v. Donnelly*, 67 Cal. 149.) Cited 81 Cal. 515; 91 Cal. 117.

VIII. Application for Purchase and Affidavit; Oath of Allegiance.

91. A party acquires no right to purchase swamp and overflowed land under an application made by the county surveyor for him without his authority, and which is not sworn to by him. (*Allen v. Dake*, 50 Cal. 80.)

Application based on survey made for another. See ante, 57.

92. The application to purchase swamp land which is first presented to the county surveyor must be preferred. (*Allen v. Dake*, 50 Cal. 80.)

93. The facts that a county surveyor fails to indorse on an application to buy swamp land the date of its receipt and to forward it to the surveyor general for approval within the time required by statute, if the applicant does not procure such neglect or omission, do not vitiate his application as against one making a subsequent application. (*Allen v. Dake*, 50 Cal. 80.)

94. Swamp and overflowed lands granted to the state by the United States are not subject to application for purchase before segregation, and no rights attach by reason of an application filed prior to the segregation, nor by reason of the subsequent approval of the application and the issuance of a certificate of purchase based thereon after the segregation. (*Buchanan v. Nagle*, 88 Cal. 591.) Cited 89 Cal. 77, 387; 90 Cal. 165.

95. The Political Code contemplates that no steps shall be taken towards a purchase of swamp and overflowed lands, or to obtain a preference by an application therefor, before the segregation of the lands to the state by the approval of the United States survey, which can alone enable the applicant to describe the exterior boundaries of the land as required by the code. (*Buchanan v. Nagle*, 88 Cal. 591.)

96. Since the year 1874 no application to purchase swamp land has been authorized until after the land has been segregated as such by authority of the United States; and a certificate of purchase issued upon an application made before the survey and segregation of such land by the United States is void. (*Wren v. Mangan*, 88 Cal. 274.) Cited 88 Cal. 592; 89 Cal. 387

97. An application for the purchase of swamp and overflowed land, filed prior to the segregation of the land by the United States to the state, confers no right upon the applicant, though it is subsequently approved and a certificate of purchase issued thereon. (*Nuttall v. Lovejoy*, 90 Cal. 163.)

98. An application for the purchase of swamp and overflowed land, filed prior to the segregation of the land to the state, is void, and is inadmissible in evidence in an action to determine the rights between the parties claiming the right of purchase of the land. (*Dewar v. Ruiz*, 89 Cal. 385.)

99. An application for the purchase of swamp land, filed before the segregation to the state, confers no right upon the applicant. (*Belcher v. Farren*, 89 Cal. 73.)

100. Under sections 3441, 3443, and 3445 of the Political Code, as amended in 1874, no application to purchase swamp and overflowed land is authorized until the expiration of six months after the land has been segregated as such by authority of the United States; and, in a contest to determine the right to purchase, an averment in the answer that the land had been so segregated for more than six months when the defendant's application to purchase was filed raises a material issue. (*Garfield v. Wilson*, 74 Cal. 175.) Cited 96 Cal. 118.

101. An application to purchase tide lands from the state must contain an intelligible description of the lands sought to be purchased. If the description be unintelligible, it will not support the application in case of a contest. (*Miller v. Taylor*, 45 Cal. 219.)

102. F. filed an application under the act to provide for the sale of certain lands belonging to the state (Stats. 1863, p. 591), in which he described the land for which he applied as "the one-half mile water-front donated to the San Francisco and Marysville Railroad Company, by an act of the legislature of the state of California, approved April 24, 1858." Held, that the description was in every respect in accordance with law. (*Hinckley v. Fowler*, 43 Cal. 56.) Cited 54 Cal. 634.

103. The act of 1863 only requires the applicant to describe the land applied for, and a description which the county surveyor can understand is sufficient. The survey, which it is his duty to make, ought to fix the lines with the requisite precision. (*Hinckley v. Fowler*, 43 Cal. 56.)

104. An affidavit made on an application to purchase swamp and overflowed lands must state directly and positively, and not in the alternative, the facts required by section 3442 of the Political Code to be stated in the affidavit. (*Botsford v. Howell*, 52 Cal. 158.) Cited 54 Cal. 214; 65 Cal. 93; 67 Cal. 7.

105. The provision of section 3443 of the Political Code, requiring the person seeking to purchase swamp and overflowed land to state in his affidavit "that he knows the land applied for, and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon," does not require that the applicant should know "of his own

knowledge," the land applied for, and the exterior bounds thereof. It is sufficient if the applicant obtains knowledge as to the identity of land from information derived from third persons. (*Price v. Beaver*, 73 Cal. 625.) Cited 83 Cal. 4.

106. When swamp land sought to be purchased from the state is covered with water, except in one corner of the section, and on this dry land the applicant finds and locates by his surveyor the government stake, and also finds and locates other government stakes on the boundary lines of the section, and his surveyor points out and shows to him by survey three of such lines, and the remaining line could easily be determined, from the knowledge of the other three, the knowledge so obtained is sufficient to satisfy the statutory requirement that the applicant must know the land applied for, and the exterior bounds thereof. (*Geer v. Sibley*, 83 Cal. 1.)

107. The affidavit required by section 3443 of the Political Code, that there are no "settlers" on the land, etc., is false if the evidence shows that another had improved and was occupying the tract, though he was not actually residing upon it. (*McIntyre v. Sherwood*, 82 Cal. 139.) Doubtful 88 Cal. 461, 462.

108. The provision of section 3444 of the Political Code, requiring a female applicant for the purchase of land to show by her affidavit that she is entitled to purchase real estate in her own name, is sufficiently complied with by a statement in the affidavit that the applicant is "an unmarried woman, over the age of eighteen years, a citizen of the United States, and a resident of the state of California, of lawful age." (*Price v. Beaver*, 73 Cal. 625.)

109. If a material statement in an affidavit for the purchase of public land be false, the applicant acquires no right by his proceedings. (*McIntyre v. Sherwood*, 82 Cal. 139.)

110. A commissioner of the United States circuit court for California is not authorized to administer the oath on an application for the purchase from the state of swamp and overflowed lands; and an application sworn to before such officer is null and void, and confers no right to purchase on the applicant. (*Garfield v. Wilson*, 74 Cal. 175.) Cited 88 Cal. 277; 89 Cal. 387.

111. An application to buy tide land, made in accordance with law, confers a right to purchase upon the applicant which, as against the state and all subsequent applicants, can be lost only by the failure of the applicant to pursue the further steps prescribed by the statute, not through the fault of any officer. (*Hinckley v. Fowler*, 43 Cal. 56.)

112. Where a party makes an application, in accordance with the act of 1863, to purchase a certain piece of tide land, but the county surveyor actually surveys but a small portion of it, and such survey is approved by the surveyor general, and subsequently, under the advice of the surveyor, the applicant makes a payment upon the tract approved and then files a new application for the balance of the tract, he is not precluded from insisting upon

his rights under the first application. (*Hinckley v. Fowler*, 43 Cal. 56.)

113. Application for purchase founded on void survey is void. (*Maddux v. Brown*, 91 Cal. 523.)

Effect of later statutes on rights of purchaser. See post, XII.

114. Under the act of April 27, 1863, no title to the land, and no right of possession or of purchase, inchoate or otherwise, attaches from any proceedings taken, until a certificate of the oath of allegiance prescribed by the twenty-eighth section of the statute is indorsed on the description of the land, and filed in the office of the county recorder. (*Dunn v. Ketchum*, 38 Cal. 93.) Cited 45 Cal. 591.

IX. Certificate of Purchase.

115. A certificate of purchase of state swamp land, obtained before the adoption of the constitution of 1879, requiring sales to be made to actual settlers only of all lands suitable for cultivation, is not impaired or affected by the constitution. (*Miller v. Byrd*, 90 Cal. 150.)

116. Certificate of purchase, as swamp and overflowed lands, of land on Sacramento river, situated below high-water mark, and over which the tide ebbs and flows, is void. (*Taylor v. Underhill*, 40 Cal. 471.) Cited 46 Cal. 107; 62 Cal. 258; 7 Nev. 345.

117. The surrender of a swamp land certificate of purchase upon the application for a patent does not of itself render the certificate invalid. After such surrender, and before the patent has issued, the certificate may serve as the foundation of an action of ejectment. (*Wright v. Roseberry*, 81 Cal. 87.)

118. The issuance of a patent for a portion of the tract described in a swamp land certificate renders the latter *functus officio* as to such portion, but does not of itself destroy the validity of the certificate as to the omitted portion. (*Wright v. Roseberry*, 81 Cal. 87.)

119. An assignment of a certificate of purchase, issued under the act providing for the sale and reclamation of swamp and overflowed lands, vests in the assignee whatever interest was conveyed by the certificate, and this interest, whether a legal or an equitable estate, is a sufficient consideration for a note given for the assignment. (*Ward v. Packard*, 18 Cal. 391.)

120. Where owner of certificate of purchase mortgages same, a purchaser at a foreclosure sale under such mortgage acquires all the rights of the mortgagor under his contract with the state, and the lien of a subsequent encumbrancer under an unrecorded mortgage is extinguished by a foreclosure of the senior mortgage, although such junior mortgagee not made a party to the foreclosure suit. (*Henderson v. Grammar*, 66 Cal. 332.) Cited 84 Cal. 243; 92 Cal. 387.

121. If such subsequent encumbrancer, after an unrecorded assignment to him of the certificate of purchase, procure the state title, it is his duty to convey the same to the purchaser at the sale under the senior mortgage. And in an action by the latter to compel such

conveyance, the judgment should not be conditioned upon a refusal of the defendant to pay to the plaintiff the amount of his lien. (*Henderson v. Grammar*, 66 Cal. 332.) Cited 91 Cal. 464.

Certificate of purchase of tide lands, action to cancel. See ante, 76.

Certificate of purchase issued on application made before segregation is void. See ante, 96, 97.

Swamp land certificate as color of title. See *Adverse Possession*, 106.

Curative statute. See post, XIV.

X. Contest.

122. An actual settler upon unsurveyed swamp lands who has made valuable improvements thereon, and who possesses all the personal qualifications necessary to entitle him to purchase the land, if surveyed, and who desires to purchase it, has a sufficient interest in the land to authorize him to contest the right to a patent of a prior applicant who has obtained an invalid certificate of purchase therefor; and it is not necessary that the contestant should allege that the land was surveyed at the date of a subsequent application made by himself to purchase it. (*Perri v. Beaumont*, 91 Cal. 30.) Cited 91 Cal. 534.

123. A party who has no right to purchase swamp and overflowed land, and even if he has not sought to purchase it, may contest the right of another to purchase. (*Garfield v. Wilson*, 74 Cal. 175.) Cited 91 Cal. 33; 96 Cal. 118.

Power of attorney general to refer contest. See ante, 55.

124. When the contest is referred to the superior court for adjudication, that court acquires jurisdiction to hear the case, and it becomes its duty to determine as to the rights of each of the parties. (*Garfield v. Wilson*, 74 Cal. 175.) Cited 91 Cal. 33.

125. The jurisdiction of the superior court over contests respecting the right to purchase swamp land from the state, conferred by sections 3414 and 3415 of the Political Code, is special, and when invoked it is the duty of the court to determine the entire controversy referred to it for decision, including the question whether the defendant has a right to purchase the land or to receive from the state a patent therefor. (*Perri v. Beaumont*, 91 Cal. 30.)

126. The district courts have no jurisdiction to determine contests as to the right to purchase swamp and overflowed land, or as to the approval of a survey, unless a contest arose in the office of the surveyor general. (*Allen v. Dake*, 50 Cal. 80.)

127. Under the twenty-seventh section of the act of 1863, for sale of tide land, when a contest is referred to the courts for settlement it is to be determined upon the principles of law and equity involved. The court is to exercise its judicial authority in adjudicating the entire case as presented, and is not confined to the measure of relief which the surveyor general might award. (*Hinckley v. Fowler*, 43 Cal. 56.)

128. In a contest over the right to purchase swamp and overflowed land which has become fit for cultivation, each party is an actor, and must allege and prove all the facts essential to entitle him to purchase. (*Goldberg v. Thompson*, 96 Cal. 117.)

129. In a contest to determine the right to purchase swamp and overflowed land, each party must make out his own case, and to that end must allege and prove that the land is subject to sale by the state, and that he has complied with all the requirements of the statute authorizing its purchase. If neither party makes the necessary showing, judgment should be entered that neither of them is entitled to make the purchase. (*Garfield v. Wilson*, 74 Cal. 175.) Cited 83 Cal. 300.

130. Upon a contest as to the right to purchase of the state swamp and overflowed lands, each of the contestants must state in his pleading all of the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase; and a complaint upon such contest stating merely that an application in due form of law was made and filed, without setting forth the facts so that the court can see that the affidavit complied with section 3443 of the Political Code, does not state facts sufficient to constitute a cause of action, and will not support a judgment by default. (*Reese v. Thorburn*, 78 Cal. 116.)

131. In an action to try the right to purchase swamp land, is an allegation in the complaint that the defendant is a nonresident of the state admitted by a failure to deny in the answer, query? (*Somo v. Oliver*, 52 Cal. 378.)

Evidence of suitability for cultivation. See ante, 85.

132. An actual settler upon swamp lands, who shows that he has presented a proper application to purchase the same, may intervene in a contest referred from the state land-office to the superior court for adjudication, and it is not error to refuse to strike from his petition allegations showing the suitability of the land for cultivation, and his actual settlement thereon and application to purchase the same, and that neither the plaintiff nor the defendant has ever resided upon the land. (*McNee v. Lynch*, 88 Cal. 519.)

Cited 96 Cal. 118.

133. In a contest in the district court concerning the right to purchase swamp and overflowed land, a judgment that neither of the parties is entitled to purchase the land in contest, or any part thereof, is equivalent in its effect to a dismissal of the action. (*Cox v. Jones*, 47 Cal. 412.)

134. In a contest as to the right to purchase swamp and overflowed lands, the answers of the defendants averred that the land had been segregated by authority of the United States for more than six months when their applications were filed. The evidence showed that their applications were filed in May and June, 1884, and that the plat of the township

in which the land is situated was approved by the United States surveyor general on October 14, 1884. The action to determine the contest was commenced on October 1, 1885. The court found that the land had been segregated as swamp and overflowed for more than six months prior to the commencement of the action. Held, that the finding did not respond to the issue raised by the answer, and was insufficient. (*Garfield v. Wilson*, 74 Cal. 175.)

135. In an action to determine a contest as to the right of several applicants to purchase swamp lands of the state, where a material issue is raised as to the character of the land, and the court finds that the land was unsuitable for cultivation, but proceeds to find further facts, inconsistent with that finding, and rendering the findings on that point uncertain and contradictory, the decision is against law, and a new trial may properly be granted on that ground. (*Nuttall v. Lovejoy*, 90 Cal. 163.)

Rights of actual settlers. See ante, VI.
Contest, allegations of defendants. See Public Lands, 545.

XI. Payment.

136. The statute of 1863, in relation to the sale of swamp lands, which prescribes that the first payment must be made within thirty days of the recording of the approval of the survey, is mandatory, and if the treasurer receives the money after the thirty days expires, the entry is void, and the land is open to location by another. (*Keema v. Doherty*, 51 Cal. 3.)
Cited 56 Cal. 223, 224.

137. The above rule is not affected by the act of 1861, concerning the assignment of certificates of purchase. (*Keema v. Doherty*, 51 Cal. 3.)

138. Under section 1 of the act of April 27, 1863, for the sale of certain lands of the state (Stats. 1863, p. 591), the first payment must be made within thirty days after the record in the county surveyor's office of the approval of the surveyor general; and a failure by the applicant to pay within the thirty days will not be excused on account of a neglect of the county surveyor to forward to him the approved copy of the survey. (*Carpenter v. Sargent*, 41 Cal. 557.)
Cited 51 Cal. 6; 56 Cal. 223.

139. The thirty days' time after the record of the surveyor general's approval of survey, prescribed for the first payment of money by section 1 of the act for the sale of swamp and overflowed lands (Stats. 1863, p. 591), cannot be postponed or extended on account of accident, mistake, neglect, or inadvertence. (*Carpenter v. Sargent*, 41 Cal. 557.)

140. Failure to pay the interest annually, and to pay the principal at the end of five years, on a swamp and overflowed land purchase, made under the act of 1855, works a forfeiture, and the state may resell, as if no purchase had been made. (*Borland v. Lewis*, 43 Cal. 569.)
Cited 45 Cal. 377; 62 Cal. 258; 92 Cal. 646.

141. County treasurer is not bound to ac-

cept money tendered after the time prescribed by law (Stats. 1863, p. 591, sec. 1) for the first payment on a proposed purchase of swamp and overflowed lands, but may properly treat the proposed purchase as abandoned. (*Carpenter v. Sargent*, 41 Cal. 557.)

142. In passing the act of March 30, 1868, "to survey and dispose of certain salt marsh and tide lands belonging to the state of California," it was the intention of the legislature to provide for the payment of the deferred installments, by requiring the payment of twenty-five per cent of the whole purchase price within the first year, and a like amount in each of the two following years. (*People ex rel. Hamilton v. Washington*, 40 Cal. 173.)

143. The stipulation in the receipt to be given by the commissioners to the purchaser, for the amount of the first payment of twenty-five per cent, to the effect "that if within one, two, or three years thereafter he pays the additional seventy-five per cent, . . . he shall receive a deed from the state," was inserted for the purpose of giving the purchaser the privilege of paying the whole balance in a shorter period of time than three years, should he desire to do so. (*People ex rel. Hamilton v. Washington*, 40 Cal. 173.)

144. It was the duty of the tide land commissioners to treat lands, upon which the first installment of the deferred payments remained unpaid for a longer period than one year, as "lands unsold by the state," and to proceed to resell the same. (*People ex rel. Hamilton v. Washington*, 40 Cal. 173.)

145. Section 3 of the act of March 27, 1872, authorizing the board of supervisors of a county to draw a warrant on the county treasurer for the repayment of money paid for the purchase of swamp and overflowed land, which afterward is proved not to have been the property of the state, was repealed by sections 3571 and 3572 of the Political Code. Under the latter section, as amended in 1878, it is the duty of the county auditor, without any action by the board of supervisors, to draw such warrant. (*Baird v. Board of Supervisors of Tulare County*, 74 Cal. 397.)

XII. Effect of Later Statutes on Rights of Purchaser.

146. One who had purchased from the state and paid for a tract of swamp and overflowed land under the act of 1855, prior to the repeal of said act in 1858, had acquired a vested right in the land which could not be taken from him by the repeal, although his patent was not issued at the time of the passage of the repealing act. (*McNear v. Hutchinson*, 31 Cal. 177.)

147. H. purchased of the state and paid for a parcel of swamp or overflowed land, but before the patent was issued an act was passed including the land within the limits of Petaluma, an incorporated city. Held, that the patent afterward issued was not thereby rendered invalid. (*McNear v. Hutchinson*, 31 Cal. 177.)

XIII. Patents, Conclusiveness and Priority; Action to Cancel.

148. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive, as between the United States and the state. (*Owens v. Jackson*, 9 Cal. 322.)

Cited 27 Cal. 89; 73 Cal. 63.

149. The governor in issuing a patent to an individual of swamp lands acts as the agent of the state, under powers conferred by statute, and his authority extends only to such lands as were granted to the state by the act of Congress. (*Summers v. Dickinson*, 9 Cal. 554.)

Cited 9 Cal. 324; 73 Cal. 63.

150. A provision in a state law for the sale of swamp lands, requiring the register to publish notice of an application for a patent, in order that adverse claimants may contest, does not require the United States to appear and contest its claim of title with the state. (*Read v. Caruthers*, 47 Cal. 181.)

151. If a state patent of swamp lands describes the land conveyed by subdivisions, according to the United States survey, and continues the description by giving the number of the swamp land survey, and saying that it is more particularly described in the field-notes of the survey, and then recites the field-notes, the land conveyed is limited to that actually surveyed in the field, and described in the field-notes, even if the survey did not include all the land in the subdivisions. (*Mahon v. Richardson*, 50 Cal. 333.)

152. If this state sells land as swamp and overflowed before the United States has issued its patent to the state therefor, the patent from the state has no other legal force except as a quitclaim from the state to the grantee of whatever interest or title the state may have to the lands therein described. (*Kile v. Tubbs*, 23 Cal. 431.)

Cited 47 Cal. 182.

153. If the law authorizes the sale of such land only as is under water at ordinary high tide, and belongs to the state by virtue of its sovereignty, and the patent conveys both swamp and overflowed lands held by the state under the Arkansas Act and land owned by the state by virtue of its sovereignty, the patent is good in part and bad in part. (*Rondell v. Fay*, 32 Cal. 354.)

154. A patent from the state for land sold as swamp and overflowed is not prima facie evidence that the land is such, as against one claiming under the general government. (*Keeran v. Allen*, 33 Cal. 542.)

155. A patent issued by the state for land sold by the state as "swamp and overflowed" upon its own survey, without the concurrence of the United States, and which describes the land as "swamp and overflowed," is neither presumptive nor prima facie evidence that such was the character of the land, as against one claiming under the United States. (*Keeran v. Griffith*, 31 Cal. 461.)

Cited 33 Cal. 547; 50 Cal. 145; 73 Cal. 67.

156. A state patent to swamp lands is the highest evidence of the transfer from the state

of its title to the lands included in the patent, and is also evidence that all the steps prescribed for its issuance, including the survey, had been properly taken, and supercedes all proof of the previous steps; and the introduction of such a patent in evidence renders immaterial any previous error in the rejection of evidence of the survey of the lands embraced in the patent. (*Heinlen v. Heilbron*, 97 Cal. 101.)

157. A patent for state lands, although based upon an invalid application, is conclusive as against all persons other than those who have, prior to its issuance, initiated a valid right to purchase from the state; and an actual settler upon unsurveyed swamp lands who is otherwise qualified to purchase, and desires to do so, but who cannot make a valid application to purchase prior to a survey of the lands, is entitled to a judgment, upon a contest against an applicant for a patent, claiming under an invalid certificate of purchase, determining the invalidity of his application. (*Perri v. Beaumont*, 91 Cal. 30.)

158. A patent of the state, for land sold as swamp and overflowed, before the same has been listed to the state by the United States as swamp and overflowed land, is not conclusive evidence of the character of the same, but parol evidence may be introduced to show whether it is dry or swamp and overflowed. (*Robinson v. Forrest*, 29 Cal. 317.)

Cited 58 Cal. 233.

159. If a state issues a patent for lands as swamp and overflowed lands, and the same are high lands as contradistinguished from swamp and overflowed, no title passes to the patentee by the patent; and any person having an interest in the lands may show that fact in his defense in an action at law by the patentee to recover possession. (*People ex rel. Pixley v. Stratton*, 25 Cal. 242.)

Cited 57 Cal. 75.

160. If the plaintiff in ejectment introduces in evidence, to prove his title, a patent issued by the state for the demanded premises as swamp and overflowed land, the defendant is not entitled to prove that the land is dry and fit for cultivation, without first showing that he is in possession under some right or title derived from the state or the United States. (*Carder v. Baxter*, 28 Cal. 99.)

Cited 29 Cal. 312; 38 Cal. 83; 68 Cal. 186; distinguished 32 Cal. 365.

161. A mere naked trespasser upon land, who does not show himself to be in privity with the common source of title, cannot question the validity of a patent from the state for swamp and overflowed land on the ground that the patent does not show that the lands described had been listed to the state, nor can he disprove the prima facie evidence of title furnished by the patent. (*Zumwalt v. Dickey*, 92 Cal. 156.)

162. If a patent issues for land as swamp land, and the same land is a part of the five hundred thousand acre grant to the state, the patent is void, and does not deprive the surveyor general of the power to make an order referring to the appropriate court a contest arising in his office between two or more con-

testants as to the right to purchase the land. (*Laugenour v. Shanklin*, 57 Cal. 70.) Cited 59 Cal. 628; 60 Cal. 125; 65 Cal. 15; distinguished 72 Cal. 242; 74 Cal. 581.

163. If the grantee, in a patent issued by this state for land sold as swamp and overflowed before the United States has issued to the state a patent therefor, bring an action to recover possession of the land by virtue of his patent, and the defendant brings himself in privity with the source of paramount title, to wit, the United States, either as a pre-emptioner under the laws of the United States, or otherwise, he has a right to show in evidence on the trial that the land described in the patent is not swamp and overflowed within the meaning of the act of Congress; and, if such shall appear to be the fact, plaintiff cannot recover. (*Kile v. Tubbs*, 23 Cal. 431, cited 28 Cal. 603, 29 Cal. 321, 52 Cal. 216, 77 Cal. 261; *Kernan v. Griffith*, 27 Cal. 87, cited 47 Cal. 182.)

164. A defendant in ejectment, who is in possession as a pre-emptioner under the laws of the United States, may attack a patent, given by the state to the plaintiff for the land as swamp and overflowed, by evidence showing that the land is not swamp and overflowed. (*Read v. Caruthers*, 47 Cal. 181.)

165. A person who had settled upon and claimed as a pre-emptioner unsurveyed public land of the United States, before a sale of the same as swamp and overflowed land and the issuance of a patent therefor by the state, is in such privity with the title of the United States as enables him to attack the patent by showing that the land is not swamp and overflowed. (*Robinson v. Forrest*, 29 Cal. 317.) Cited 33 Cal. 458; 52 Cal. 216.

166. The plaintiff, in ejectment, deraigned title under a United States patent dated June 3, 1874. From the approved list upon which it was issued it appeared that the land had been claimed by the state under section 4 of the act of Congress of July 23, 1866, as having been segregated by the state as swamp lands prior to that date, and that approved amended maps showing such segregation had been returned by the United States surveyor general. The defendant gave in evidence a patent of the United States of the same land to his predecessor in title of date August 5, 1869, and offered to prove that the land, at the date of the Swamp Land Act, was not swamp or overflowed land; but the evidence was rejected. It was admitted by the plaintiff that the land was surveyed by the United States surveyors, and returned and represented on the township plat approved by the United States surveyor general December 3, 1853, as high lands. Held, the state, by the selection and segregation of said lands as swamp and overflowed prior to July 23, 1866, acquired the right under the act of that date to have the character of said lands determined in the mode prescribed by that act, and any one who purchased said lands from the United States pending the proceedings for the determination of the question of right of the state to said lands took subject to that determination, which, if in favor of the state, entitled it to a patent which would relate back to the twenty-eighth day of Septem-

ber, 1850, the date of the passage of the act granting swamp and overflowed lands to the state. The secretary of the interior having determined the character of said lands, evidence tending to impeach that determination was clearly inadmissible in this action and properly ruled out by the court. (*Sacramento Valley Reclamation Co. v. Cook*, 61 Cal. 341.) Cited 73 Cal. 63.

167. In an action by the holder of a state swamp land patent against a United States patentee for the same land to compel a conveyance, held, (1) the first section of the act of July 23, 1866, referred only to selections made by the state, and not to lands claimed by the state as part of the swamp land grant; (2) if the land in controversy was swamp land, the title having already passed to the state, the subsequent patent was void, and conveyed no title; and if the land was not swamp, the state patent was void and gave the plaintiff no right; and in either case the plaintiff could not maintain this action. (*Kile v. Tubbs*, 59 Cal. 191.) Cited 83 Cal. 107.

168. In an action by the state for the cancellation of a patent to certain swamp land, on the ground that the application for the purchase thereof was defective, the complaint must specifically allege that the patent was issued on the application claimed to be defective. (*People v. Bryan*, 73 Cal. 376.)

169. The state cannot maintain an action for the cancellation of a patent to certain swamp land, for an innocent mistake in the foreclosure, without first offering to return the purchase money. (*People v. Bryan*, 73 Cal. 376.) Cited 77 Cal. 208.

Patent, when void. See post, XVII, 1.

Issuance or application for, effect of on certificate. See ante, 117, 118.

Patent issued for bed of river as swamp land is void. See ante, 5.

Patent cannot be impeached by showing land to be swamp. See Mexican Lands, 106.

XIV. Curative Statutes or Acts Quieting Title.

170. A certificate of purchase of tide lands, issued prior to the Curative Act of March 27, 1872, was validated by that act, and a patent from the state for such lands, issued subsequent to the passage of that act, and pursuant to the prior certificate, vests title in the patentee. (*Northern Ry. Co. v. Jordan*, 87 Cal. 23.)

171. Conceding that an application for the purchase of swamp and overflowed land, and a certificate of purchase thereof obtained from the register of the state land-office in 1871, before any survey of the land was made or approved by the surveyor general, were invalid, yet the title of the state was vested in the applicant by the Curative Act of March 27, 1872, upon his making full payment for the land, provided no other application was made prior to the issuance of the certificate of purchase; and a new applicant for the land, whose application was filed in 1868, has no standing to contest the invalidity of the

former application and certificate of purchase. (*Barker v. Freeman*, 85 Cal. 533.)

172. Curative Act of March 27, 1872, validated sales of tide lands. (*Upham v. Hosking*, 62 Cal. 250.)

173. If a state has sold land as swamp and overflowed to one person, and the same is claimed as a homestead under the Federal Homestead Act by another, the land, if not swamp and overflowed, is not taken out of the operation of the homestead law by the acts of Congress for the relief of purchasers and locators of swamp and overflowed lands, passed March 2, 1855, and to confirm to the several states the swamp and overflowed lands, approved March 7, 1857. (*Keeran v. Allen*, 33 Cal. 542.)

174. The first section of the act of Congress of July 23, 1866, to quiet land titles in California, does not relate to lands which had been segregated by the state as swamp and overflowed. (*Sutton v. Fassett*, 51 Cal. 12.)

175. Lands, not swamp or overflowed, which had been surveyed by the United States prior to the act of Congress of July 23, 1866, and which were segregated as swamp and overflowed by the state by surveys conforming to those of the United States, did not pass to this state by virtue of said act of Congress, unless the state surveys made by the county surveyor were approved by the surveyor general of this state prior to the passage of said act. (*Sutton v. Fassett*, 51 Cal. 12.)

176. The certifying of lands to this state to which said act did not apply did not transfer the title under said act. (*Sutton v. Fassett*, 51 Cal. 12.)

Act of Congress to quiet title to lands. See ante, 167.

Confirmation of sale under act of July 23, 1866. See Public Lands, 641.

XV. Levee Districts.

Right of reclamation district to erect. See post, XVII, 3, h.

177. The act of March 25, 1868, is unconstitutional. (*Moulton v. Parks*, 64 Cal. 166, 182.)

178. The board of supervisors of Sutter county had no power, by virtue of the act of March 25, 1868, to establish a levee district or cause levees to be constructed in the county of Colusa. (*Moulton v. Parks*, 64 Cal. 166, 182.)

179. An act of the legislature which requires the supervisors of a county, upon the petition of persons in the possession of more than one-half of the acres of any specified portion of the county, to erect such specified portion into a levee district for the purpose of reclaiming the same from overflow, and then provides the details by which the reclamation shall be effected, makes a levee district organized by the board of supervisors a corporation, and a public corporation, even if the act does not in terms declare it a corporation. (*Dean v. Davis*, 51 Cal. 407.)

Cited 53 Cal. 348; 56 Cal. 647; 57 Cal. 585; 59 Cal. 131; 67 Cal. 528; 73 Cal. 133; 76 Cal. 368; 79 Cal. 353; 92 Cal. 311, 323.

180. A petition for the formation of a levee

district under the act of March 10, 1891 (Stats. 1891, p. 80), need be signed only by a majority of freeholders owning lands along the stream within the proposed district, and not by a majority of all the freeholders owning lands subject to overflow along the entire course of the stream, whether within the district or not. (*De Baker v. Batcheller*, 97 Cal. 472.)

181. Where a petition for the formation of a levee district under such act fully stated the boundaries of the proposed district with minute detail, and the body of the petition was published as required by the act, the publication is not rendered fatally defective by failure to publish a plat of the boundaries, merely because the petition contained a provision that "the said proposed boundaries of said district are shown approximately by the plat thereof hereunto annexed." (*De Baker v. Batcheller*, 97 Cal. 472.)

182. If petition to the board of supervisors for a levee district appears on its face to be signed by persons owning a majority of acres, and the district is in fact exercising corporate powers, the validity of its corporate existence can be tested only by proceedings in behalf of the people, and it cannot be shown in a collateral action that persons owning a majority of acres did not sign the petition, and that the charter was therefore procured through fraud. (*Dean v. Davis*, 51 Cal. 407.) Cited 92 Cal. 334.

183. A charge imposed on all the property of a district, to be used in constructing levees to protect the district from overflow, is a tax, and not an assessment. (*People v. Whyler*, 41 Cal. 351.) Cited 52 Cal. 81.

184. The fact that levees, built to protect the land of a district from overflow, injure some of the land instead of benefiting it does not render the tax unequal or void for want of uniformity. (*People v. Whyler*, 41 Cal. 351.)

185. If the property of a district is taxed to build levees to protect it from overflow, the fact that land which is injured by the levee is assessed at its former value, and land benefited by the levee is also assessed at its former value, does not render the tax liable to the objection of want of equality and uniformity. (*People v. Whyler*, 41 Cal. 351.)

186. Under sections 12 and 16 of the act of March 25, 1868, providing for the protection of certain lands in the county of Sutter from overflow, the levee taxes of a district organized under the act may be paid either with warrants of the district drawn upon the levee fund or with money; but when payment is made in money, it must be in gold or silver coin of the United States. (*Prescott v. McNamara*, 73 Cal. 236.)

187. Section 13 of that act, providing in effect that the county treasurer shall keep a register of the warrants of the district in the order of their presentation for payment, and shall pay the same in the order of their registry, when from time to time there shall be any money in the levee fund, does not qualify the right given by section 12 of the act to use the warrants in payment of taxes, with-

out reference to the order of their registry. (*Prescott v. McNamara*, 73 Cal. 236.)

Levees. See Watercourses, XIV, 1, e.

Levees, legislature may build. See Constitutional Law, 319.

Representations as to nature of soil and number of yards to be excavated. See Fraud, 47.

Levee commissioners, damages from building canal. See State, 10.

Levee commissioners, liability of city for negligence of. See Municipal Corporations, 168.

Cutting levee to save property or life. See Eminent Domain, 304.

Damages for breach of contract to construct levee. See Damages, 37.

Trespass by officers of levee district. See Trespass, 42.

XVI. Statutes Relating to Drainage.

188. The act of April 23, 1880, entitled "An act to promote drainage," is unconstitutional, in that it authorizes a local board to levy a tax and two assessments for a public purpose at the same time on the same property, in addition to a tax levied by the state for the same purpose on all the property of the state, while none of the taxes are levied for a local purpose. (*People v. Parks*, 58 Cal. 624; *Doane v. Weil*, 58 Cal. 334.)

189. The act of April 23, 1880, entitled "An act to promote drainage," is unconstitutional, in that it creates no relation between the taxes to be levied within any district which the state board may choose to establish, and the benefits received by such district. (*People v. Parks*, 58 Cal. 624.)

190. The act of April 23, 1880, entitled "An act to promote drainage," is unconstitutional, in that it does not designate the locality where drainage is necessary, nor establish the boundaries of any drainage district, but delegates this duty to a board. (*People v. Parks*, 58 Cal. 624.)

191. The act of April 23, 1880, entitled "An act to promote drainage," is not obnoxious to article IV, section 24, of the constitution. *Myrick, J.*, concurring. (*People v. Parks*, 58 Cal. 624.)

192. The act of April 23, 1880, entitled "An act to promote drainage," is not so clearly unconstitutional as to authorize the court to oust from office a director of a drainage district, or to enjoin the letting of contracts under the act, or to adjudge that one of said drainage districts was illegally formed. *Sharpstein, J.*, dissenting. (*People v. Parks*, 58 Cal. 624.)

193. The people of the state cannot be heard to object to the levying of a tax within a drainage district. *Sharpstein, J.*, dissenting. (*People v. Parks*, 58 Cal. 624.) Distinguished 85 Cal. 244.

194. Where the title to real property sought to be condemned by eminent domain proceeding has not passed, it is not "materials furnished" within the meaning of the third section of the above act, and the owner has no claim. (*Callahan v. Dunn*, 78 Cal. 366.)

195. The third section of the act "to pro-

vide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare valley," passed April 11, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee, until performance of the conditions annexed, that is, until the reclamation of the lands. (*Montgomery v. Casson*, 16 Cal. 189.) Cited 66 Cal. 560.

196. This grant is a contract between the state and the grantees, by which the state grants certain lands upon condition of work to be performed, the grant to take effect when the work is done. It is a contract by which rights may be acquired absolutely, upon performance of the acts specified as the consideration moving to the state. (*Montgomery v. Casson*, 16 Cal. 189.)

197. The grantees under the act, having surveyed the lines of the canals mentioned therein, and commenced the work of excavating one of them, and continued the same within and during the year after the passage of the act, have brought themselves within the first section thereof, and secured the right to proceed with the reclamation; and when this is accomplished, to take one-half of the lands. And if, within the five years limited in the act, the reclamation be effected, the title to the alternate sections designated will vest in the grantees absolutely. (*Montgomery v. Casson*, 16 Cal. 189.)

198. With the contract, and the rights of the grantees thereunder acquired by this part performance of its consideration, the legislature cannot interfere. They are protected by both the federal and the state constitutions. (*Montgomery v. Casson*, 16 Cal. 189.)

199. The act of April 20, 1858, repealing the act of April 11, 1857, making this grant, and declaring the rights and privileges thereunder forfeited, is unconstitutional and void. (*Montgomery v. Casson*, 16 Cal. 189.)

200. When one of the grantees under the act of 1857, as to construction of canals and draining and reclaiming swamp and overflowed lands in Tulare valley, enters into an agreement to sell to defendant five of the sections of land embraced within the act, and covenants that he and his associates will execute a good and sufficient deed to the defendant upon payment of the several notes given as the consideration, will complete the canals within the five years allowed, and that by means thereof and the operation of the statute they will have a good and valid title to the premises, held, that defendant cannot resist the payment of the first note merely because the legislature has attempted, by an unconstitutional act, to repeal the contract of the state with the vendor and his associates, the agreement itself providing for a surrender of the unpaid notes, and a return of the moneys paid, in case of future failure of title, and the right of the grantees of the state being fully known to defendant. (*Montgomery v. Casson*, 16 Cal. 189.) Cited 64 Cal. 316.

Drainage act invalid because title insufficient. See Constitutional Law, 242, 243.

Drainage act compelling payment of money into general fund. See *Mandamus*, 131.

Claim against state under void act for promotion of drainage, allowing. See *Constitutional Law*, 417.

XVII. Reclamation.

1. Grant on Condition of.

201. In the absence of a certificate by the governor and surveyor general to the reclamation, as required by section 6 of the act of April 10, 1862, a patent for swamp and overflowed lands, purporting to be issued under such act, is void, and conveys no title or right of possession, as against the state, to either the original patentees or their grantees; and the fact that the patent was signed by the governor and countersigned by the register of the state land-office is not equivalent to such certificate, although the office of register and surveyor general were held by the same person. Nor can a message addressed by the governor to the senate and assembly, in which he says, "We believe that under the provisions of the act the grantees and their assigns are entitled to, or at least have a strong claim to, the odd-numbered sections," etc., be construed to be such certificate. (*People ex rel. Love v. Center*, 66 Cal. 551.) Cited 67 Cal. 484.

202. Conceding that, if the governor and surveyor general had made the statutory certificate, it would be conclusive evidence that the condition precedent as to the performance of the reclamation had been complied with, the patentees, the condition precedent not having, in fact, been performed, should not be permitted to remain in possession without the certificate. (*People ex rel. Love v. Center*, 66 Cal. 551.)

203. At the end of three years after the passage of the statute no presumption came into existence that the grantees had done the work required, for the state could not thus be deprived of its rights by a presumption. On the contrary, the burden was, and continued to be, on the grantees or their assigns to prove that the work had been done, the doing of which constituted a condition precedent to the acquisition of any rights by them. The presumption, in the absence of evidence, would have been that the work was not done within the three years, or at all. (*People ex rel. Love v. Center*, 66 Cal. 551.)

204. The act of April 10, 1862, was a contract by which the state granted certain lands upon condition of work to be performed, the grant to take effect when the work was done; and upon a failure to make performance within the time limited by the statute a court of equity will not interfere to protect the parties in possession, although they have made valuable improvements on the land. (*People ex rel. Love v. Center*, 66 Cal. 551.)

2. Corporations to Purchase and Reclaim.

205. Under the act of March 5, 1864, corporations might be formed for the purpose of purchasing and reclaiming swamp lands. (*People v. Hagar*, 52 Cal. 171.)

3. Reclamation Districts.

a. Power of State Over; Construction and Constitutionality of Statutes.

206. It is not a defense to an action to recover an assessment for reclamation purposes that the state, by accepting the grant under the Arkansas Act, assumed the burden of reclaiming the land, and therefore could not impose it upon the grantees of the state. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.) Cited 98 Cal. 54.

207. A party claiming title to swamp lands under a patent from the state, which conveys a title without conditions, is deemed to have acquired his title with a full knowledge of the terms, conditions, and purposes of the grant, and to have accepted the title in subordination to the paramount right and duty of the state to cause the land to be reclaimed. (*Kimball v. Reclamation Fund Commrs.*, 45 Cal. 344.)

208. He is presumed to have taken the title with the consent that the legislature might afterward modify the system of reclamation, and that, if the proceeds of the sale should prove to be insufficient to accomplish the reclamation, he would submit to the imposition of such burdens on the land to effect the object as the legislature might deem expedient. (*Kimball v. Reclamation Fund Commrs.*, 45 Cal. 344.)

209. The legislature may provide for dividing swamp lands into districts and having an estimate made of the cost of reclamation, and for the issuing of bonds and sale of the same to pay the expense of the reclamation, and the levy of an assessment on the lands in the district to pay the same, even after it has sold the land and given a patent which does not contain any conditions. (*Kimball v. Reclamation Fund Commrs.*, 45 Cal. 344.)

210. The legislature has the constitutional power to provide for the reclamation of all the swamp and overflowed lands in the state, whether the title has been acquired under the Arkansas Act or from Mexican grants, and to assess the land reclaimed to pay for the expense incurred. (*Hagar v. Supervisors of Yolo County*, 47 Cal. 222.) Cited 73 Cal. 133; 76 Cal. 371; 92 Cal. 311; distinguished 59 Cal. 702.

211. The act of 1868 (Stats. 1867-68, p. 514), which provides for the reclamation of swamp and overflowed lands, is not limited to swamp and overflowed lands acquired by the state under the Arkansas Act, but applies to all swamp and overflowed lands in the state, even if the title was derived from a Mexican grant. (*Hagar v. Supervisors of Yolo County*, 47 Cal. 222.)

212. The statutes of this state, providing for the formation of swamp land reclamation districts, are not in conflict with the provision of the fourteenth amendment to the constitution of the United States, which declares that no state shall deprive any person of life, liberty, or property without due process of law. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.) Cited 76 Cal. 368; 98 Cal. 54.

213. The act of April 15, 1880, providing for the segregation of reclamation districts, and entitled "An act to amend section 3481 of the Political Code," expresses the subject of the act in its title sufficiently to meet the requirements of section 24 of article IV of the constitution. (People ex rel. Attorney General v. Parvin, 74 Cal. 549.)

Statutes relating to assessments. See post, XVII, 3, k, A.

Creation of reclamation district by special law. See Constitutional Law, 485.

b. Petition.

214. A petition to a board of supervisors for the formation of a swamp land district must state all the facts necessary to show that the board has jurisdiction to act. (Ferran v. Board of Supervisors, 51 Cal. 307.)

215. A petition for the division of a swamp land district formed prior to March 28, 1868, and for the formation of a new district out of a part of the old district, must state that the petitioners are the owners of all the land within the proposed new district, and that they are the holders of certificates of purchase or patents for the lands claimed by them within the district, and the land to be included in the proposed new district must be described by legal subdivisions or other boundaries. (Ralston v. Board of Supervisors of Sacramento County, 51 Cal. 592.)

216. If the petition for the formation of a swamp land district under the act of March 28, 1868, is signed by persons purporting to be holders of certificates of purchase, patents, or other evidences of title, representing at least one-half of the land in the proposed district, and if the petition is approved and the district organized by the board of supervisors, in an action to enforce an assessment, an averment in the answer that there were a large number of landowners in the district who did not sign the petition is immaterial, and may be stricken out. (People v. Hagar, 52 Cal. 171.)

217. Petition for formation of new swamp land district out of a portion of an old district should also be published precisely as presented to the board. By Rhodes, J., McKinstry, J., concurring. (Ferran v. Board of Supervisors, 51 Cal. 307.)

218. Petition for formation of a new reclamation district out of a portion of an old district should be signed by all the persons owning lands within the proposed new district. By McKinstry, J. (Ferran v. Board of Supervisors, 51 Cal. 307.)

219. A petition for the formation of a new swamp land district out of a portion of an old district, under section 3481 of the Political Code, must show that the old district sought to be divided was in existence prior to May 28, 1868. (Ferran v. Board of Supervisors, 51 Cal. 307.)

220. A petition presented under section 3481 of the Political Code for the formation of a new swamp land district must state the name of the owner of each tract of land which has been disposed of in the territory sought to be set off, and must give a description of the same. By Rhodes, J., McKinstry, J., con-

curring. (Ferran v. Board of Supervisors, 51 Cal. 307.)

221. The provision of section 3447 of the Political Code, that the petition for the formation of a swamp land district "be published for four weeks next preceding the hearing thereof," etc., requires the petition to be published at least once a week, or, in other words, every seven days for that period. Accordingly, where the day fixed for the hearing was the seventeenth day of June, and the publication was made May 20th, May 27th, June 4th, and June 12th, held, that the publication was insufficient and that the board did not acquire jurisdiction, there being two intervals of more than seven consecutive days in the publication. (Williams v. Supervisors of Sacramento County, 58 Cal. 237.)

Petition to form swamp land district, certified copy of. See Evidence, II, 7, g.

Petition, defective, failure to object to. See Certiorari, 141.

Creating by special act. See post, XVII, 3, c.

c. Nature of; Creation by Special Act; Evidence of Existence of.

222. Reclamation district is public corporation for municipal purposes. (People v. Reclamation District No. 108, 53 Cal. 346, cited 58 Cal. 647, 57 Cal. 585, 79 Cal. 353, 95 Cal. 605, 98 Cal. 53; Hoke v. Perdue, 62 Cal. 545, cited 79 Cal. 353; People v. La Rue, 67 Cal. 528, cited 76 Cal. 368, 79 Cal. 353; Swamp Land District No. 150 v. Silver, 98 Cal. 51.)

223. Reclamation districts are public corporations. (People v. Williams, 58 Cal. 647, cited 76 Cal. 368, 79 Cal. 353; Reclamation District No. 124 v. Gray, 95 Cal. 601, cited 98 Cal. 53.)

224. A reclamation district can be created not only by the means and in the manner provided by the general law, but also by special act or implication. (Reclamation District No. 124 v. Gray, 95 Cal. 601.)
Cited 98 Cal. 53.

225. Legislative recognition is in many cases sufficient proof of the existence of a reclamation district. (Reclamation District No. 124 v. Gray, 95 Cal. 601.)

226. The creation of a reclamation district may be shown by acts recognizing its existence. (Swamp Land District No. 150 v. Silver, 98 Cal. 51.)

227. An act of the legislature purporting to legalize and validate a reclamation district is conclusive proof, in an action to recover an assessment upon lands in the district, of the existence of the corporation from the time of the passage of the act, and an assessment levied thereafter in accordance with the statute having reference to the organization of the district is valid and enforceable. (Reclamation District No. 124 v. Gray, 95 Cal. 601.)

228. The existence of such a reclamation district may be established by implication arising from the passage of acts recognizing its existence, and requiring a corporation for the performance of the duties and powers enjoined or conferred by such acts of the

legislature, however defective the original organization may have been. (*People v. Reclamation District No. 108*, 53 Cal. 346.)

d. Organization Cannot be Collaterally Attacked.

229. Validity of corporate existence cannot be collaterally attacked or questioned. (*Hoke v. Perdue*, 62 Cal. 545.)
Cited 79 Cal. 353.

230. The validity of its organization cannot be collaterally attacked in an action to recover an assessment levied upon land by a de facto district. (*Swamp Land District No. 150 v. Silver*, 98 Cal. 51.)

231. In an action to recover an assessment levied upon land by a de facto reclamation district, the defendant cannot collaterally question the validity of the organization of the district, or of the acts of the board of trustees and commissioners in using data in the nature of evidence furnished by surveys, estimates, and reports considered by them as to the assessment of lands in the district, not invalidating their acts, otherwise legal, in levying the assessment sued upon. (*Reclamation District No. 124 v. Gray*, 95 Cal. 601.)
Cited 98 Cal. 53.

Order of supervisors creating, reviewing. See *Certiorari*, 119.

Swamp land proceedings, appealability. See *Appeals*, 57, et seq.

e. By-Laws.

232. Act of legislature, if in conflict with by-law of a swamp land district, supersede the same. (*Hagar v. Board of Supervisors of Yolo County*, 51 Cal. 474.)

233. By-law providing that value of work already done should be included in estimate is inconsistent with the provisions of the code upon the subject. (*Swamp and Overflowed Land District No. 110 v. Feck*, 60 Cal. 403.)

234. Under the act of March 28, 1868, it was not necessary that the by-laws of the district should be signed by holders of certificates of purchase or patents. It was sufficient if they were signed by holders of "other evidences of title" to the requisite amount. (*People v. Hagar*, 52 Cal. 171.)

f. Boundaries of; What may be Included.

235. The board of supervisors of a county may be empowered by the legislature to include within a reclamation district lands situated in another county. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)

236. Under the act of March 28, 1868, land held under a confirmed Mexican grant may be included and assessed in a swamp land district. (*People v. Hagar*, 52 Cal. 171.)
Cited 88 Cal. 354.

237. On the hearing of a petition for the formation of a swamp land reclamation district, the board of supervisors have jurisdiction to determine what lands will be benefited by the proposed reclamation, and to include such lands within the district. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 59.)
Cited 79 Cal. 360; 88 Cal. 354.

238. The act of April 15, 1880, does not

authorize the setting apart of a new and independent reclamation district, within the limits of a district formed or organized prior to the adoption of the Political Code, and which has not reorganized under the Political Code. (*People ex rel. Attorney General v. Parvin*, 74 Cal. 549.)

View by jury to ascertain character of land. See *Pleading and Practice*, 766.

g. Estimate of Work; Approved Plans; Warrants and Approval of.

239. Neither the board of trustees of a swamp land district nor its engineer has authority to include in its estimate of the cost of work necessary for reclamation the value of work done before the board had any existence. (*Swamp and Overflowed Land District No. 110 v. Feck*, 60 Cal. 403.)

240. The act of 1868 did not require a strict compliance with the approved plans in doing the work. Some discretion was vested in the trustees, and a trifling deviation from the plans, or a deviation beneficial in its character, will not vitiate the proceedings. (*Reclamation District No. 3 v. Goldman*, 65 Cal. 635.)
Cited 98 Cal. 54.

241. Under the provisions of the Political Code for the reclamation of swamp lands, where the district is situated in different counties, the assessment or charge upon each tract of land is to be paid into the treasury of the county in which the particular tract is situated, and is to be paid out, for the work of reclamation, upon the warrants of the trustees, approved by the board of supervisors of that county. (*Cosner v. Supervisors of Colusa County*, 58 Cal. 274.)
Cited 81 Cal. 550.

242. The provision requiring the approval of the warrants of the trustees by the board of supervisors involves the idea of discretion and adjudication, and each board of supervisors (where the district extends beyond a single county) has the same discretion, with respect to warrants drawn upon their county, as has the board where the whole district is included within one county. (*Cosner v. Supervisors of Colusa County*, 58 Cal. 274.)

Estimate of work already done. See *post*, 291, 292.

h. Right to Erect and Maintain Levee; Conditional Liability of Members on Contract.

243. A reclamation district organized and existing under the laws of the state, for the purpose of reclaiming certain swamp and overflowed lands situated upon the Sacramento river, has a right to erect and maintain a levee along the bank of the river, so as to prevent the inundation of the land sought to be reclaimed, notwithstanding the possible or probable effect of the levee would be to cause the waters of the stream to overflow other lands situated upon the river. Damages so caused by the levee several years after its erection on land situated upon the opposite bank of the river, two miles farther down the stream, are *damnum absque injuria*, for which the reclamation district is not liable. (*Lamb v. Reclamation District No. 108*, 73 Cal. 125.)
Cited 83 Cal. 520.

244. Conceding that the reclamation district is a municipal corporation acting under the authority of the state, and that in building the levee it exercised the power of eminent domain, the indirect and consequential damages so caused by the levee do not constitute a taking of the property injured, within the meaning of the constitutional provision prohibiting the taking of private property for public purposes without compensation. (*Lamb v. Reclamation District No. 108*, 73 Cal. 125.)

245. The reclamation district has a right to construct and maintain the levee across the mouth of a slough through which, in times of flood, a part of the waters of the river was accustomed to flow and escape upon the adjoining lowlands. (*Lamb v. Reclamation District No. 108*, 73 Cal. 125.)

246. Fact that levee was originally constructed without previous adoption of plan for the protection of the district, as provided for in section 10 of the act, constitutes no good reason why the levee, after having been constructed, should not be repaired in places where broken or washed away. (*Hoke v. Perdue*, 62 Cal. 545.)

247. An allegation in the complaint that the effect of repairing the levee "will be to dam up the waters and increase the same in volume until said levee will break, and permit said waters to flow down to and upon plaintiff's land, and destroy the fences and trees thereon," is in the very nature of things a simple expression of opinion on the part of the plaintiff, and cannot be accepted as the statement of a positive existing fact. The mere opinion of the plaintiff that the scheme is impracticable affords no reason in law for arresting the work by injunction. (*Hoke v. Perdue*, 62 Cal. 545.)

248. The fact that a large quantity of the land lying within the district and subject to taxation or assessment has been voluntarily omitted from the assessment list by the commissioners—though perhaps a good ground for enjoining the collection of the assessment—is not sufficient to enjoin the reconstruction or repair of the levee; non constat but there is a sufficient fund already collected to defray the expenses of such reconstruction and repair. (*Hoke v. Perdue*, 62 Cal. 545.)

249. If the owners of swamp land in a district contract to pay certain persons stipulated amounts of money, to be expended in building a levee to reclaim the district, and such persons employ another to build the levee at a certain price per cubic yard, and stipulate that they are not to be personally liable unless they fail to use due diligence in collecting the money, the person so employed cannot recover for his labor, without showing a want of diligence in collecting the money from the owners of the land. (*Bachman v. Meyer*, 49 Cal. 220.)

1. Reorganization.

250. A meeting of landowners, for the purpose of reorganizing, under the act of the 28th of March, 1868, a reclamation district previously formed, was called by a notice signed by the swamp land clerk, an officer created by that act. Held, that the meeting was

properly called. (*Reclamation District No. 3 v. Goldman*, 65 Cal. 636.)

251. In reorganizing a reclamation district under the act of 1868 the approval of the board of supervisors was not required. (*Reclamation District No. 3 v. Goldman*, 65 Cal. 635.)

252. Swamp land levee and reclamation districts de facto, acting as such in good faith and under an attempted compliance with the law, may, under section 3489 of the Political Code, be united, consolidated, and reorganized, so as to form a new corporation in all respects valid, and proceedings in the nature of quo warranto against such new corporation cannot be extended to an inquiry and determination as to the legality of the organization of the original districts. (*People v. La Rue*, 67 Cal. 526.)

Distinguished 85 Cal. 244, 53 Cal. 346.)

j. Forfeiture.

253. The fact that reclamation of the lands of the district is impracticable is not a sufficient ground upon which to base a judgment of forfeiture of the corporation. (*People v. Reclamation District No. 108*, 53 Cal. 346.) Cited 73 Cal. 133.

Quo warranto against reorganized district. See ante, XVII, 3, i.

k. Assessments.

A. Statutes Governing; Construction and Constitutionality of.

254. A swamp land district organized under the act of 1868 is governed by that act, and cannot levy and collect assessments in the manner provided by the Political Code. (*Swamp Land District No. 121 v. Haggin*, 64 Cal. 204.)

255. In an action to enforce an alleged assessment for reclamation purposes made under and pursuant to the provisions of the Political Code in which it appeared that the plaintiff was not originally formed under the provisions of that code, nor reorganized thereunder by virtue of section 3478 of the Political Code, held, that the provisions of the code had no application to the plaintiff, and the assessment based upon them was unauthorized and void. (*Reclamation District No. 3 v. Kennedy*, 58 Cal. 124.) Cited 64 Cal. 206, 209; 74 Cal. 554.

256. In an action to recover an assessment tax for reclamation purposes levied during the year 1876, under the act of March 28, 1868, entitled "An act to provide for the management and sale of land belonging to the state," it was objected on demurrer that the act was repealed by the code. Held, the provisions of the act referred to with reference to assessments for reclamation purposes were provisions "in relation to taxation for local purposes," and therefore (under subdivision 25 of section 19) were not repealed by the Political Code. (*Reclamation District No. 3 v. Goldman*, 61 Cal. 205.) Cited 64 Cal. 209, 210.

257. Where a reclamation assessment can only be enforced by suit, in which notice must be given to the defendant, and an op-

portunity afforded him to be heard in respect to the assessment without restriction as to the defenses he may interpose, the constitutional provision as to due process of law is not violated. (Reclamation District No. 3 v. Goldman, 65 Cal. 635.) Cited 66 Cal. 55.

258. In an action upon an assessment for reclamation purposes it was objected that the provisions of the Political Code relating to the assessment of lands within reclamation districts are unconstitutional, the ground of objection being that they do not provide for any mode by which a party assessed shall have notice of the proceeding and an opportunity to object to the amount charged against his land. Held, no assessment against any tract of land can be enforced except by action to which the owner of a tract must be made a party; and it is immaterial whether he has notice before the assessment, if in the subsequent action he has his day in court with full opportunity to contest the charge before it is declared a lien upon his land, or a judgment to be collected out of his general property. (Reclamation District No. 108 v. Evans, 61 Cal. 104.) Cited 65 Cal. 638; 72 Cal. 413, 420.

259. By a special act in relation to a swamp land reclamation district, the trustees were required to make up a sworn statement of the cost of the reclamation work, "based upon the books and vouchers thereof," and the amount so reported was to be assessed upon the lands. Held, that this was a levy by the legislature of an assessment upon the lands of the district, and that the act was unconstitutional. (People v. Houston, 54 Cal. 536.)

Special act legalizing assessments. See Constitutional Law, 482.

Statute providing for assessment and sale without hearing is void. See Constitutional Law, 375.

B. Commissioners, Appointment, View, and Report of.

260. A swamp land assessment is not rendered invalid by the failure to show that the commissioners took, subscribed, and filed their oath of office in the office of the county clerk before they assessed the land and made the assessment list, where it appears that they were sworn verbally by a justice of the peace before they went to view the land. (Swamp Land Reclamation District No. 407 v. Wilcox, 75 Cal. 443.)

261. Section 33 of the act of March 23, 1868, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a tax," etc., means that the three commissioners, acting jointly or together, shall view and assess. (Reclamation District No. 3 v. Parvin, 67 Cal. 501.)

262. When an act appointing commissioners to assess swamp lands provides that they shall jointly view and assess upon each acre a tax proportionate to the whole expense, all the commissioners must be present, both in viewing and assessing the land; and if only a quorum are present, the assessment is void, even if the absent commissioner was well ac-

quainted with the land, and assented to the act of the majority by letter. (People v. Coghill, 47 Cal. 361.) Cited 49 Cal. 232, 665; 52 Cal. 211; 70 Cal. 567, 570; 3 Col. 456.

263. If a board of commissioners is created by statute to assess a tax upon swamp and overflowed land for the purpose of reclaiming the same, and the statute requires such board to jointly view and assess the land, all the commissioners must be present, and they must jointly view and assess, or the assessment will be void. (People v. Hagar, 49 Cal. 229.)

Cited 52 Cal. 211; 70 Cal. 567, 570; 75 Cal. 451.

264. Commissioners appointed under the act of March 24, 1868, for the purpose of viewing and assessing swamp lands in order to reclaim the same, must jointly view and assess the same, or the assessment is void. (People v. Ahern, 52 Cal. 208.) Cited 70 Cal. 570.

265. Section 3456 of the Political Code does not change this rule. (People v. Ahern, 52 Cal. 208.)

266. Under section 3456 of the Political Code, the commissioners appointed to make an assessment for the reclamation of swamp land need not act jointly in viewing the lands within the district. (Swamp Land District No. 307 v. Gwynn, 70 Cal. 566.)

267. Under the act of March 23, 1868, it is not necessary that the commissioners of assessment should jointly go in person upon each and every acre in the district; and it will be sufficient if the commissioners jointly make such an examination of the land as will enable them to form an intelligent judgment as to the benefits which will accrue to each and every acre. (People v. Hagar, 52 Cal. 171.)

268. The court found that the lands in the district, and each and every tract thereof, were viewed by the commissioners. At the time of the view, the lands were mostly covered with water, but the commissioners were at a point where they could look over the whole area of the district and see every part of it, except a few small parcels along its eastern margin, which were hidden from view by trees. Held, that the finding was sustained by the evidence, and that the view was not insufficient in point of law. (Swamp Land District No. 307 v. Gwynn, 70 Cal. 566.)

269. If a board of supervisors has appointed three commissioners to view and assess swamp lands, for the expense of reclaiming the same, under the act for the reclamation of swamp and overflowed lands, the fact that the commissioners undertake to make an assessment, but the same is void, because only two of the three are present, does not authorize the board of supervisors to appoint new commissioners to make a further assessment, or to direct the old commissioners to make a further assessment. (Harris v. Board of Supervisors of Colusa County, 49 Cal. 662.)

270. If board of commissioners, in their report, state that they jointly viewed and assessed the land, when in fact they were not

all present, the report is not conclusive of the question if the statute does not require them to thus report, nor even prima facie evidence of the fact, but the assessment may be attacked in a collateral action to recover the tax. (*People v. Hagar*, 49 Cal. 229.)

271. The question not decided whether such report would be conclusive if the statute required the commissioners to report that they jointly viewed and assessed the land. (*People v. Hagar*, 49 Cal. 229.)
Cited 92 Cal. 333.

Presumption in favor of regularity. See post, 290.

Record of order of supervisors appointing commissioners as evidence. See post, 295.

O. How Levied; Description of Land; Effect of Omission of Land.

272. Mode of assessment is matter for legislature, and the courts will not interfere on the ground of an improper apportionment or inequality of burden or benefit, unless there is a palpable violation of private rights. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)
Cited 98 Cal. 54.

273. The trustees are authorized to cause surveys, plans, and estimates of cost to be made, and the commissioners may assess upon each acre of the district a tax proportionate to the whole expense. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 59.)
Cited 79 Cal. 360; 88 Cal. 354.

Evidence as to benefit. See post, 296, 297.

274. In the assessment list the land assessed to the defendant was described as being a portion of two swamp land surveys "bounded on the north by the lands of Mrs. R. F. Davis, on the east by the lands of L. C. Rube, on the south by the lands of the Pacific Mutual Life Insurance Company, and on the west by Old river; number of acres, one hundred." Held, that the description was sufficient. (*Swamp and Reclamation District No. 407 v. Wilcox*, 75 Cal. 443.)

275. It was competent for the commissioners, under the act of 1868, to omit from the assessment land within the boundary of the district which would not be benefited by the reclamation. (*Reclamation District No. 3 v. Goldman*, 65 Cal. 635.)

276. The commissioners appointed under section 3456 of the Political Code have no power to levy an assessment which does not cover all the land in the reclamation district. (*Levee District No. 1 v. Huber*, 57 Cal. 41.)
Cited 62 Cal. 547.

277. The act of March 30, 1874 (Stats. 1873-74, p. 867), under which swamp land district No. 150, was organized, showing that the district is entirely within the boundaries of Yolo county; the board of supervisors of that county is the proper tribunal to which report should be made, although they did not form the corporation; and in an action upon an assessment thereunder the order of the board of supervisors of that county appointing commissioners is admissible as evidence. (*Swamp Land District No. 150 v. Silver*, 98 Cal. 51.)

D. Actions on; Parties; Pleadings; Joinder of Actions; Summons; Action, When Barred.

278. Such action should be brought in the name of the swamp land district. (*People v. Haggin*, 57 Cal. 579.)
Cited 66 Cal. 57-59; 67 Cal. 502.

279. A reclamation district, as the real party in interest, may sue in its own name to recover delinquent assessments for the reclamation of swamp lands. (*Reclamation District No. 3 v. Parvin*, 67 Cal. 501.)

280. An action to recover an assessment levied for reclamation purposes in a swamp land district, organized under the act of March 28, 1868, may be prosecuted in the name of the people of the state. (*People v. Hagar*, 52 Cal. 171.)
Cited 66 Cal. 57, 58; 67 Cal. 502.

281. In an action to enforce an assessment for the reclamation of swamp lands, the reclamation district is the real party in interest; and where the action is brought in the name of the district, a judgment in its favor, if otherwise valid, will not be reversed on the ground that the action should have been brought in the name of the people of the state. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)
Cited 67 Cal. 502.

282. Objection that such action is brought in the name of the people can be raised upon a demurrer to the complaint, on the ground that it does not state a cause of action. (*People v. Haggin*, 57 Cal. 579.)
Cited 65 Cal. 636.

283. Objection that it does not appear from complaint that plaintiff was ever duly created a swamp and overflowed land district, goes to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. (*Swamp and Overflowed Land District No. 110 v. Feck*, 60 Cal. 403.)

284. If several tracts of swamp land of the same owner be separately assessed under one assessment, the assessments on the several tracts may be recovered in one action. (*People v. Hagar*, 52 Cal. 171.)
Cited 76 Cal. 583.

285. Two assessments for reclamation purposes in a swamp land district, made on the same land at different times, may be recovered in the same action. (*Swamp and Overflowed Land District No. 110 v. Feck*, 60 Cal. 403.)

286. In an action to enforce an assessment upon lands in a reclamation district, any person claiming an interest in the lands may appear and answer within forty days after the publication of summons and posting, as provided in section 3466 of the Political Code. (*Reclamation District No. 104 v. Coghill*, 56 Cal. 607.)

287. A complaint in an action to recover an assessment upon a swamp land district stated that the petition for the formation of the district was published for four weeks ending with February 25th, and that on the 2nd day of May thereafter, at the next meeting of the board of supervisors, the board made an order approving the petition, which order was signed

by the president and attested by the clerk. Held, that the complaint was insufficient in not showing that the publication was made for four weeks next preceding the hearing, and in not showing that the board noted its approval on the petition. (*People v. Haggin*, 57 Cal. 579.)

Distinguished 64 Cal. 210.

288. In an action on an assessment for reclamation purposes, it may be, and probably is, true that the court below has no power to change the assessment, but of this the defendant cannot complain, since the court has the power to declare the assessment invalid in so far as it purports to create a charge against his land. (*Reclamation District No. 108 v. Evans*, 61 Cal. 104.)

289. An assessment for the reclamation of swamp and overflowed lands is a liability created by statute, within the meaning of subdivision 1, section 338, of the Code of Civil Procedure, and an action to enforce it is barred if not commenced within three years after the cause of action accrued. (*People v. Hulbert*, 71 Cal. 72.)

E. Validity; Evidence.

290. In the absence of evidence to the contrary, it will be presumed that the commissioners, in viewing the land and making the assessment, conformed to the requirements of section 3456 of the Political Code. (*Swamp Land Reclamation District No. 407 v. Wilcox*, 75 Cal. 443.)

291. Under section 3459 of the Political Code, as amended March 30, 1874, providing for an assessment for work upon a reclamation district, there is no necessity for a statement by the trustees of the district as to what work has been done, unless the assessment is to be for work already done, in whole or in part; and an assessment levied under such act for work to be done is not invalid because the trustees fail to specify the work already done. (*Swamp Land District No. 150 v. Silver*, 98 Cal. 51.)

292. Such assessment is not rendered invalid because it includes incidental expenses and a sum required for the purpose of erecting and maintaining a pump. (*Swamp Land District No. 150 v. Silver*, 98 Cal. 57.)

293. The failure to place a dollar-mark before the figures intended to designate the amount of the charges assessed against a particular person is not fatal to the assessment against him, when it appears from the record that such assessment was only one of a number of others contained in the list, and that in a number of cases there was a dollar-mark preceding the figures in columns headed with the words "amount of charges assessed." (*Swamp Land Reclamation District No. 407 v. Wilcox*, 75 Cal. 443.)

Attacking report collaterally in action. See ante, 270, 271.

Assessment levied under code in district formed before. See ante, XVII, 3, k, A.

Validity of assessment. See ante, 227.

294. Conceding that the assessment-roll of a swamp land district, when properly certified by the commissioners, becomes an official record within the meaning of sections 1920 and

1926 of the Code of Civil Procedure, and evidence of all the facts recited in it, still it is only prima facie evidence, and may be contradicted by showing that the assessments were arbitrarily made without reference to the proportionate benefits to be derived to each piece of land assessed by reason of the proposed work. (*Swamp Land District No. 307 v. Gwynn*, 70 Cal. 566.)

295. In an action to enforce the payment of a swamp land assessment the record as entered in the minute-book of the board of supervisors of the order of the board appointing commissioners to view the land and make the assessment is prima facie evidence of the facts stated therein; and where the record as originally entered is shown to have contained a clerical error it may be altered so as to conform to the order as actually passed by the board, and, as so altered, is admissible in evidence. (*Swamp Land Reclamation District No. 407 v. Wilcox*, 75 Cal. 443.)

296. In an action to enforce the assessment the court will not admit evidence to show whether a particular parcel of land was in fact benefited, or to what extent. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 59.) Cited 79 Cal. 360; 88 Cal. 354.

297. In a collateral proceeding it is not competent to prove that the commissioners of assessment erred in judgment in determining the degree of benefit which the several parcels of land would receive from the reclamation. In the absence of fraud the decision of the commissioners is conclusive in a collateral action. (*People v. Hagar*, 52 Cal. 171.)

Cited 71 Cal. 208; 87 Cal. 42, 45.

Order appointing commissioners as evidence. See ante, 277.

Validity of organization cannot be attacked in action on. See ante, XVII, 3, d.

Order annulling assessment. See *Certiorari*, 120.

F. Payment; Interest; Counsel Fees.

298. The defendants tendered in payment of the assessment a warrant of the district for a larger sum than the amount of the assessment. The warrant was owned by a third person, and was tendered only for the purpose of having the assessment indorsed thereon, and was not intended to be given up and canceled. Held, that the tender was not a satisfaction of the assessment under section 3465 of the Political Code. (*Swamp Land District No. 307 v. Gwynn*, 70 Cal. 566.)

299. It is not error to make an assessment in a swamp land district payable in gold coin. (*People v. Hagar*, 52 Cal. 171.)

300. An assessment on swamp land, for the purpose of reclaiming the same, under the act of 1868, may be enforced by a lien on the land, and may be made payable in gold coin of the United States. (*People v. Hagar*, 52 Cal. 171.)

301. An assessment may be made payable in gold coin, and interest may be collected thereon. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)

302. In enforcing the lien of an assessment on swamp land, for reclaiming the same,

under the act of 1868, the court cannot award interest on the delinquent assessment. (*People v. Hagar*, 52 Cal. 171.)

303. Under the act of March 28, 1868, a delinquent swamp land assessment does not bear interest. (*People v. Hagar*, 52 Cal. 171.)

304. It is competent for the trustees of a reclamation district to appropriate a portion of the fund arising from an assessment to the payment of special counsel employed to enforce its collection. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)

Assessment, fees of district attorney prosecuting suits for. See *District Attorneys*, 6.
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1. Additional Assessments.

305. Where original assessment proves inadequate, an additional assessment may be made. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)

306. If an assessment is levied on the swamp land of a district for the purpose of reclaiming it according to the plan presented by the trustees, and the work is performed, and the assessment is insufficient to pay for the same, a new assessment may be made, under the act of March 30, 1874, to pay the deficiency due on the work already done. (*Hagar v. Board of Supervisors of Yolo County*, 51 Cal. 474.)
Distinguished 64 Cal. 209.

307. The reclamation district being situated wholly in Sacramento county, held, that the estimates for an additional assessment as authorized by the act of 1868 were properly presented to the board of supervisors of that county. (*Reclamation District No. 3 v. Goldman*, 65 Cal. 635.)

SWITCHES.

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I. Definition and Nature of; Distinction Between and Assessment.

1. Taxes are charges, imposed by or under the authority of the legislature, upon persons or property subject to its jurisdiction. (*People v. McCreery*, 34 Cal. 432.) Cited 71 Cal. 73.

2. Tax is a charge upon persons or property to raise money for public purposes. (*Perry v. Washburn*, 20 Cal. 318.) Cited 96 Cal. 638.

3. The power of "taxation" is a power which the legislature takes from the law of its creation to impose taxes upon the property of the citizens for the support of the government. (*Taylor v. Palmer*, 31 Cal. 240.) Cited 46 Cal. 555.

4. A tax is a personal debt, or in the nature of a personal debt due from the property holder, and not a mere charge upon the property created by and depending upon the regularity of the proceedings given by statute; and the legislature may prescribe a mode of correcting an informal assessment. (*People v. Seymour*, 16 Cal. 332.) Cited 18 Cal. 403; 20 Cal. 351; 23 Cal. 116; 39 Cal. 115; 62 Cal. 646; 71 Cal. 245; 14 Nev. 250; 21 Nev. 284.

5. A tax is a debt within the meaning of section 82 of the Consolidation Act. *Thornton, J.*, concurring. (*San Francisco Gas Co., v. Brickwedel*, 62 Cal. 641.)

6. Tax is not founded upon contract, and does not establish relation of debtor and creditor between the taxpayer and state. (*Perry v. Washburn*, 20 Cal. 318.)

7. The authority to compel local improvements, at the expense of those to be immedi-

ately benefited, is not taxation. (*Hagar v. Supervisors of Yolo County*, 47 Cal. 222.) Cited 66 Cal. 57.

8. The fact that a statute designates as a "tax" that which in its elements is an "assessment," does not make it a "tax." The question whether it is a "tax" or "assessment" must be decided by the nature of the imposition. (*People ex rel. Doyle v. Austin*, 47 Cal. 353.)

9. The words "taxation" and "assessment," as used in the constitution of this state, do not have the same signification. (*Taylor v. Palmer*, 31 Cal. 240.) Cited 38 Cal. 477; 40 Cal. 514.

10. The words "taxation" and "taxed," in section 13 of article XI of the constitution, relate to such general taxes upon all property as are levied to defray the ordinary expenses of the state, county, town, and municipal governments, and not to assessments levied on the lots fronting on a street in a city to pay the expenses of their improvements. (*Emery v. San Francisco Gas Co.*, 28 Cal. 345.) Cited 32 Cal. 279; 47 Cal. 234; 51 Cal. 501; 92 Cal. 325; 17 Col. 209, et seq.; 1 S. Dak. 54.

11. A tax for local improvement levied upon the property within a district created by an act of the legislature is not an assessment within the meaning of that term as employed in article XI, section 18, of the constitution. (*Smith v. Farrelly*, 52 Cal. 77.)

Distinction between tax and assessment. See post, XV.

Irrigation assessment is not a tax. See *Irrigation Districts*, 56.

Percentage allowed gauger is not a tax. See *Gauger of the Port*, 2.

Toll on logs floated from another state. See *Constitutional Law*, 31.

License is a tax. See *Licenses*, II, 1.

Tax and not assessment, what is. See *Swamp and Overflowed Lands*, 183.

Assessment, what is and not a tax. See *Streets*, 105.

Assessment for street improvement, whether a tax. See *Streets*, XVI, 2.

Questions of taxation are questions of law. See *Injunctions*, 212.

Proceedings are in invitum. See *Idem Sonans*, 5.

II. Power of Taxation; Uniformity and Equality of.

12. Power of taxation is a necessary incident to sovereignty, and under our system of government it pertains to the legislative department. A tax must have its origin in a law enacted for that purpose. (*People v. McCreery*, 34 Cal. 432.) Cited 47 Cal. 654.

13. The power of taxation is authorized for the benefit of the taxpayer, and taxation cannot be justly compelled for an object or for the benefit of a class in which the taxpayer is directly excluded from participating. (*Hughes v. Ewing*, 93 Cal. 414.)

14. The taxing power, whether it be asserted in the form of general taxation or of local assessment, cannot be upheld when the

purpose in view can be judicially seen to be other than public. (*Matter of Market Street*, 49 Cal. 546.)

15. The legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise, even though the private enterprise might benefit the local public in a remote or collateral way. (*People v. Parks*, 58 Cal. 624.) Cited 92 Cal. 309.

16. The same kind of "public use" which will authorize the taking of private property in aid of a particular railroad, in the exercise of the power of eminent domain, will support the laying of a tax in aid of the same road under the taxing power. (*Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 147.)

17. The legislature may, in strict conformity with its constitutional powers and duties, recognize a moral obligation as the sole basis for the imposition of taxes. (*Beals v. Amador County*, 35 Cal. 624.)

18. Where, by a prior statute for the ascertainment of a debt due from one county to another, and to provide for its payment by a tax which was thereby imposed, without allowing or making provision for the payment of interest thereon, under which enactment the debt was fully paid, it is competent for the legislature, by subsequent enactment, to provide for the payment of interest on such debt by the imposition of a further tax for that purpose. (*Beals v. Amador County*, 35 Cal. 624.)

19. Where, in such case, said debt had been assigned to and was exclusively owned by a private individual before said past enactment, the tax thereby imposed was no less for that reason for a public benefit. (*Beals v. Amador County*, 35 Cal. 624.)

20. The principle upon which taxation is to be imposed by the state government is pointed out by the constitution; but the extent to which it may be carried is left unlimited, except by legislative discretion. (*Stockton etc. R. R. Co. v. City of Stockton*, 41 Cal. 149.)

21. The powers of taxation and appropriation are limited by the eighth article of the constitution, and cannot be extended to debts contracted in violation thereof. (*Nougués v. Douglass*, 7 Cal. 65.) Cited 72 Cal. 473.

22. Limitations by Congress upon the right of a state to tax its citizens are to be strictly construed. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)

23. The power of taxation was given to the legislature without limit, for all purposes allowed by the constitution. (*Nougués v. Douglass*, 7 Cal. 65.)

24. The power of apportionment, with the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. (*Burnett v. Sacramento City*, 12 Cal. 78.) Cited 1 S. Dak. 57.

25. The legislature has the power of taxation without restriction as to mode or limitation as to time; and if, from accident or oversight, or remissness on the part of the tax-

payer, the time for payment has passed, or the mere mode of charging him has not been followed by the officers, the legislature may still compel him to pay. (*People v. Seymour*, 16 Cal. 332.)

Cited 23 Cal. 58.

28. The power of the legislature in matters of taxation is unlimited, except as restricted by constitutional provisions, and extends to the providing of assessments for local improvements, upon any basis of apportionment which the legislature may select; and the apportionment does not depend upon the fact of any special local benefit to the taxpayer. (*Matter of Bonds of Madera Irrigation District*, 92 Cal. 296.)

27. The power of the legislature over the whole subject of taxation, including the property to be charged, the amount of the tax, the mode of levying, assessing, and collecting it, etc., is as ample as over any other matter that is a proper subject of legislative action. The provisions of section 13, article XI, of the constitution are limitations, and not grants of power; but as limitations, are, according to their terms, mandatory upon the legislature. (*People v. McCreery*, 84 Cal. 432.)

Cited 41 Cal. 530; 46 Cal. 515; 2 Mont. 579; 4 Nev. 200; 12 Nev. 270; distinguished 51 Cal. 38.

26. Although the legislature cannot directly impose taxes upon counties or other public corporations, it has authority to vest the power of taxation in them by general laws, and such corporations have no power to impose taxes other than that granted by the legislature, and its exercise must be within the limits, and in the manner so conferred. (*Hughes v. Ewing*, 93 Cal. 414.)

29. By the constitution of California the legislative department of the government is vested with the power of taxation, and the authority to determine the objects for which the taxing power shall be exercised, and to appropriate the moneys thus raised to such objects; and there is no restriction upon this power as to the objects to which, or the time for which, appropriations may be made, except that "no appropriations for a standing army shall be for a longer time than two years." (*People ex rel. McCullough v. Pacheco*, 27 Cal. 175.)

Cited 28 Cal. 355, 395; 30 Cal. 439.

30. The legislature can impose a general tax upon all the property of the state, or a local tax upon the property of particular political subdivisions, as counties, cities, and towns. The cases in which its power shall be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualifications of equality and uniformity in the assessment. And, except as especially restricted, its power of appropriation of the moneys raised is coextensive with its power of taxation. It may appropriate them to claims which have no legal obligation, and are founded only in justice. The power of appropriation which the legislature can exercise over the revenues of the state for any purpose, which it may regard as calculated to promote the public good, it can exer-

cise over the revenues of a county, city, or town, for any purpose connected with their present or past condition, except as such revenues may, by the law creating them, be devoted to special purposes. In creating the law imposing the tax it can prescribe the objects to which the money raised shall be applied. It is only for the convenient administration of the government that the state is divided into counties, cities, and towns. (*People ex rel. Blanding v. Burr*, 13 Cal. 343.) Cited 16 Cal. 845; 17 Cal. 31; 18 Cal. 631; 35 Cal. 632; 41 Cal. 530; 42 Cal. 450; 49 Cal. 549; 2 Mont. 579.

31. The legislature has a right to authorize a local tax for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition or without it, or by or without a submission of the proposition to the people, and it is not essential that the improvement should be within or confined to the locality taxed, and a subscription for stock, to be paid for by taxation, is a valid contract to pay it. (*Pattison v. Yuba County*, 13 Cal. 175.)

Cited 30 Cal. 437; 41 Cal. 201.

32. The fact that the legislature has once exercised its powers in limiting the extent of taxation in municipal corporations, under the thirty-seventh section of article IV of the constitution, does not prevent the legislature from again exercising its power by enlarging the authority to tax. (*People ex rel. Blanding v. Burr*, 13 Cal. 343.)

33. A grant of municipal jurisdiction over certain limits includes all the powers which the municipal corporation is given by its charter, including the power of taxation. (*City of San Diego v. Grannis*, 77 Cal. 511.)

34. The authority given by the constitution to a city having over one hundred thousand inhabitants to frame and adopt "a charter for its own government," which "shall become the organic law thereof," authorizes such city to provide in its charter for taxation for municipal purposes. (*Security Savings Bank and Trust Co. v. Hinton*, 97 Cal. 214.) Cited 97 Cal. 321.

35. The provision in section 12 of article XI of the constitution that the legislature may, by general laws, vest in the corporate authorities of municipal corporations the power to assess and collect taxes for municipal purposes, applies fully to municipal corporations formed under general laws, but does not render the enactment of a general law necessary to empower a city having a freeholder's charter to impose taxes for municipal purposes. (*Security Savings Bank and Trust Co. v. Hinton*, 97 Cal. 214.)

36. The constitution, in prohibiting the legislature from imposing taxes for municipal purposes, and in authorizing cities of sufficient population to adopt freeholders' charters, which the legislature cannot change or amend, vests in such cities, by necessary implication, the power of taxation, which is essential to municipal existence. The constitution further assumes by its various provisions that all municipalities, however chartered, shall have and exercise the power of taxation. (Se-

curity Savings Bank and Trust Co. v. Hinton, 97 Cal. 214.)

37. Under section 12 of article XI of the constitution the whole subject of county and municipal taxes for local purposes is relegated to the corporate authorities thereof; and the legislature has no power to impose any tax whatever within those territories for local purposes. (City and County of San Francisco v. Liverpool etc. Ins. Co., 74 Cal. 113.)

38. The only restriction imposed upon legislative discretion in the matter of taxation by our constitution is, that it shall be equal and uniform, and in proportion to the property taxed. This is not a restriction of the absolute power to impose taxation, but affects the mode of its exercise only. In every case where the legislative act imposing taxes conforms to and is not in conflict with constitutional restrictions it is binding and obligatory, and beyond the control of the judicial department of the state government. (Beals v. Amador County, 35 Cal. 624.) Cited 41 Cal. 530; 51 Cal. 36; 2 Mont. 579.

39. Those clauses in the constitution which provide that taxation shall be equal and uniform, and prescribe the mode of assessment, and the officer by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements. (Hagar v. Supervisors of Yolo County, 47 Cal. 222.) Cited 92 Cal. 327.

40. Under the provisions of section 13, article XI, of the constitution, to wit: "Taxation shall be equal and uniform throughout the state," and "all property in this state shall be taxed in proportion to its value, to be ascertained as directed by law," held (1) that by the words "all property in this state," is meant all private property, or all property other than that belonging to the United States or this state, or that which is public property; (2) that the words "taxation shall be equal and uniform throughout the state" relate to taxation of property, and that the legislature has no power to exempt any private property in this state from taxation; and (3) that the rate of taxation on property, for state purposes, shall be uniform throughout the state. (People v. McCreery, 34 Cal. 432.) Cited 36 Cal. 222; 37 Cal. 55, 678; 43 Cal. 336, 594; 46 Cal. 492, 500; 47 Cal. 360; 51 Cal. 22; 64 Cal. 507; 65 Cal. 461, 462; 17 Nev. 156; 23 Or. 341; denied 51 Cal. 250.

41. A tax levied on the property of a given district, to pay for a local improvement, which is assessed upon the parcels of property in the district, in proportion to the benefits each parcel derives from the work, is unconstitutional. Such tax must be levied on all property according to its value. (People v. Whyler, 41 Cal. 351.) Cited 46 Cal. 555; 47 Cal. 92.

Tax to be valid must be equal and uniform. See post, VIII, 1.

Uniformity, tax on Chinese. See post, 43, 44. Rate, power in fixing. See post, VII.

Power to impose for public improvement. See Constitutional Law, 321, 322.

Power of appropriation of revenue, court of sessions have. See Jurisdiction, 143, 144.

Court of sessions has power of taxation. See Jurisdiction, 142.

Inequality of, what is not. See Swamp and Overflowed Lands, 184.

Placerville cannot levy for railroad. See Placerville, 1.

Tax to pay void debt. See Constitutional Law, 149.

Extent of power of taxation. See Constitutional Law, 34.

III. Statutes Relating to.

1. Constitutionality of.

42. The act of 1855, imposing a tax of fifty dollars on every person arriving in this state by sea, who is incompetent to become a citizen, is void. (People v. Downer, 7 Cal. 169.)

43. The Chinese may be taxed as other residents; but they cannot be set apart as special subjects of taxation, and be compelled to contribute to the revenue of the state in their character of foreigners. (Lin Sing v. Washburn, 20 Cal. 534.)

44. The act of April 26, 1862, entitled "An act to protect free white labor against competition with Chinese coolie labor, and discourage the immigration of the Chinese into the state of California," is in violation of the provision of the constitution of the United States which gives Congress the power to regulate commerce with foreign powers. (Lin Sing v. Washburn, 20 Cal. 534.) Cited 34 Cal. 498.

45. Revenue Act of May, 1853, is neither in derogation of the constitution of this state nor of the constitution of the United States. (People v. Coleman, People v. Hussey, 4 Cal. 46.)

46. The Revenue Act of May, 1853, does not violate that clause of the federal constitution which guarantees to the citizens of each state the same privileges and immunities which they are entitled to in their own state. (People v. Coleman, People v. Hussey, 4 Cal. 46.)

47. The Revenue Act of May, 1853, does not violate that provision of the state constitution which provides that all laws of a general nature shall be uniform in their operation. By a uniform operation, it was intended that laws of this character should, as near as possible, affect persons and property alike. A perfectly equal tax law is impossible, from the very nature of the subject. (People v. Coleman, People v. Hussey, 4 Cal. 46.)

48. The Revenue Act of May, 1853, does not violate that provision of the state constitution which provides that all laws of a general nature shall be uniform in their operation. By a uniform operation, it was intended that laws of this character would, as near as possible, affect persons and property alike. A perfectly equal tax law is impossible, from the very nature of the subject. (People v. Coleman, People v. Hussey, 4 Cal. 46.)

49. That part of the law which provides (1) that all goods, wares, etc., brought into the state, from any other state or foreign country, to be sold in this state, owned by any person not domiciled in the state, shall be declared consigned goods; and (2) that every person selling such consigned goods

shall be taxed sixty cents on every one hundred dollars' worth of goods so sold (such tax to be paid by the seller of the goods, he having a lien for the same), does not violate those provisions of the constitution of the United States, which declare (1) that Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian tribes; (2) that no state shall, without the consent of Congress, levy any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. (*People v. Coleman*, *People v. Hussey*, 4 Cal. 46.)

50. The provisions of the Revenue Act of 1853 and 1854, authorizing the court of sessions to assess a tax for county purposes, are unconstitutional, and the assessments made thereunder, and a subsequent levy upon and sale of property, in the enforcement of such assessment, are void. (*Hardenburgh v. Kidd*, 10 Cal. 402.)

51. The act of the legislature of April, 1858, amending the act of April, 1857, "to provide revenue for the support of the government of this state from a tax to be levied and collected from foreign and inland bills and other matters," so far as it imposes a tax upon bills of lading for the transportation of gold or silver from any point in this state to any point without the state, is in conflict with that clause of the constitution of the United States which declares that "No state shall, without the consent of the Congress lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws"; and hence the provisions of the original act of 1857 for enforcing the stamp tax must be restricted in their application to other instruments than such bills of lading. (*Brumagim v. Tillinghast*, 18 Cal. 265.)

Cited 33 Cal. 340; 34 Cal. 498.

52. Act of 1860, authorizing suit to be brought for unpaid taxes of the years 1858 and 1859, in the city and county of Sacramento, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment-rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. (*People v. Seymour*, 16 Cal. 332.)

53. Such a law making the assessment *prima facie* proof merely affects the remedy, and is not therefore liable to any constitutional objection. (*People v. Seymour*, 16 Cal. 332.)

54. Nor is the act unconstitutional because it compels the delinquent, if sued, to pay costs and percentage by way of attorney's fees, in addition to the tax assessed. (*People v. Seymour*, 16 Cal. 332.)

55. Nor is it any constitutional objection to the act that the delinquent tax list for 1859 was not properly published. The liability to pay the tax assessed preceded the publication of the delinquent list and suit, under the act

of 1860, is based upon that liability. (*People v. Seymour*, 16 Cal. 332.)

56. Where the charter of the city of Nevada authorized the trustees thereof to levy and collect annually a tax on all property in the city not exceeding one-half of one per cent, and the legislature subsequently, in 1861 (*Stats.* 1861, p. 78), passed an act authorizing the trustees, for the purpose of constructing a bridge within the city limits, in their discretion, to levy and collect a special tax, not exceeding five-eighths of one per cent on the valuation of all taxable property within the city as fixed by the assessment-roll of the city made by the city assessor during the year 1860, the trustees, as a board of equalization, to have power, on due notice, to add to or modify said roll, held, that the act is constitutional; that it is a mere amendment to the city charter, and does not transfer legislative powers to the trustees; that the legislature had the same power to amend the charter as to make it; the same power to increase the tax as to limit it; the same power to authorize this special tax as a general tax. (*Kelsey v. Trustees of Nevada*, 18 Cal. 629.)

57. It is no objection to such act that the tax is to be apportioned according to the assessment-roll of 1860; that our constitution does not require annual assessments; and that property may be taxed for several years at a rate based upon a particular valuation. (*Kelsey v. Trustees of Nevada*, 18 Cal. 629.)

58. If any individual injustice has been done, this is no objection to the whole law, but, at most, would only entitle the party injured to relief. (*Kelsey v. Trustees of Nevada*, 18 Cal. 629.)

59. The act entitled "An act to provide revenue for the support of the government of this state from a tax upon foreign and inland bills, passengers, insurance companies, and other matters," passed May 14, 1862, has no reference to the execution of the inspection laws of this state, and is not in the nature of a police regulation, but is a measure designed for revenue purposes only. (*People v. Raymond*, 34 Cal. 492.)

Cited 42 Cal. 585; 51 Cal. 501.

60. The stamps which, by the provisions of the act, are required to be purchased from the state, are to be regarded in no other light than as a tax on the contract for passage, to be paid by the passenger. This is a regulation of commerce, within the meaning of section 8, article I, of the federal constitution, and the act is unconstitutional and void. (*People v. Raymond*, 34 Cal. 492.)

61. Constitutionality of act of April 2, 1866, providing for assessments on interests in mining claims, not discussed or decided. (*Brunnage v. Adams*, 41 Cal. 619.)

62. The act of the legislature of March 16, 1874, entitled "An act to regulate the assessment of migratory herds or bands of livestock, and to provide for an equitable distribution of the taxes derived therefrom," is unconstitutional. (*People ex rel. Long v. Townsend*, 56 Cal. 633.)

Arbitrary assessment, constitutionality of statute as to. See post, V, 14.

Assessment, statute allowing assessor out of district to make, is void. See post, 227.

Assessment-roll, constitutionality of statute allowing property to be added to. See post, 414.

Board of equalization, constitutionality of statute creating. See post, VI, 1.

Board of equalization, statute giving power to raise or lower assessments. See post, VI, 3.

Bridge tax, ordinance levying in Nevada City, validity of. See post, 855.

Deduction of amount of indebtedness, statute allowing. See post, 344.

Defective assessments, statute curing. See post, VIII, 5.

Exempting property from taxation, constitutionality of statutes. See post, IV, 16.

Percentage on delinquent tax, constitutionality of law adding. See post, 693.

Railroads operated in more than one county, statutes relating to assessment of. See post, V, 13.

Rate, constitutionality of statute giving board of equalization power to fix. See post, VI, 2.

Remission of tax, statute authorizing. See post, X.

Reassessment or double assessment of property escaping taxation, statute as to, is valid. See post, V, 15.

Amendment of Political Code relating to revenue, constitutionality. See Constitutional Law, 240, et seq.

2. Construction of.

63. It was the intention of the legislature in adopting the codes to establish one revenue system, which should be applicable alike to all the counties. (*Mitchell v. Crosby*, 46 Cal. 97.)

64. The general revenue system provided in the Political Code applies to the city and county of San Francisco. (*People ex rel. Attorney General v. Reis*, 76 Cal. 269; *Savings and Loan Society v. Austin*, 46 Cal. 415, cited 76 Cal. 276.)

65. Section 3891 of the Political Code, which declares that the provisions of the code with respect to revenue must be construed as if passed on the last day of the session of 1871-72, has the effect to repeal all acts passed at the session of 1871-72, concerning revenue, except acts amendatory of or carrying into effect the codes. (*Mitchell v. Crosby*, 46 Cal. 97.)

66. The Revenue Act of May 17, 1861, so far as its operation as a general law is concerned, was repealed by section 18 of the Political Code; but, so far as it was incorporated into and became a part of the charter of the city of Sacramento, it was continued in force. (*People v. Clunie*, 70 Cal. 504.)

67. If there are two acts for the assessment and collection of a tax, and by one a notice of the election to vote it must be posted ten days and published two weeks, and the tax is not to exceed one dollar and fifty cents on the hundred dollars, and, by the other, the notice is to be posted twenty days and published three weeks, and the rate of taxation is not to exceed seventy cents on the hundred dollars, the two acts are repugnant, and the

latter repeals the former. (*People v. Burt*, 43 Cal. 560.)

Consigned goods, construction of statutes concerning. See post, IV, 14.

Delinquent list, construction of statute relating to. See post, 575.

Valuation of property, statute relating to, construction of. See post, 324.

Defective assessments, statute curing. See post, VIII, 5.

Publication of delinquent tax list, statute relating to. See post, XII, 2.

Revenue system in Political Code applies to San Francisco. See San Francisco, VIII.

IV. What Subject to.

1. General Rule that All Property is Subject to.

68. Constitution provides that all property shall be taxed. (*DeWitt v. Hays*, 2 Cal. 463.)

69. The taxing power is an incident of sovereignty, the exercise of which belongs exclusively to every state, and attaches alike upon every thing which comes within its jurisdiction. (*People v. Coleman*, *People v. Hussey*, 4 Cal. 46.)

70. The legislature has power to levy a tax upon all the property in the state, either before or after the value of the property is ascertained. (*People v. Latham*, 52 Cal. 598.)

"All property in this state," meaning of. See ante, 46.

2. Occupations.

71. Constitution of this state does not prohibit legislature to tax occupations, nor to authorize municipal corporations to tax them for purposes of revenue. (*San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 476.) Distinguished 56 Cal. 149.

72. Power of legislature to tax trades, professions, and occupations is a matter completely within its control, and rests in its sound discretion. (*People v. Coleman*, *People v. Hussey*, 4 Cal. 46.)

73. When power is conferred on a municipal corporation to "license and regulate" occupations the whole charter and the general legislation of the state pertinent to the subject must be consulted, in order to determine whether the power to "license and regulate" includes the power to tax occupations for revenue purposes. (*San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 476.)

3. Mining Claims and Flumes.

74. The interest of the occupant of a mining claim is property, and, under the constitution, it is in the power of the legislature to tax such property. (*State v. Moore*, 12 Cal. 56, cited 14 Cal. 154, 30 Cal. 657, 5 Or. 106, distinguished 22 Cal. 80; *People ex rel. McCullough v. Shearer*, 30 Cal. 645; cited 98 Cal. 404, 1 Oklahoma, 76.)

75. Money invested in the purchase and opening of mining claims is not within the provisions of that portion of the Revenue Act which provides for the levy of a tax on "all capital loaned, invested, or employed in any trade, commerce, or business whatsoever." (*State v. Moore*, 12 Cal. 56.)

76. The legislature having expressly ex-

empted mining claims from the operation of the Revenue Act it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. (*State v. Moore*, 12 Cal. 56.)

77. The case of the *People v. Moore*, 12 Cal. 56, simply holds, that the value of a mining claim itself cannot be taxed; but this does not exempt every thing near the claim necessary to give it value. (*Hart v. Plum*, 14 Cal. 148.)

78. Under the second section of the Revenue Act of 1857, taxing all property within the state, except certain descriptions of property, among which are mining claims, a flume, constructed by a mining company along the bank of a river leading to the claims of the company in the bed of the river, is not exempt. (*Hart v. Plum*, 14 Cal. 148.)

79. The fact that such flume is an auxiliary to the working of the claim does not exempt it. It is not so affixed to the claim as to be a part of it. (*Hart v. Plum*, 14 Cal. 148.)

80. The flume, although not delivered to the company by plaintiff, the contractor, until after the assessment, was the property of the company at the time of assessment, taxable to it, and not to the contractor. (*Hart v. Plum*, 14 Cal. 148.)

81. The contractor has his lien; but the flume being constructed for the company, on land selected by it, and paid for, as the work progressed, was the property of the company, although they had power, under the contract, to reject the work when completed. (*Hart v. Plum*, 14 Cal. 148.)

Statute providing for tax on interest in mining claim. See ante, 61.

4. Growing Crops.

82. Growing crops are private property, and subject to taxation, the provision of said statute exempting them notwithstanding. (*People v. Gerke*, 35 Cal. 677.)

83. Fruit trees are not growing crops within the meaning of article XIII, section 1, of the constitution, and are subject to taxation. (*Oottle v. Spitzer*, 65 Cal. 456.)

5. Lands and Interests Therein; Agricultural Lands in City.

84. Term "property in lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructuary interest, whether it be a leasehold or a mere right of possession. Several persons may have, in the same land, a property which is subject to taxation; and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which private individuals have acquired in the same property. Exemption from taxation is a privilege of the government, not an incident to the property. (*State v. Moore*, 12 Cal. 56.)

85. A grant of three square leagues of land made by the Mexican government, to be selected within exterior boundaries containing a much larger tract, after two prior grants have been located within the same boundaries, is real estate liable to taxation, although

not yet surveyed, provided there is land enough within the exterior boundaries to satisfy the grant or any part thereof. (*People v. Crockett*, 33 Cal. 150.)
Cited 12 Cal. 435; 2 Col. 636.

86. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained, and the land segregated by a survey, under a decree of confirmation by the United States supreme court, held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey. (*Palmer v. Boling*, 8 Cal. 384.)

Cited 13 Cal. 328; 22 Cal. 372; 33 Cal. 157; 72 Cal. 435; distinguished 36 Cal. 73.

87. Fact that title of land is in dispute between the claimants and the United States, and that the claimants under a Mexican grant are not in possession, affords no ground for exempting the land from taxation. (*Robinson v. Gaar*, 6 Cal. 273.)

Cited 1 Wash. (Ter.) 191; a. c. 1 Wash. (Ter.) N. S. 168.

88. Possession, with a claim, of ownership, is a subject of taxation, and imposes on the occupant the duty of paying the tax levied on the property. (*Reilly v. Lancaster*, 39 Cal. 354.)

Cited 58 Cal. 259.

89. A tax on a "claim to and possession of" land is not a tax on the land itself. (*People v. Cohen*, 31 Cal. 210.)

90. Under the Revenue Act of 1861 a person's "claim to and possession of" lands, or his "claim to" or his "possession of" such lands, may be assessed for taxation. (*People v. Frisbie*, 31 Cal. 146.)

Cited 37 Cal. 54; 58 Cal. 146.

91. The term "claim to . . . any land," as used in section 5 of the Revenue Act of 1861, means not only an assertion of title to, but an actual possession of, the land claimed. (*People v. Frisbie*, 31 Cal. 146.)

92. A "claim to" and "possession of" land is "property" liable to taxation within the meaning of the thirteenth section of the eleventh article of the constitution. (*People v. Frisbie*, 31 Cal. 146.)

93. The public domain of the United States is exempt from taxation. What is meant by the term "public domain," as here used, discussed. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)

Cited 47 Cal. 361; 58 Cal. 146; 98 Cal. 404; 1 Oklahoma, 176.

94. Public land of the United States cannot be sold for taxes, and plaintiff in ejectment for such land cannot recover on a tax deed. If the tax was for improvements on the land, and if such tax was proper, then the deed should show this, and not a sale of the fee, or a taxing of the land itself. (*Hall v. Dowling*, 18 Cal. 619.)

Cited 22 Cal. 80; 30 Cal. 655, 657.

95. The "claim to and possession of" land is properly liable to taxation, even if the land

belongs to the United States. (*People v. Cohen*, 31 Cal. 210.)
Cited 37 Cal. 54.

96. The possession by the citizen of, and his possessory interest in, the public lands for mining, agricultural, or other purposes, constitutes a species of property recognized by law, and is subject to taxation by the state. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)
Cited 16 Nev. 242.

97. Land, as such, in the occupancy of a pre-emptor, whose right to purchase as such pre-emptor has been determined in his favor, is not subject to taxation until the pre-emptor has paid for the same. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)
Cited 31 Cal. 148, 211; 37 Cal. 54.

98. A possession of and claim to public land of the United States is property, and, as such, is taxable to the claimant, without violating the act of Congress by which this state was admitted into the union. (*People v. Black Diamond Coal Min. Co.*, 37 Cal. 54.)
Cited 64 Cal. 507.

99. Under the provisions of the act of Congress admitting California into the union no parcel of the public lands can be taxed by the state until a patent for it has been issued to a private person, or until such private person has become vested with a perfect equity, leaving only the dry legal title in the United States. (*Central Pac. R. R. Co. v. Howard*, 52 Cal. 227.)
Cited 58 Cal. 146.

100. The definition in the constitution and statutes of property subject to taxation is broad enough to include the possessory right and imperfect interest acquired by a purchaser from the state, prior to payment of the purchase money or patent; and the state is not estopped from assessing the same. (*People v. Donnelly*, 58 Cal. 144.)

101. When land of the United States has been paid for, and a certificate of purchase has been given to the purchaser, it is liable to taxation, although the patent may not have issued. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)
Cited 58 Cal. 146; 2 Or. 140.

102. Improvements on the public lands of the United States, whether owned by a pre-emptor or one occupying public lands without license, are liable to assessment and taxation if made so by the revenue laws of a state. (*People ex rel. McCullough v. Shearer*, 30 Cal. 645.)

103. In order to hold improvements upon public lands liable for a state tax the assessment must be upon the improvements *eo nomine*, and not upon the land itself. (*People v. Morrison*, 22 Cal. 78.)

Tax on improvements. See ante, 94.

104. If a grant by Congress to a railroad company of public land to aid in its construction contains conditions by which the grant is liable to be defeated the land cannot be taxed while the conditions are in force and are not fulfilled. (*Central Pac. R. R. Co. v. Howard*, 52 Cal. 227.)

105. When the act of Congress making a

grant of public land to a railroad company to aid in its construction provides that the president shall appoint commissioners, who shall report when a section of the road is completed, and that the company shall pay the costs and charges of the commissioners, and that patents for the land shall not issue until such commissioners have reported favorably on a section, and their costs and charges have been paid, the land is not subject to state taxation until such commissioners have been appointed and have reported, and their costs and charges have been paid by the company. (*Central Pac. R. R. Co. v. Howard*, 51 Cal. 230.)

106. Such lands are not subject to state taxation until the company has complied with the conditions on which they were granted, and is entitled to a patent therefor. (*Central Pac. R. R. Co. v. Howard*, 51 Cal. 230.)

107. Land situate within the limits of a municipal corporation organized under the act of March 13, 1883, but used solely for agricultural purposes, is subject to municipal taxation. (*Town of Dixon v. Mayes*, 72 Cal. 166.)

6. National or Savings Banks; Capital or Stock of Corporations.

108. Section 3617 of the Political Code, subdivision 6, as amended in 1881, which provides that "credits, claims, debts, and demands due, arising, or accruing for or on account of money deposited with savings and loan corporations shall, for the purpose of taxation, be deemed and treated as an interest in the property of such corporation, and shall not be assessed to the creditor or owner thereof," is a general law declaring the general policy of the state upon the subject of taxation of savings and loan corporations, and must control a city ordinance providing for the taxation of property "taxable by law," regardless of whether there is or is not any conflict between the terms of the charter and the ordinance and the provisions of the code; and a loan and savings bank doing business in such city is not entitled to deduct from its solvent unsecured credits its unsecured liability to its depositors for moneys deposited for purposes of municipal taxation. (*Security Savings Bank and Trust Co. v. Hinton*, 97 Cal. 214.)

109. The language of section 3617 of the Political Code is broad enough to include savings banks which pay to depositors a specified rate of interest on time deposits, as in case of borrowed money, as well as those which distribute to depositors the net profits realized by the bank in proportion to their several deposits. (*Security Savings Bank and Trust Co. v. Hinton*, 97 Cal. 214.)

110. The plaintiff was owner of certain shares of capital stock of a national bank upon which a tax for the year 1880 had been assessed, and an agreed case was submitted in the lower court by her and the defendant, who was tax-collector (under section 1138 of the Code of Civil Procedure), in which the question in effect was whether the assessment was valid. Held, the provision of section 3640 of the Political Code, as amended March 22,

1880 (under which the assessment was made), so far as it applied to national banks, was in violation of the restriction imposed by section 5219 of the Revised Statutes of the United States, forbidding the taxation of such shares at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the state; and the assessment was therefore void. (*Miller v. Heilbron*, 58 Cal. 133.)

111. Assessment upon "the capital" of a corporation, *eo nomine*, held to be valid. (*San Francisco v. Spring Valley W. W.*, 54 Cal. 571, cited 54 Cal. 603, 63 Cal. 533, *San Francisco v. Spring Valley W. W.*, 54 Cal. 603, cited 63 Cal. 533.)

112. Where, prior to the adoption of the constitution of 1879, all the tangible property of a corporation had been assessed, and the taxes paid thereon, and the corporation did not own, or have in its possession, or under its control, any of the shares of its capital stock, the same being owned and held by third persons, it is not liable for taxes assessed upon "capital," or upon "capital stock." (*City and County of San Francisco v. Spring Valley W. W.*, 63 Cal. 524.)

113. Shares of the capital stock of corporations were taxable under the constitution of 1849, and the revenue laws in force during the fiscal year 1876-77. (*City and County of San Francisco v. Flood*, 64 Cal. 504.)

114. Shares of stock in mining corporations constituted under the laws of California, but whose tangible property is situated in another state, are taxable. Sections 3640 and 3641 of the Political Code do not apply to such corporations. (*City and County of San Francisco v. Flood*, 64 Cal. 504.)

115. The Revenue Act does not make a corporation liable for taxes assessed on its capital stock, when such capital is represented by shares of stock which are not the property of the corporation. (*People v. National Gold Bank*, 51 Cal. 508.)
Cited 63 Cal. 526, 527, 531, 533.

116. Shares of stock in a corporation, the tangible property of which is situated in another state, and subject to taxation under the laws thereof, such shares being owned by a resident of this state, are taxable here without regard to the taxes thus imposed upon the corporate property. Section 3640 of the Political Code has reference to corporations whose property is situated in this state. The inhibition against double taxation only applies to such taxation by the same state or government. (*City and County of San Francisco v. Fry*, 63 Cal. 470.)
Cited 64 Cal. 507.

117. On the same day on which the legislature enacted section 3608 of the Political Code, declaring that shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they represent, and prohibiting the taxation of such shares of stock, it repealed section 3640 of the same code, which required the assessment to every person owning, or having the control thereof, of all shares of stock in corporations. Held, by this section

which was repealed, the whole property of the corporation, including franchise and other assessed property, would have been taxed by taxing the shares to each owner of shares in the manner indicated by its provisions. But by declaring, in section 3608, that shares of stock were not to be taxed, but the property should, no doubt it was their intention to tax every thing in the shape of property owned by the corporation; that every thing entering into and giving value to the shares should be taxed. It cannot be doubted that the legislature, in acting on the subject of revenue and taxation during the session of 1881, did not intend to leave the system in relation to so important a matter in such a shape that so large an amount of property as indicated by the difference between the market value of the shares of corporations and the value of the tangible property of such corporations should escape taxation. To come to any other conclusion would be to impute to that body a most culpable dereliction of duty. (*Spring Valley W. W. v. Schottler*, 62 Cal. 69.)

Corporate stock, double taxation. See post, VIII, 3.

Savings banks, double taxation. See post, VIII, 3.

7. Money in Bank or With County Treasurer.

118. A. & Co. having, on general deposit with B. & Co., of Marysville, seventy-five thousand dollars, a tax for county purposes was levied thereon, and payment demanded both of B. & Co. and A. & Co. Held, that the tax was legal. (*Yuba County v. Adams*, 7 Cal. 35.)

119. Money belonging to litigants, but placed in the hands of a county treasurer by order of the court, subject to the order of the court, is liable to taxation, and may be assessed to the treasurer by name, and when the assessment is levied it becomes a lien on the money in the treasurer's hands. (*People v. Lardner*, 30 Cal. 242.)

8. Debts, Credits, Choses in Action or Mortgages.

120. The word "debts," as used in the revenue laws of this state, includes not only debts due and payable on or before the first Monday of December of the year for which an assessment is made, but debts to become due and payable at any time thereafter. (*People v. Arguello*, 37 Cal. 524.)

121. Solvent debts are liable to taxation. (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)
Cited 17 Nev. 156.

122. Solvent debts are "property" within the meaning of that word as used in the constitution, and are liable to taxation. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)
Cited 46 Cal. 527; 17 Nev. 154, 157, 158.

123. Credits are not property in sense in which the word "property" is used in section 13 of article XI of the constitution, and cannot be assessed for taxes, or taxed as property, even if secured by mortgage. (*People v. Hibernia Bank*, 51 Cal. 243.)
Cited 51 Cal. 370, 472; 17 Nev. 154; distinguished 64 Cal. 507.

124. Choses in action are property subject

to taxation, even when secured by mortgage. (*Lick v. Austin*, 43 Cal. 590.)

125. Solvent debts, promissory notes, and mortgages are not liable to taxation. (*Bank of Mendocino v. Chalfant*, 51 Cal. 369.)

126. Neither promissory notes, solvent debts, nor mortgages are subjects of taxation; and if assessed along with other property and the tax-collector can separate the legal from the illegal portion of the tax, and the legal portion is tendered him and he refuses to receive it, and the whole tax is then paid under protest and to prevent a sale of the property, the illegal portion may be recovered back. (*Bank of Mendocino v. Chalfant*, 51 Cal. 471.)

Solvent debts, taxation of. See post, VIII, §.

127. Prima facie a mortgage is no more taxable than a deed or any other muniment of title or mere security, and the money which it secures cannot be taxed without a more particular description than the general designation "personal property." (*Falkner v. Hunt*, 16 Cal. 167.)

Cited 23 Cal. 140; 25 Cal. 604.

128. A mortgage is not personal property within the Revenue Act of 1856, nor liable, as such, to taxation. (*Falkner v. Hunt*, 16 Cal. 167.)

129. A mortgage, as such, is not liable to be assessed for taxes, but the assessment should be made of the debt which the mortgage was given to secure, and the debt, where the creditor resides in the state, has no situs for the purpose of taxation, apart from the residence of the owner. (*People v. Eastman*, 25 Cal. 601.)

Cited 29 Cal. 546; 38 Cal. 467; 64 Cal. 483, 484; 3 Col. 351.

130. By the provisions of the Revenue Act it is the "money at interest" which is subject to be taxed, and not the mortgage, as such. (*People v. Whartenby*, 38 Cal. 461.)

131. In the fiscal year of 1868-69 no liability for assessment and taxation could accrue upon a bond and mortgage which was not in existence on the first Monday in March preceding, that being the time fixed by the statute when the lien for taxes attached. (*People v. Kohl*, 40 Cal. 127.)

132. Land mortgaged may be taxed without reference to the mortgage, and if the mortgage be to secure a debt the debt may be taxed; if to secure a loan of money, the money may be taxed; but the act does not intend to tax the mortgage, as such, and also to tax the money loaned and secured by the mortgage, or the solvent debt it represents. (*Falkner v. Hunt*, 16 Cal. 167.)

133. The owner of land who had been assessed with the same, and had paid the taxes thereon, and who, during the same year, had sold the land and taken a note and mortgage, payable at a future day, for the purchase money thereof, was not liable to reassessment with the amount of such mortgage for the same fiscal year. (*People v. Kohl*, 40 Cal. 127.)

Cited 43 Cal. 596; 46 Cal. 485; 15 Col. 95.

Mortgage, double taxation. See post, VIII, §.

134. A mortgagee prior to the adoption of the new constitution did not have a vested right of exemption from taxation which extended beyond the life of the former constitution. Even if he had a contract with his mortgagor by which the latter agreed to pay all taxes a change in the law which imposed the duty on him to pay the tax in the first instance would not violate the obligation of the contract. (*McCoppin v. McCartney*, 60 Cal. 367.)

135. The provision of the constitution as to the taxation of mortgages applies to mortgages executed prior thereto. (*McCoppin v. McCartney*, 60 Cal. 367.)

Cited 65 Cal. 384.

136. Under section 4 of article XIII of the constitution, a mortgage upon real estate is assessable and taxable as an interest in the mortgaged premises. (*Doland v. Mooney*, 72 Cal. 34.)

Mortgages, constitution relating to, does not apply to prior. See Constitutional Law, 92.

9. Bonds.

137. Bonds of the state of California are personal property within the meaning of the term "personal property" as used in the Revenue Act, and are subject to taxation. (*People v. Home Ins. Co.*, 29 Cal. 533.)

138. The bonds of this state which are owned by a foreign insurance company, but kept in this state in accordance with the act of the legislature requiring such companies to deposit bonds here as security for their liabilities, are a portion of the capital of the company, and are property in this state within the meaning of the Revenue Act. (*People v. Home Ins. Co.*, 29 Cal. 533.)

Cited 63 Cal. 531.

139. The bonds of the United States, issued in pursuance of the acts of Congress, are not subject to taxation. (*People v. Home Ins. Co.*, 29 Cal. 533.)

140. The bonds of this state owned by a foreign insurance company doing business in this state and deposited with a banker, in pursuance of the act to tax and regulate foreign insurance companies doing business in this state, and under the control of an agent of the company, are subject to taxation in this state. (*People v. Home Ins. Co.*, 29 Cal. 533.)

10. Franchises.

141. Franchises are property, and are to be taxed in proportion to their value. (*San Jose Gas Co. v. January*, 57 Cal. 614.)

Cited 62 Cal. 108, 112, 114, 117; 99 Cal. 38.

142. There can be no doubt of the power of a state to tax the franchise at its assessed value. There may be more difficulty in arriving at its value than that of a parcel of land or personal chattels, but still its value may be estimated, and such value may exceed the value of the tangible property of the corporation. (*Spring Valley W. W. v. Schotter*, 62 Cal. 69.)

Cited 92 Cal. 614; 99 Cal. 38.

143. It was the intention of those who framed and ratified the constitution to place

franchises in the category of property to be taxed. The word "franchises," as used in the first section of article XIII, is used generally without any qualifying words, and is intended to embrace all franchises of the character above referred to, whether vested in individuals or bodies politic. (*Spring Valley W. W. v. Schottler*, 62 Cal. 69; *San Francisco Gaslight Co. v. Schottler*, 62 Cal. 119.)

144. The clause "and all other matters and things real, personal, and mixed, capable of private ownership," in section 1 of article XIII, does not qualify the word "franchises," which preceded it. The words used show clearly that they were intended to add something to what preceded them, to refer to kinds of property not previously mentioned, not to qualify any thing. They constituted a declaration that in enumerating the property to be taxed it was not intended to confine the enumeration to "moneys, credits, bonds, stocks, dues, franchises," but to include all other kinds of property, and that by no construction of the word "property," as used in the section, were any kinds of property to be left out. (*Spring Valley W. W. v. Schottler*, 62 Cal. 69.)

145. All these rights exist until the legislative authority has acted so as to impair them or take them away; and until such legislation is enacted, the rights of property remain unimpaired. Shares of stock, whether real or personal estate, are property. (*Spring Valley W. W. v. Schottler*, 62 Cal. 69.)

146. A franchise conferred by the legislature on private persons to construct a railroad track through the streets of a city, and to run cars thereon, and prescribing certain conditions to be performed by the grantees, is not a contract in such sense as to exempt the occupation of operating the road from proper police regulations, or from taxation by the municipal authorities in cases authorized by law. (*San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 476.)

147. The fact that the railroad extends and cars are run beyond the corporate limits does not exempt the occupation from taxation by the municipality. (*San Jose v. San Jose etc. R. R. Co.*, 53 Cal. 476.)

148. Franchise of the Central Pacific Railroad Company is property subject to taxation; and is not exempt from taxation by reason of its being a means or instrumentality employed by Congress to carry into operation the powers of the general government. (*Central Pac. R. R. Co. v. State Board of Equalization*, 60 Cal. 35.)

Not followed, 77 Cal. 520.

149. A water company, whose franchise has been assessed in the county where it has its principal place of business, cannot be assessed as upon a "franchise" for a mere right of way in another county, through which a portion of its pipe and pipe line passes entirely unconnected with any privilege granted by such county to take tolls or collect water rates, or enjoy any other special prerogative. Such mere right of way is not a franchise. (*Spring Valley W. W. v. Barber*, 99 Cal. 36.)

150. The Western Union Telegraph Company, owning and operating telegraph lines

by authority of the United States government, along the military and post roads of the United States, and over, under, and across the navigable streams or waters thereof, and which uses its lines in the transmission of telegrams from points in this state to points in other states, and to foreign countries, as well as in the transmission of telegrams from point to point within this state, and which is likewise engaged in the transmission over its wires of messages for, from, and between the several departments of the government of the United States, giving such messages priority over all other business, and sending them at rates annually fixed by the postmaster general of the United States, is one of the means or instruments employed by the United States government for carrying into effect its sovereign powers; and a tax upon its franchise, in addition to the taxes which, in common with others, it pays on its property, is beyond the power of the state to levy, and is void. (*City and County of San Francisco v. Western Union Tel. Co.*, 96 Cal. 140.)

151. The charter of the city of Marysville contains this clause: "The common council shall have power within the city to construct a bridge across the Yuba river at the southern extremity of the public plaza, or to authorize the construction upon such terms as to a division of the proceeds from the tolls as may be just, and to regulate the rates of tolls." Under this clause an ordinance was passed granting Eaton & Smith the franchise of constructing a bridge, the grant to last twenty-five years, they paying the city five per cent of the gross tolls. They constructed the bridge, and subsequently assigned all their interest in it and the franchise to plaintiff, who has regularly paid over the five per cent. The city now assesses a tax on the bridge as the property of plaintiff. Held, that plaintiff has a taxable estate in the bridge, and that the tax is valid; that the city is not the present owner of the bridge, but has only a reversionary interest. Held, further, that the objection that the bridge has been assessed at its full value does not affect plaintiff's right to maintain this suit to enjoin the collection of this tax, but only goes to the amount of the tax, and not to its validity; and that the only remedy of plaintiff was to apply for a reduction of the tax. (*Fall v. Mayor of Marysville*, 19 Cal. 391.)

Cited 46 Cal. 552; 47 Cal. 361.

152. The property was not taxable beyond plaintiff's interest in it, and, in legal effect, the tax assessed amounted to nothing more than a tax upon such interest. (*Fall v. Mayor of Marysville*, 19 Cal. 391.)

153. The legislature have omitted to provide for any tax on the right to collect wharfage and dockage; the naked right to collect wharfage cannot be assessed *eo nomine*, or made liable. (*De Witt v. Hays*, 2 Cal. 463.)

Railroads, assessment of. See post, V, 13.

11. Property of Railroad Other than Its Franchise.

154. The state of California has authority to impose taxation for state purposes upon that portion of the Central Pacific Railroad,

and the telegraph line in connection therewith lying within its limits. (People v. Central Pac. R. R. Co., 43 Cal. 398.) Cited 54 Cal. 574.

Central Pacific Railroad, taxation of. See Taxation, IV, 11.

155. A railroad corporation, organized under the laws of a state, cannot claim an exemption of its property lying within the limits of a state from state taxation, because the corporation thus created has been subsequently adopted by the federal government, and is employed in the service of the general government, in the carriage of mails, munitions of war, etc. (People v. Central Pac. R. R. Co., 43 Cal. 398.)

156. The principle upon which the business of a corporation, created by the federal government as an agent in the execution of its powers, is exempt from state taxation, does not apply to the real property of the corporation lying within the limits of a state. (People v. Central Pac. R. R. Co., 43 Cal. 398.)

157. Under the constitution of this state the property of railroad and other quasi public corporations is subject to assessment and taxation, without deduction of the amount of any mortgage or like lien thereon. (Central Pac. R. R. Co. v. State Board of Equalization, 60 Cal. 35.)

158. This provision is not in conflict with the fourteenth amendment to the constitution of the United States. The provision of that section, that no state shall "deny to any person within its jurisdiction the equal protection of the laws," applies to natural persons only, and does not apply to corporations or artificial persons. (Central Pac. R. R. Co. v. State Board of Equalization, 60 Cal. 35.)

Railroads, assessment of. See post, V, 13.
Roadbed and roadway, double taxation. See post, VIII, 3.

12. Vessels.

159. Steamboat whose owners reside in New York, and by whom it was sent to San Francisco and used in navigation within the state, is liable to assessment and taxation. (Minturn v. Hays, 2 Cal. 590.)

160. Vessel registered out of the state, and never here except transiently in the course of her voyages for the purpose of receiving and discharging cargo, is not subject to assessment for taxes within the state. In such a case it makes no difference that the vessel is owned in part by residents of the state. (City and County of San Francisco v. Talbot, 63 Cal. 485.)

Vessels belonging to railroads. See post, V, 13.

13. Property of Nonresidents.

161. The language used in the eighth section of the act of 1851, that "every person shall be listed in the county where he resides," does not exempt the property of nonresidents of the state from taxation. (Minturn v. Hays, 2 Cal. 590.)

162. That the same property is taxed in New York is no ground why it should not be taxed in California, when it is within the limits

of the latter state. (Minturn v. Hays, 2 Cal. 590.)

163. Personal property in this state belonging to nonresident may be assessed to such owner, notwithstanding he is a nonresident. (People v. Home Ins. Co., 29 Cal. 533.) Cited 64 Cal. 483; 17 Nev. 393.

Assessment of property of nonresident. See post, 234.

Foreign insurance companies, taxation of. See Insurance, 249.

14. Consigned Goods.

164. The Revenue Act of May, 1853, does not levy on the foreign owner of consigned goods in the hands of the consignee, but only upon their sale. All other consigned goods are taxed by the system of licenses, as part of the general property of the state. (People v. Coleman, People v. Hussey, 4 Cal. 46.)

165. Sixth article of the Revenue Act of 1854, which declares "all goods, wares, and merchandise, provisions, or any other property whatsoever, brought or received within this state from any other state, or from any foreign country, to be sold in this state, owned by any person or persons not domiciled in this state," to be consigned goods within its intent and meaning, and provides that all persons selling such goods shall be subject to a tax, for the use of the state, at the rate of fifty cents on each one hundred dollars of the amount of sales made by them, is not repealed by the Revenue Act of 1857. (Crosby v. Patch, 18 Cal. 438.)

166. The repeal of statutes by implication is not favored. And as there is no necessary repugnancy between the specific provisions of the sixth article of the act of 1854, taxing consigned goods, and the general language of the act of 1857, taxing all property within the state, with certain exceptions, and as the legislature has not in direct terms repealed said sixth article, the two acts must be construed together, and effect given, if possible, to both. (Crosby v. Patch, 18 Cal. 438.)

Tax on consigned goods. See ante, 49.

15. Public Property; Herein or Lessees of Public Property.

167. Property of United States, or of this state, or of municipal corporation, is not subject to taxation for revenue purposes. (People ex rel. Doyle v. Austin, 47 Cal. 353.)

168. The provisions of the constitution and revenue laws upon the subject of taxing property are to be understood as referring to private property and persons only, and not as including public property and the state or any subordinate part of the state government, such as counties, towns, and municipal corporations. (People v. Doe G. 1034, 36 Cal. 220.) Cited 42 Cal. 557; 89 Cal. 114.

169. The state has in no manner provided for taxing itself or its own property, nor has the state authorized suits to be instituted by itself against itself or its property for the collection of any tax. (People v. Doe G. 1034, 36 Cal. 220.)

170. Lands within this state belonging to United States are, both by the provisions of the state revenue law and by the terms

of the act of Congress admitting California into the union, exempt from state taxation. (*People v. Morrison*, 22 Cal. 73.) Cited 30 Cal. 655; 1 Nev. 107; distinguished 30 Cal. 657.

171. The property of a municipal corporation is not liable to taxation for municipal purposes. (*Low v. Lewis*, 46 Cal. 549.) Cited 47 Cal. 361.

172. A municipal corporation cannot tax its own property. (*Low v. Lewis*, 46 Cal. 549.)

173. A tax suit in rem was brought in the name of the people against a tract of land situated in the city of Sacramento. In due course a judgment as demanded was rendered therein, and the property sold, and the proceeds of sale applied to the satisfaction of the judgment. M., who as purchaser had in due course received a sheriff's deed, applied for a writ of assistance to be let into possession, when, it being shown at the hearing, that a part of said tract was, at the time the tax was levied and said suit was commenced, the property of said city, and constituted a part of the city cemetery, the application as to such part was denied. Held, that said application was properly denied, and that said suit, so far as it related to said city and its said property, was coram non iudice. (*People v. Doe G. 1034*, 36 Cal. 220.)

174. For the purpose of taxation, improvements erected by a lessee upon lands owned by and leased from a municipal corporation are regarded as the property of the lessee. (*City and County of San Francisco v. McGinn*, 67 Cal. 110.) Cited 1 Oklahoma, 176.

175. If a city, being the owner of water and the reservoirs and pipes connected therewith for supplying its inhabitants with pure water, for a consideration paid by a party, concedes to him the use and possession of the water and works for a term of years, with the right to sell the water and enjoy for his own use the rents and profits, with also the right to lay additional pipes, the city, at the expiration of the term, to pay the party the value of improvements made by him, such party has an interest in the water-works which is the subject of taxation. (*Los Angeles v. Los Angeles W. W. Co.*, 49 Cal. 638.)

176. If such contract provides that the party of the second part shall bear all expenses on account of the water-works, except state, city, and county taxes, it does not exempt the property from taxation on behalf of the city. (*Los Angeles v. Los Angeles W. W. Co.*, 49 Cal. 638.)

177. The interest of such party in the property may be taxed by the city. (*Los Angeles v. Los Angeles W. W. Co.*, 49 Cal. 638.)

Bridge constructed under authority of city. See ante, 151, 152.

Public lands. See ante, IV, 5.

16. Exemption of Property.

178. It is not within power of legislature to exempt any species of property, however owned, from taxation by article XI, section 13, of the constitution. (*Minturn v. Hays*, 2 Cal. 590.)

179. Legislature cannot, under the pretense of regulating the duties of assessors, exempt property from taxation which the constitution requires to be taxed. (*People v. Eddy*, 43 Cal. 331.)

Cited 23 Or. 341.

180. The legislature has no power to exempt any property from taxation, but the crediting of taxes heretofore paid upon property under an invalid levy does not amount to an exemption from taxation of the property upon which said taxes were paid. (*People v. Latham*, 52 Cal. 598.)

181. The revenue laws of the state are unconstitutional, so far as they exempt private property from taxation; and all parts thereof relating to such exemption must be disregarded. (*People v. Gerke*, 35 Cal. 677.)

Cited 37 Cal. 55; 43 Cal. 336; 64 Cal. 507; 65 Cal. 462.

182. The provisions of the second section of the General Revenue Act of 1857, as amended in 1859 (Stats. 1859, p. 343), and the act fixing the rate of taxation for state purposes, passed April 2, 1866 (Stats. 1865-66, p. 786), so far as they provide for the exemption of any private property within this state from taxation, are unconstitutional and void. Said acts are to be read and construed as if such void provisions had never been incorporated in them. (*People v. McCreery*, 34 Cal. 432.) Cited 23 Or. 341.

183. An act taxing the property of a district for a local improvement, which exempts personal property from its operation, is unconstitutional, because not levied on all the property in the district. (*People v. Whyler*, 41 Cal. 351.)

184. It was not intended by the framers of the constitution that the legislature should have the power to exempt any kind of property from taxation. (*People v. Eddy*, 43 Cal. 331.)

Cited 23 Or. 341.

185. Cases on this point cited with approval: *People v. McCreery*, 34 Cal. 433; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54; *People v. Whartenby*, 38 Cal. 461. (*People v. Eddy*, 43 Cal. 331.)

186. Where the general revenue law subjects all solvent debts to taxation, any other law which singles out a class of such debts and exempts them from taxation is repugnant to the clause of the constitution which provides that taxation shall be equal and uniform throughout the state. (*People v. Eddy*, 43 Cal. 331.)

187. So much of the General Revenue Act as exempts possessory claims and improvements upon the public lands from taxation is unconstitutional and void. (*People v. Black Diamond Coal Min. Co.*, 37 Cal. 54.) Cited 43 Cal. 336.

188. Omission in Revenue Act of 1857 to tax all the lands in the state did not render the act void for unconstitutionality. (*High v. Shoemaker*, 22 Cal. 363.)

Statute exempting railroad from school tax is void. See *Schools*, 50.

189. The constitutional provision "that

taxation shall be equal and uniform throughout the state" is not violated by a revenue act exempting from taxation church and school lands, and lands of the United States. (*High v. Shoemaker*, 22 Cal. 363.) Overruled 34 Cal. 449, 458.

190. Property of all asylums and charitable institutions which are supported in whole or in part by the state, is exempt from taxation. (*San Francisco etc. Society v. Story*, 32 Cal. 65.)

Property cannot be exempted from taxation. See ante, 40.

Flumes. See ante, IV, 3.

Mining claims. See ante, IV, 3.

V. Assessment of Property.

1. Nature of.

191. The assessor does not act judicially in making an assessment for taxes. (*City and County of San Francisco v. Talbot*, 63 Cal. 485.) Cited 20 Nev. 451.

192. The assessment of taxes is not a judicial act; it partakes of no element of a judicial character. It is a legislative act; it requires the exercise of legislative power, which, for certain governmental purposes in the county, may be devolved on a board of supervisors, but cannot be delegated to any branch of the judicial department. (*Hardenburgh v. Kidd*, 10 Cal. 402.)

Proceedings are in invitum. See post, 195.

2. Legislative Control of Mode; Statute Must be Strictly Pursued; Presumption in Favor of.

193. Quo modo is matter of legislative control, and the statute must be steadily followed. (*De Witt v. Hays*, 2 Cal. 463.)

194. It is within the power and is the duty of the legislature to prescribe the mode in which all property shall be assessed, but the legislature cannot, under the pretense of regulating the duties of assessors, exempt property from taxation which the constitution requires to be taxed. (*People v. Eddy*, 43 Cal. 331.)

Cited 65 Cal. 464; 23 Or. 341.

195. All proceedings in the nature of assessing property for purposes of taxation, and in levying and collecting taxes thereon, are in invitum, and must be stricti juris. (*Weyse v. Crawford*, 85 Cal. 196; *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 17, cited 69 Cal. 539, 83 Cal. 400, 86 Cal. 124, 87 Cal. 502, 90 Cal. 465; *People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

196. Provisions of statute must be strictly followed, and all its conditions fully complied with by him in order to impart any validity to the acts of an assessor. (*Moss v. Shear*, 25 Cal. 38.)

197. All the provisions of the statutes for the assessment of taxes, and for the sale of property for their nonpayment must, in their substance, be strictly pursued, in order that a title acquired at such a sale shall be valid. (*Russell v. Mann*, 22 Cal. 131.)

198. Assessment which is not made as prescribed by the statute is invalid. (*City of San Luis Obispo v. Pettit*, 87 Cal. 499.)

199. The acts of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown. (*Palmer v. Boling*, 8 Cal. 384.)

200. When the assessment-book shows an assessment which on its face purports to be sufficient it is incumbent on the defendant to introduce evidence of any facts that will defeat the regularity or sufficiency of the assessment; and, if no such evidence is introduced, judgment should be rendered for the recovery of the tax. (*San Francisco v. Pennie*, 93 Cal. 465.)

201. Where record discloses conflict of testimony, and that there was some testimony showing that the assessor had done every thing necessary to make a valid assessment, such an assessment will not be held fatally defective on appeal. (*People v. Empire Gold and Silver Min. Co.*, 33 Cal. 171.)

Performance of statute acts is necessary. See *Streets*, 489, 490.

3. Statements.

202. It is the duty of a taxpayer to furnish a true and correct list of his taxable property to the assessor, and if he fails to do so, and any loss results to him in consequence of such failure, he is entitled to no protection from the courts. (*City and County of San Francisco v. Flood*, 64 Cal. 504.)

203. Under the act of March 16, 1874, "to regulate the assessment of migratory stock," the assessor must, when he makes the assessment, demand a statement from the owner of migratory stock as to whether the stock will be removed from the county during the year; and unless such demand be made, the duty of making the statement is not imposed upon the owner, whether at the time of making the assessment he shall have decided to remove the stock, or shall subsequently decide to do so. (*People ex rel. Murphy v. Shippee*, 53 Cal. 675.)

204. Assessor may demand of warehouseman, who has in his possession personal property of another subject to taxation, the name of the owner and a description of the property. If this be refused, it is the duty of the assessor to note the refusal upon the assessment-book, and make an estimate of the value of the property. (*Bode v. Holtz*, 65 Cal. 106.)

205. For the purposes of sections 3629 and 3630 of the Political Code the superintendent of a mining company is equivalent to the managing agent, and may be required to furnish the assessor with a list of the property of the company for taxation, and, where the description of the property in the assessment is taken from such list, the company will be estopped, in an action to collect the tax, from questioning the sufficiency of the description. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14.)

206. A property owner who, upon demand made by the assessor, refuses to give under oath a statement of his assessable property, cannot have the valuations of the assessor reduced by the county board of equalization. Consequently, any irregularity as to the time of meeting of the board cannot be taken ad-

vantage of by him as a defense to an action to recover the taxes levied against him. (*Modoc County v. Churchill*, 75 Cal. 172.) Cited 98 Cal. 636.

Refusal to make statement, arbitrary assessment. See post, V, 14.

207. Oath to be made, under the Revenue Act of 1857, to the "list" or "statement" of taxable property, need not be in writing. Nor need the taxpayer furnish in writing such "list" or "statement." It is sufficient if he give the assessor the necessary information to make out the "list." (*People v. Quinn*, 18 Cal. 122.)

Statement by railroad. See post, V, 13.

4. Necessity of; Copying Former Assessment.

208. All subsequent proceedings are nullities without an assessment. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

209. The listing and valuation of real estate, for the purposes of taxation, is an essential prerequisite to the validity of all subsequent proceedings. (*Ferris v. Coover*, *Ferris v. Chapman*, 10 Cal. 589.) Cited 29 Cal. 452.

210. If the property is not listed and assessed for the purpose of taxation the tax deed conveys no title. (*People v. Hastings*, 29 Cal. 449.) Cited 97 Cal. 324; 12 Mont. 34.

211. The making of a certified copy by an assessor of an assessment-roll made by another assessor a previous year is not an assessment of property. (*People v. Hastings*, 29 Cal. 449.)

5. Time of; Fiscal Year.

212. Sections 15 and 17 of the charter, authorizing the city council to annually assess, levy, and collect taxes upon all taxable property within the city, and requiring the city assessor to prepare a list of such property between the first day of January and the first Monday of April of each year, were not repealed by section 8 of article XIII of the constitution of 1879, providing that the legislature shall by law require each taxpayer to annually make and deliver to the county assessor a statement of the property owned by him, or in his possession, or under his control, at 12 o'clock m., on the first Monday in March; and an assessment of a mortgage made in conformity with such provisions of the charter is not invalid, although the mortgage was not executed until after the first Monday in March. (*City of Stockton v. Western Fire and Marine Ins. Co.*, 73 Cal. 621.)

213. Section 871 of the Municipal Corporation Act, which provides that the city council may adopt a system for the assessment, levy, and collection of taxes, which shall conform to the general laws of the state as nearly as circumstances will permit, "except as to the times for such assessment, levy, and collection," does not forbid the council from selecting the time fixed for the other taxes. It simply leaves the selection of the time to the discretion of the council. (*City of San Luis Obispo v. Pettit*, 87 Cal. 499.)

214. The provision that the assessment must be made on or before the first Monday of May is directory. And, generally, when a time is fixed by statute within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory, unless the nature of the act to be performed or the language of the legislature shows that designation of the time was intended as a limitation of the power of the officer. (*Hart v. Plum*, 14 Cal. 148.) Cited 48 Cal. 146; 15 Nev. 388.

215. In this case the assessment could be made after May by virtue of the second proviso in the eleventh section of the act. (*Hart v. Plum*, 14 Cal. 148.)

216. Section 9 of the act of March 8, 1874, authorizing an assessment for taxes in the city and county of San Francisco, after the time within which the board of supervisors can meet for the purpose of equalization, violates both the state constitution and the fourteenth amendment to the constitution of the United States, and its validity may be attacked even by one who has failed to furnish the statement required by section 3629 of the Political Code. (*People v. Pittsburg R. R. Co.*, 67 Cal. 625.)

217. A finding that the tax was assessed as of the date of 12 m., on the first Monday of March, in the year of the assessment, is not a finding of the date when the assessment was actually made; and if importing that the value placed on the property was that which it then bore, is only a finding of what the law would imply, and not of fact. (*San Francisco v. Pennie*, 93 Cal. 465.)

218. The fiscal year begins on the 1st of July, and ends with the 30th of June following. (*Rollins v. Wright*, 93 Cal. 395.)

6. By Whom to be Made.

219. Assessment must be made by the assessor. (*Ferris v. Chapman*, 10 Cal. 589.)

220. County assessor cannot assess property of township for tax levied on township property to raise a fund for township purposes. (*People v. Sargent*, 44 Cal. 430.)

221. By the provisions of section 13 of article XI of the constitution the authority of assessors is limited to the districts within and for which they are elected. They have no power to assess property situated beyond the limits of their respective districts. (*People v. Placerville etc. R. R. Co.*, 34 Cal. 656.) Cited 39 Cal. 359; 47 Cal. 663; 87 Cal. 118.

222. Tax, to be valid, must rest upon assessment made by assessor elected by qualified voters of the district, county, or town in which the property is taxed for state, county, or town purposes. (*Reilly v. Lancaster*, 39 Cal. 354.) Cited 46 Cal. 556; 47 Cal. 617; 80 Cal. 347.

223. An assessment made by an assessor elected by the qualified electors of the city and county of Sacramento is not a sufficient basis for the levy of a tax in the city of Sacramento for city purposes. (*Reilly v. Lancaster*, 39 Cal. 354.)

224. A tax on the property in a township for a township road fund must be assessed by

an assessor elected by the electors of the township. (People v. Sargent, 44 Cal. 430.) Cited 46 Cal. 512, 556; 47 Cal. 617, 664; 49 Cal. 421; 52 Cal. 80.

225. A tax, in order to be valid, must rest upon an assessment made in the mode prescribed by law, by an assessor elected by the qualified electors of the district, county, or town in which the property is taxed for state, county, or town purposes. (People v. Hastings, 29 Cal. 449.)

Cited 31 Cal. 138, 140; 34 Cal. 437, 576; 39 Cal. 11; 44 Cal. 434; 46 Cal. 512, 556; 47 Cal. 617, 663, 664; 51 Cal. 614; 52 Cal. 80; 97 Cal. 324; 12 Mont. 34; 14 Nev. 247

226. An assessment made by an assessor elected by the qualified electors of the city and county of Sacramento is not a sufficient basis for the levy of a tax in the city of Sacramento for city purposes. (People v. Hastings, 29 Cal. 449.)

Cited 34 Cal. 476, 657; 39 Cal. 358, 359.

227. So much of the act regulating the assessment and taxation of railroads (Stats. 1863-64, p. 357) as provides for the assessment of railroad and other property by assessors other than by those in whose respective districts the property is situated, is held to be unconstitutional and void. (People v. Placerville etc. R. R. Co., 34 Cal. 656.)

Assessment must be by duly elected assessor. See post, XVI.

Road tax, by whom to be made. See post, XV.

Mandamus to compel assessor to make assessment. See Mandamus, II, 12, g.

7. Where to be Assessed.

228. All personal property within a county on the first Monday of March is assessable in that county if not removed from that county before the assessment is actually made, and, if assessed in that county before it is removed from it, the tax is payable in that county; but if removed from that county to another before actually assessed the assessor of that county may make the assessment, and transmit the same to the assessor of the county to which the property is removed. (People v. Holladay, 25 Cal. 300.)

Cited 35 Cal. 288; 38 Cal. 467; 64 Cal. 484, 505; 17 Nev. 395.

229. To authorize the taxing of personal property in any other county than that in which the owner resides it must appear that such property is kept or maintained in such county, and is not there casually, or in transitu, or temporarily, in the ordinary course of business or commerce. (People v. Niles, 35 Cal. 282.)

Cited 21 Nev. 227.

230. Personal property, transiently within a county, cannot be there taxed, but should be taxed in the county in which the owner resides. (City of Oakland v. Whipple, 39 Cal. 112.)

Cited 71 Cal. 245; 17 Nev. 390, 393, 395.

231. Personal property is to be assessed and taxed in the county in which it is situated, except money and gold-dust, which may, at the option of the owner, be taxed in the

county in which he resides. (People v. Niles, 35 Cal. 282.)

Cited 38 Cal. 467; 39 Cal. 115; 17 Nev. 385, 390, 393-95; 21 Nev. 227.

232. Money at interest is to be taxed in the county in which the creditor resides. (People v. Whartenby, 38 Cal. 461.)

Cited 64 Cal. 484; 17 Nev. 390.

233. Choses in action and property of intangible character, such as debts, and the like, are property assessable in the county where the owner resides at the time of the assessment, under the Revenue Law of 1860. (People v. Park, 23 Cal. 138.)

Cited 25 Cal. 603; 29 Cal. 546; 38 Cal. 467; 64 Cal. 484; 2 Or. 330.

234. Judgment for debt and foreclosing a mortgage given to secure it is only subject to taxation in the county where the owner of the judgment resides, and then the money due on the judgment alone is taxable. (People v. Eastman, 25 Cal. 601.)

235. For the purpose of taxation the situs of money belonging to the estate of a deceased person is in the county where the decedent resided at the time of his death, and the situs is not changed by placing the money on general deposit in a bank in another county. (City and County of San Francisco v. Lux, 64 Cal. 481.)

236. Vessel sailing from port in which owner resides is not liable to taxation in another county because it is temporarily in such other county for the purpose of being freighted. (People v. Niles, 35 Cal. 282.)

Cited 64 Cal. 484.

Situs of debt. See ante, 129.

Act relating to assessment of migratory herds is unconstitutional. See ante, III, 1.

8. Description of Property.

237. When the description of property assessed is taken from a list furnished by the taxpayer, or the assessor makes a description without the aid of such list, the taxpayer cannot be heard to complain of the insufficiency of the description. (City and County of San Francisco v. Flood, 64 Cal. 504.)

238. The assessment must be as certain as to the person taxed as it is to the amount of the tax and to the property. (Kelsey v. Abbott, 13 Cal. 609.)

Cited 32 Cal. 332; 53 Cal. 667; 90 Cal. 465.

239. If the description of the property assessed is certain enough to inform the taxpayer for what he is assessed it is sufficiently certain. (San Francisco v. Pennie, 93 Cal. 465.)

240. A description of property in an assessment-roll which is so vague, indefinite, and uncertain as to render it impossible to determine whether the whole or a part, or if a part, what part of the land was intended to be assessed to the person named therein, is insufficient. (People v. Flint, 39 Cal. 670.)

241. A lumping assessment of "personal property" is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated, as goods, money loaned, gold-dust, solvent debts. (Falkner v. Hunt, 16 Cal. 167.)

242. Under section 3650 of the Political Code the failure to enumerate personal property in detail does not invalidate the assessment. It is only necessary to show generally the kind or quality of personal property, so that the taxpayer may know for what property he is taxed. (*Dear v. Varnum*, 80 Cal. 86.)

Cited 12 Mont. 36.

243. Personal property may be assessed for taxes in bulk, without any statement of the character of the property. (*People v. Sneath*, 28 Cal. 612.)

Cited 30 Cal. 538; 31 Cal. 482; 32 Cal. 332; 34 Cal. 441; 47 Cal. 618; 64 Cal. 505, 506; 69 Cal. 539; 93 Cal. 470.

244. The word "enumerate," as used in subdivision 4 of section 3650 of the Political Code, which provides for the assessment of "personal property, showing the number, kind, amount, and quality," but that "a failure to enumerate in detail such personal property does not invalidate the assessment," does not mean merely to "number," but imports to "designate," or "specifically mention," and applies to each of the specifications previously named in the clause. The legislature evidently intended that the assessment should not be invalidated if neither the number, kind, or quality of the personal property should be specifically mentioned. (*San Francisco v. Pennie*, 93 Cal. 465.)

245. The rule as to the degree of certainty required in describing personal property in assessments for taxation is that the property must be so described that taxpayers may know for what they are taxed; and where an assessment is for "mining stock," the description meets the requirements of section 3650, subdivision 4, of the Political Code, and is sufficient for all purposes. (*City and County of San Francisco v. Flood*, 64 Cal. 504.)

Cited 68 Cal. 16; 80 Cal. 89; 93 Cal. 469, 470, 472; distinguished 67 Cal. 627.

246. Bonds of this state belonging to a foreign insurance company, but deposited in this state in accordance with law, when assessed for taxes, are sufficiently described by being designated "money and bonds deposited as per statute." (*People v. Home Ins. Co.*, 29 Cal. 533.)

Cited 93 Cal. 470.

247. An assessment which describes the property assessed as consisting of a mortgage upon certain described real estate, being the mortgaged premises, is an assessment of such real estate, and not merely an assessment of the mortgage. (*Doland v. Mooney*, 72 Cal. 34.)

248. An assessment thus: "Personal property—mortgages (Marysville) one hundred thousand dollars," is not good as an assessment of personal property, independent of the term "mortgages," on the ground that the act requires no description of personal property to be given, but its value only. The whole statement must be taken together, and that shows "mortgages" to be taxed, and they are not subject to taxation as such. (*Falkner v. Hunt*, 16 Cal. 167.)

Cited 34 Cal. 439, 440; 38 Cal. 467; 64 Cal. 485, 505.

249. An assessment thus: "Mortgages (Marysville) one hundred thousand dollars," is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that a mortgage is held for a given amount does not make the mortgage subject to taxation as for so much money. (*Falkner v. Hunt*, 16 Cal. 167.)

Cited 2 Or. 330.

250. An assessment of taxes to a mortgagee on the mortgage interest in land, which describes the mortgaged land as divided by the owner into blocks and lots before the levy of the assessment, sufficiently describes the land, although the mortgage described the land as an entire tract in a specified section and township, where it appears that the blocks and lots assessed to the mortgagee constitute the identical land described in the mortgage, and no more, and that the assessment is in substantial conformity to the statute, and in proper form for the assessment of a mortgage interest in town lots. (*San Gabriel Valley Land and Water Co. v. Witmer Brothers Co.*, 96 Cal. 623.)

251. It is not essential that the assessment-book shall in itself contain a complete description of the personal property to be assessed, but it is sufficient to refer to any public record or document in which the details of the description may be found. (*San Francisco v. Pennie*, 93 Cal. 465.)

252. An assessment of taxes against the administrator of an estate of a decedent, upon property described as "personal property, as per inventory on file in the superior court, Department No. 9, personal property one hundred thousand dollars," is a sufficient compliance with the requirements of the statute as respects the description of the property to form the basis of the assessment. (*San Francisco v. Pennie*, 93 Cal. 465.)

Cited 94 Cal. 322.

253. An assessment stating: "House and lot north side of Commercial street, formerly owned by Belle Creole, also brick store north side of Commercial street, and second from the corner of Pine and Commercial, including lot and all the appurtenances seven thousand dollars," there being at the top of the page containing this description the words "Nevada county, Nevada township, Nevada city," is fatally defective in omitting "to give the metes and bounds, or describing the premises by lots or fractions of lots," according to the fourth section of the Revenue Act of 1857. (*Kelsey v. Abbott*, 13 Cal. 609.)

Cited 55 Cal. 289.

254. Under the Revenue Act of 1857 several city lots cannot be assessed in gross for taxes, and then sold together for the aggregate amount of the tax. A tax deed based on such sale is void. The intention of the act is that each lot shall be separately assessed and valued, so as to bear its own portion of the public burdens. (*Terrill v. Groves*, 18 Cal. 149, cited 70 Cal. 507, 3 Nev. 348, 356, 17 Or. 55; *People v. Clunie*, 70 Cal. 504.)

255. Under section 3650 of the Political

Code, town lots must be separately listed and valued for purposes of assessment, according to the system of numbering obtaining in such towns; and an assessment of several lots as one undivided parcel is void, if the owner thereof did not return them to the assessor as a whole, and did not refuse to make a return. (*Cadwalader v. Nash*, 73 Cal. 43.)
Cited 80 Cal. 89; 12 Mont. 36.

256. A sheriff's deed made under a sale for a tax in pursuance of a judgment enforcing the lien of the tax is not void because the property sold, being several lots in a city, was assessed in *solido*, and not each lot separately. (*Anderson v. Rider*, 46 Cal. 135.)
Cited 51 Cal. 10.

257. Blocks of land in a city may be assessed for taxation by blocks, when they are assessed to the owner, even if they have been subdivided into lots. (*People v. Culverwell*, 44 Cal. 620.)
Cited 73 Cal. 50.

258. Land outside of a city or incorporated town must be prescribed by metes and bounds; the number of acres, as nearly as possible, and the locality and township must be given. (*Lachman v. Clark*, 14 Cal. 131.)
Cited 22 Cal. 371, 372.

259. Under the Revenue Act of 1857 the assessment of lands outside of a city or incorporated town need not describe the land by metes and bounds. (*High v. Shoemaker*, 22 Cal. 363.)

260. In an assessment for taxes a description of a tract of land by name is sufficient. (*People v. Leet*, 23 Cal. 161.)
Cited 74 Cal. 455.

261. An assessment of property as "a ranch, commonly known as 'Clark's ranch,' situated on the Auburn road, two miles south of Grass Valley, in Nevada county, state of California," is insufficient, and a deed on a sale under it is void. (*Lachman v. Clark*, 14 Cal. 131.)

262. Under sections 3650 and 3628 of the Political Code it is sufficient in an assessment of a tract of land to describe it by stating the congressional subdivisions contained in it. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

263. An assessment of real property, described as "a tract of land entered by Frazier in section 13, township 13, range 7," is void. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

264. The description of real property in an assessment as the "west fractional half and southeast quarter of (mine) section 5, township 13, range 7, four hundred and thirty-six acres, all of fractional section 6, township 13, range 7, one hundred and thirty-three acres," is sufficient. It is in effect a statement that all of the subdivisions are a mine. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)
Cited 68 Cal. 16.

265. If the assessor, in assessing a tract of land which consists of a specific quantity granted by the Mexican government, to be selected within the exterior boundaries of a much larger tract, describes it as definitely as

the nature of the case will admit of, the assessment is valid. (*People v. Crockett*, 83 Cal. 150.)

266. A description of land in an assessment-roll as follows: "Four hundred acres of land situated on the Volcano and Jackson road, in township No. 1, of the county of Amador and state of California, and commonly known as the 'New York Rancho,'" held, to be sufficient under the Revenue Act of 1857. (*High v. Shoemaker*, 22 Cal. 363.)
Cited 72 Cal. 435.

267. No action can be maintained under the act of May 17, 1861, for a tax on real estate unless the assessment has sufficiently designated the property to enable a proper description of it to be given in the complaint. A description of the land assessed as "the unsold portion" of eleven square leagues of land known as Los Mokelamos, is fatally defective. (*People v. Pico*, 20 Cal. 595.)
Cited 25 Cal. 302, 305; 31 Cal. 199; 39 Cal. 673; 48 Cal. 430; 55 Cal. 289; 99 Cal. 601.

268. An assessment of land as "balance of land on Rancho Arroyo de San Antonio, ten thousand and ninety acres, at four dollars per acre, forty thousand three hundred and sixty dollars," is sufficient, it appearing on the roll that the part of the ranch not assessed was comprehended within the plat of a town, certain lots in which were assessed on the same list to the same owner. (*Patten v. Green*, 13 Cal. 325.)
Cited 22 Cal. 372; 72 Cal. 435; 2 Or. 209.

269. A description sufficiently certain to convey land, between man and man, and which, if contained in an agreement to convey, would authorize a court of equity to decree a specific execution, may not answer in a proceeding to enforce the collection of a tax. In the latter case the description must be certain of itself, and not such as to require evidence aliunde to render it certain. Held, accordingly, that an assessment, one of the calls of which was "north by the lands of James Reagan and others," was void; and so held, also, with reference to an assessment which described the land as "bounded . . . south by the lands of Felton and Patterson." (*People v. Mahoney*, 55 Cal. 286.)
Cited 66 Cal. 20; 83 Cal. 400; 21 Nev. 101; 2 N. Dak. 148.

270. An assessment for a tax, in which fifteen thousand and eighty acres of land are assessed by quantity and boundaries, excepting therefrom a portion thereof before sold, without a description of the excepted portion, is void. (*People v. Hyde*, 48 Cal. 431.)
Cited 55 Cal. 289.

271. An assessment of a large tract of land for taxes, under the act of 1861, which describes the whole tract by metes and bounds, and then excepts from the tract parcels of the same which had previously been conveyed, but does not describe the excepted portions by metes and bounds, nor in any manner, except by a reference to recorded deeds, is void on its face. (*People v. Cone*, 48 Cal. 427.)
Cited 48 Cal. 433; 55 Cal. 289; 2 N. Dak. 148; 11 Or. 332.

272. When the assessor assesses an entire

tract of land to a person, and the person assessed had previously sold a part of the same by metes and bounds, and the assessment contains nothing to show what valuation the assessor placed on the part not sold, the assessment is fraudulent and void, and the tax cannot be collected. (*People v. Hancock*, 48 Cal. 631.)

273. Neither an assessment for taxes nor a tax deed are necessarily void because, in describing the land assessed, a false call has been inserted in the description in the assessment-roll or tax deed. (*Bosworth v. Danzian*, 25 Cal. 296.)
Cited 33 Cal. 513; 79 Cal. 356; 1 Idaho, N. S., 419.

274. An assessment of land is not void by reason of mistake in description, unless it contains such a falsity in the designation or description of the land assessed, as might probably mislead the owner and prevent him from ascertaining that his land had been assessed. (*Bosworth v. Danzian*, 25 Cal. 296.)

275. Since the passage of the act of 1861 an assessor is only required to assess improvements on real estate and personal property in general terms and under a gross valuation, and a specific description of such property is unnecessary. (*People v. Rains*, 23 Cal. 127.)

276. The object of a description of property in an assessment-roll is to clearly identify the property assessed. An assessment-roll which describes minutely each particular piece of improvement on land assessed, with the value of each, separately stated, in a column of item figures, so arranged that there can be no mistake as to the property intended to be assessed, and where, in addition, the aggregate value of the same is stated under the general head "Value of improvements on lands," is clearly sufficient. (*People v. Empire Gold and Silver Min. Co.*, 33 Cal. 171.)
Cited 34 Cal. 440.

Description of roadway of railroad. See post, V, 13.

Description in statement by mining superintendent. See ante, V, 3.

9. To Whom Assessed.

Certainty as to person. See ante, 238.

277. It is duty of assessor to assess property to owner if he can ascertain who the owner is; otherwise, to assess it to unknown owners, and proceed at once to collect the tax by seizure and sale, in the manner provided by law. (*Weyse v. Crawford*, 85 Cal. 196.)

278. An assessment for taxes must be made against the owner when known. The individual, not the property, pays the tax. The property shows the amount of the tax with which to charge the owner, and is security for payment. (*Kelsey v. Abbott*, 13 Cal. 609.)

Cited 28 Cal. 615; 30 Cal. 538; 54 Cal. 523; 66 Cal. 21; 69 Cal. 539.

279. It is duty of assessor to ascertain name of owner of each piece or parcel of property, under sections 3623, 3635, 3636, and 3650 of the Political Code, and to assess it to him; or failing to ascertain the name of the owner, to assess it to "unknown owners." An assessment to "D. B. M. and all owners and

claimants known or unknown," is void. (*Grotefend v. Ultz*, 53 Cal. 666.)
Cited 54 Cal. 523; 55 Cal. 387; 59 Cal. 51; 80 Cal. 76; 87 Cal. 502.

280. If assessor cannot find persons to be taxed he may nevertheless assess their property. (*Hart v. Plum*, 14 Cal. 148.)

281. Assessor may assess real estate to any person whom he finds in possession, charge, or control of it, and such person is liable for the taxes as well as the property assessed. (*People v. Rains*, 23 Cal. 131.)

282. To make party liable to assessment for property as being in his possession, control, or management, within the meaning of section 3629 of the Political Code, his "possession" must be one that carries with it the usual marks and indications of ownership; and property in the possession of mere naked bailees, who are without interest in or power over the property, is not assessable to such bailees. (*Weyse v. Crawford*, 85 Cal. 196.)

283. Property on storage in a warehouse, for which the owners of the warehouse had given storage receipts, each receipt showing that the holder of the receipt was the owner of the property described in it, and there on store, is not in the possession, control, or management of the owners of the warehouse within the meaning of section 3629 of the Political Code. (*Weyse v. Crawford*, 85 Cal. 196.)

Arbitrary assessment of goods in warehouse. See post, V, 14.

284. If personal property in this state belonging to nonresident is in possession of trustee or agent it may properly be assessed to the agent or trustee having it in possession. (*People v. Home Ins. Co.*, 29 Cal. 533.)
Cited 34 Cal. 440.

285. In the absence of evidence of identity an assessment of personal property to the "Sulphur Banks Q. M. Co., F. Fiedler, Agent," cannot be enforced against a corporation known as the "Sulphur Bank Quicksilver Mining Company." (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

286. An assessment for the purpose of taxation was made to "Sulphur Bank Quicksilver Mining Company, F. Fiedler, Agent." Held, that this was sufficient to indicate that the assessment was to the Sulphur Bank Quicksilver Mining Company. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 14.)

287. Error made by assessing personal property to wrong owner or claimant under the Revenue Act of 1857, and acts amendatory thereof, does not affect the validity of the assessment. (*People v. Home Ins. Co.*, 29 Cal. 533.)
Cited 64 Cal. 506.

288. A tax deed based upon an assessment of land not made to the true owner, he being known, but to a person who had no title thereto, is void. (*Klumpke v. Baker*, 68 Cal. 559.)
Cited 87 Cal. 502.

289. An assessment of land for taxes, not made to unknown owners, but to the owner

by his surname, leaving a blank for his given name, is void, and a deed executed to a purchaser of the land at a sale for the tax is void also. (*Crawford v. Schmidt*, 47 Cal. 617.) Cited 55 Cal. 367; 66 Cal. 21; 69 Cal. 539; 90 Cal. 465.

290. Under section 3628 of the Political Code, as amended in 1880, the ascertainment of the name of the owner of real property is a matter with respect to which the assessor has discretionary power, and his judgment or conclusion in regard to it is final, so far as the validity of the tax is concerned. (*Landregan v. Peppin*, 86 Cal. 122.)

291. A mistake in the name of the owner in an assessment of real property does not invalidate the assessment, but an assessment of personal property to a person other than the owner is absolutely void. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

292. Under section 3628 of the Political Code, as amended in 1880, no mistake in the name of the owner or supposed owner of real property can render the assessment thereof invalid; and the assessment to M. & Co. of real property standing in the name of M. is binding upon the property assessed, and a tax deed given upon the sale of the property for delinquent taxes is valid, and passes title to the land. (*Landregan v. Peppin*, 86 Cal. 122.)

Cited 96 Cal. 380.

293. The tax law creates two remedies, one against the person and the other against the property, each having a distinct and separate existence; and a mistake in the name of the person to whom the property should have been assessed does not affect the validity of the tax as against the property itself. (*O'Grady v. Barnhisel*, 23 Cal. 287.) Cited 14 Nev. 231.

294. Where property owned by S. B. Whipple, who had always been known by that name and no other, was assessed to S. M. Whipple, held, that the assessment was void because there was no designation of the property owner. (*People v. Whipple*, 47 Cal. 591.) Cited 66 Cal. 21; 90 Cal. 465.

295. An assessment of property for a tax to a name which is neither the true name of the owner, nor one by which he has been known, is void. (*People v. Whipple*, 47 Cal. 591.)

296. An assessment under the Revenue Act of 1854 of lands owned by one "Castro" to "Castero" is invalid; and a tax deed describing the lands sold as having been assessed to "Castro," and not purporting to be made in pursuance of the assessment to "Castero," is void. (*Emeric v. Alvarado*, 90 Cal. 444.)

Slight discrepancy in name of owner. See post, V, 16.

297. An assessment of land in the name of a deceased person made prior to the amendment of March 22, 1880, to section 3628 of the Political Code, is void. (*Pearson v. Creed*, 69 Cal. 538.)

298. If the statute requires money paid into court and deposited with the county treasurer to be assessed to such treasurer, and it is assessed to the plaintiff in the suit, the as-

essment is invalid. (*City of San Luis Obispo v. Pettit*, 87 Cal. 490.)

299. A certificate of sale for taxes which recites that the land was assessed to a named person, "and all known owners or claimants, and, when unknown, to unknown owners or claimants," and a tax deed founded thereon purporting to convey the land and all interests therein belonging to the person named, "and all owners and claimants thereof known or unknown," are each void. (*Greenwood v. Adams*, 80 Cal. 74.)

300. The recital in a tax deed of an assessment of certain property to a person named and "unknown owners" is void, and the deed is inadmissible in evidence to prove title. (*Jatunn v. O'Brien*, 89 Cal. 57.)

301. Where the certificate of a tax sale states that the property was assessed to a person named, "and to all owners and claimants, known and unknown," the certificate shows that the property was not lawfully assessed; and, where the tax deed omits to recite the latter part of the assessment as recited in the certificate of tax sale, it is void for not reciting the matters recited in the certificate. (*De Frieze v. Quint*, 94 Cal. 653.)

302. An assessment of land to "A B, and all claimants, known and unknown," is valid and effectual as against the property, even if A B was neither the owner of nor in possession of the property at the time of the assessment. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

303. Action to recover a personal property tax. The assessment was made to defendant by name. Held, a recital in the assessment-book under the head, "description of property," that "the property is assessed to parties listed, and to all owners and claimants, known or unknown," was an idle recital, and did not vitiate the assessment. (*City and County of San Francisco v. Phelan*, 61 Cal. 617.)

Cited 64 Cal. 2; 66 Cal. 226.

304. An assessment of land for taxes to Murphy and Dooley, and to all owners and claimants, known or unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same," is good under the Revenue Act of 1854, as amended by the acts of 1857 and 1859. (*Brunn v. Murphy*, 29 Cal. 326.)

305. A certificate issued on a sale for taxes, reciting that the property was assessed to "G. A. Hemenway and to all claimants, known and unknown," shows an invalid assessment, and may be given in evidence to defeat a deed founded thereon, though regular on its face. (*Daly v. Ah Goon*, 64 Cal. 512.)

Cited 80 Cal. 76; 87 Cal. 502; 94 Cal. 660.

306. An assessment for taxes held not to be vitiated by the words, "to all owners and claimants, known and unknown," appearing in the general heading to the assessment-roll; but in the tabular part of the roll, under the heading "Taxpayer's name," were the words "Place, Wilson, Newman, and others." Held, that the assessment was invalid. (*Bosworth v. Webster*, 64 Cal. 1.)

Cited 78 Cal. 147; 87 Cal. 502.

307. Action to obtain an injunction re-

straining the defendants from selling certain real property under an execution. The plaintiff claimed under a tax sale and deed; the defendants were proceeding to sell under an execution against the prior owners. The defendants demurred; the demurrer being sustained, and no amendment made, judgment went for defendants. A preliminary injunction having been issued, the same was dissolved. Held, the tax deed is void, it being therein recited that the property was assessed to "California Consolidated Mining Company, and to all owners and claimants, known and unknown." Per Myrick, McKinstry, and Ross, JJ., concurring. (*Hall v. Theisen*, 61 Cal. 524, 526.)

308. An assessment to "C. G., and all owners or claimants, known or unknown," is void. (*Grimm v. O'Connell*, 54 Cal. 522.) Cited 59 Cal. 51; 87 Cal. 502; 97 Cal. 574.

309. In an action to quiet title, in which the defendant claimed under a tax sale and deed, and the plaintiff under a deed from parties doing business under the name of "The Blue Range Mining Company," it appeared that the property was assessed to "The Blue Range Mining Company" by direction of the plaintiff's agent, and that the certificate of sale and tax deed each recited the assessment as made to "The Blue Range Mining Company, and to all owners and claimants, known and unknown." Held, (1) that the assessment was void because "The Blue Range Mining Company" was not the owner, and was not a person who could own; and (2) that the certificate and sale were void for the additional reason that they recited an assessment to "The Blue Range Mining Company, and to all owners and claimants, known and unknown." (*Hearst v. Egglestone*, 55 Cal. 365.)

Cited 61 Cal. 619; 64 Cal. 2; 67 Cal. 484; 69 Cal. 539; 86 Cal. 564; 87 Cal. 502.

310. Under the Revenue Act of 1854, if lands were assessed to unknown owners, the assessor must have stated in his list that the land was so assessed because it was unoccupied and the owner was unknown, or the assessment created no charge upon the land, and no legal obligation was imposed on any one to pay the taxes. (*Moss v. Shear*, 25 Cal. 38.)

Cited 28 Cal. 615; 29 Cal. 328; 30 Cal. 538; 32 Cal. 332; 66 Cal. 20; 83 Cal. 400.

311. A tax deed is void and conveys no title if it recites that the assessment on which it is founded was made to unknown owners, and to all owners and claimants, known and unknown. (*Wilson v. Atkinson*, 68 Cal. 590, cited 77 Cal. 487; *Brady v. Dowden*, 59 Cal. 51, cited 64 Cal. 2, 78 Cal. 147, 87 Cal. 502.)

312. If assessor, in assessing city lot owned and occupied by the owner as a single lot, arbitrarily divides the same, and assesses one part to the owner and another part to unknown owners, the assessment to the unknown owners is illegal, and a tax deed under a sale of the same for nonpayment of the tax is void. (*Bidleman v. Brooks*, 28 Cal. 72.)

Names, rule of idem sonans does not apply in. See *Idem Sonans*, 5.

10. Partnership Property or Property Held in Common.

313. An assessment for taxes of the personal property of a former member of a firm, made to the firm after its dissolution, is void. Such assessment cannot be legalized by legislative enactment. (*People v. Sneath*, 28 Cal. 612.)

314. Where two or more persons transact business under common name they may be sued by the common name, under section 388 of the Code of Civil Procedure; but this does not vary the terms of section 3623 of the Political Code, by which the assessor "must assess such property to the persons who own, claim, or have the control thereof." (*Hearst v. Egglestone*, 55 Cal. 365.) Cited 68 Cal. 561.

315. When a person holds an interest in a tract of land in severalty he is entitled to be assessed for his particular tract only. (*People v. Shimmins*, 42 Cal. 121.)

316. It is the better practice to assess each particular person who claims an interest in a tract of land according to his interest or claim of title, and not to assess the whole tract in solido to all those who claim an interest in it. (*People v. Shimmins*, 42 Cal. 121.)

317. Where land is assessed as entirety to numerous persons, without designating interest of any one of them, it is an assessment to them as copartners, joint tenants, or tenants in common, and not as owners in severalty. (*People v. Shimmins*, 42 Cal. 121.)

318. Under the Revenue Law of 1860 lands owned by several persons as tenants in common may be assessed to them jointly. (*People ex rel. Presburg v. McEwen*, 23 Cal. 54.)

319. The San Pablo rancho was assessed as an entirety to a large number of owners; some of the owners individually paid taxes upon thirteen thousand five hundred and ninety-eight acres, leaving four thousand three hundred and thirty-eight acres, owned by numerous persons, upon which the taxes were unpaid. Judgment was rendered against certain persons, who were assessed, for delinquent taxes, ordering the sale of a certain number of acres undivided, without designating the interests of the judgment debtors in the land. Held, to be erroneous. (*People v. Shimmins*, 42 Cal. 121.)

11. Valuation of Property.

320. Assessment is void if there be no valuation. (*Garwood v. Hastings*, 38 Cal. 217.) Cited 12 Mont. 34.

321. A tax deed executed in 1860, for land sold for taxes, is void if the assessment shows that there was not any cash valuation of the lot which the deed purports to convey. (*Hurlbutt v. Butenop*, 27 Cal. 54.) Cited 31 Cal. 135; 84 Cal. 615.

322. A valuation by the assessor is essential to the validity of a property tax, and neither the legislature nor the auditor can make the valuation if the assessment is defective in this particular. (*People v. San Francisco Savings Union*, 31 Cal. 132.) Cited 12 Mont. 34.

233. Legislature cannot, by law, fix assessed

value of property. (*People v. Hastings*, 29 Cal. 449.)

324. Object of eighth article of act of 1854, page 102, if in force, is to procure a true statement of taxable property. But these provisions are directory. If the value of the property be rightly fixed by the assessor the assessment is valid, though that value was arrived at in a way different from that pointed out by the statute. (*Hart v. Plum*, 14 Cal. 148.)

Cited 23 Cal. 116; 48 Cal. 146.

325. The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as to other lands. (*State v. Moore*, 12 Cal. 56.)

326. Where there is no dollar mark, word, abbreviation, or other character in the original or duplicate assessment-roll to show what was meant or intended by the figures in the column headed "Value" or "Taxes," the assessment is fatally defective, and the deed based thereon is void. (*Emeric v. Alvarado*, 90 Cal. 444.)

327. The abbreviation "dolls." is equivalent to the word "dollars" in an assessment for taxes. (*Salisbury v. Shirley*, 66 Cal. 223.)

328. Where, in an item column of figures, the dollar mark is prefixed to some, but not to all, the items, held, that all the figures standing in the same column and in the same relation to other similar items must be construed to be dollars, without a repetition of the mark before each. (*People v. Empire Gold and Silver Min. Co.*, 33 Cal. 171.)

329. Where the figures representing the aggregate value of the property assessed are placed in the column headed by "Value of improvements on lands," and preceded by the dollar mark, such an assessment is not void in consequence of the omission of the dollar mark preceding the figures in the column representing the separate values of the items, for if the aggregate figures represent dollars, so also the smaller sums, in figures, which go to make up those in the aggregate, must represent dollars. (*People v. Empire Gold and Silver Min. Co.*, 33 Cal. 171.)

330. If, in the original assessment-roll of property, figures are placed by the assessor in the column headed "Valuation," without any thing to indicate whether the figures represent eagles, dollars, or cents, the assessment is void, and the people cannot recover a judgment for the tax. (*People v. San Francisco Savings Union*, 31 Cal. 132.)

Cited 38 Cal. 224; 47 Cal. 664; 51 Cal. 246; 66 Cal. 226; 90 Cal. 401, 467; 8 Nev. 25.

331. Where, in an assessment-roll, there was neither a dollar mark prefixed to the figures inserted in the column headed "Valuation of lands," nor at the head of such column, and nothing appeared elsewhere in the roll to explain the intended meaning of said figures, held, that there was no assessed valuation of certain lands described for assessment in the roll, and such assessment was void. (*People v. Hastings*, 34 Cal. 571.)

Cited 66 Cal. 226; 90 Cal. 401, 467; 97 Cal. 324; 12 Mont. 34.

332. An assessment of town lots for taxa-

tion, which does not give their cash valuation, either in gross or detail, is radically defective. Figures placed opposite town lots in an assessment-roll, without any statement whether they stand for cents, dollars, or eagles, do not fix any valuation to the same. (*Hurlbutt v. Butenop*, 27 Cal. 54.)

Cited 34 Cal. 615; 59 Cal. 178; 90 Cal. 467.

333. An assessment of real estate in which, for the value of the same, certain figures are written, with nothing in connection therewith to designate that they represent the quantity or sum of any thing whatever, is void, and a tax deed based on the assessment is also void. (*Brady v. Seaman*, 30 Cal. 610.)

Cited 90 Cal. 401, 467; 12 Mont. 34; 2 Utah, 114.

Omission of dollar mark. See *Swamp and Overflowed Lands*, 293.

334. The assessor of the city and county of San Francisco for the fiscal year 1865-66 assessed the property of the defendant for the purposes of state and municipal taxation, which assessment was entered in the proper assessment-roll as follows: "Money" valuation, "5,000," "Money loaned" valuation, "125,000," and over the column of valuations is the word "dollars." The only money loaned by defendant and the only solvent debts due him during said fiscal year consisted of the said one hundred and twenty-five thousand dollars, which was loaned by him to L., and secured to be paid by a deed of trust. Held, (1) that said assessment was made under section 4 of the General Revenue Act of 1857, as amended by sections 1 and 2, of the act of March 6, 1863 (Stats. 1864, p. 35); (2) that said assessment to defendant was a sufficient compliance with said acts as to the classification and description of his property; and, (3) if said assessment were deemed in said respects, or either of them, defective, such defect would be cured by the act of April 2, 1866. (Stats. 1865-66, p. 831.) (*People v. McCreery*, 34 Cal. 432.)

Cited 47 Cal. 664; 64 Cal. 505, 506; 93 Cal. 470; 12 Col. 375.

335. Where there is nothing on original assessment-roll to show what valuation was put upon the land and improvements attempted to be assessed the assessment is invalid, and a tax deed based thereon is void. (*Emeric v. Alvarado*, 90 Cal. 444.)

336. An assessment of personal property and improvements on real estate, assessed to a person other than the owner of the real estate, which does not separately value and set down in separate columns the values of the different parcels and descriptions of property, is not in compliance with the revenue laws, and therefore invalid. (*People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511.)

Cited 66 Cal. 21.

337. Although, under the Revenue Act of 1861, the assessor need not place the value of the land and the improvements thereon in separate columns, where both are assessed to the same person, yet, if he does so, the assessment is not radically defective, and does not show that the improvements were twice assessed. (*People v. Culverwell*, 44 Cal. 620.)

338. Where the description of the property

assessed is placed under the head "Improvements on land," and the aggregate value of the same is carried out in figures, preceded by the dollar mark, under the general head of "Value of improvements on lands," the assessment is correctly made. (*People v. Empire Gold and Silver Min. Co.*, 33 Cal. 171.) Cited 75 Cal. 451; 8 Nev. 28.

339. When several parcels of land are assessed to same person they must be separately valued, and the value of each parcel must be placed in the column under "Value of land." It is not sufficient to place the valuation of each parcel in the column under "Description of property," and the total valuation in the column under "Value of land." (*People v. Hollister*, 47 Cal. 408.) Cited 90 Cal. 467; 21 Nev. 105.

340. Assessor may assess and place valuation on block in city, as a whole, when one man owns it, without placing a separate valuation on the several lots into which it is divided. (*People v. Morse*, 43 Cal. 534.) Cited 44 Cal. 622; 70 Cal. 507; 73 Cal. 50.

341. There is no force in the objection that the value of a mining claim, which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture. (*State v. Moore*, 12 Cal. 56.) Cited 6 Mont. 281.

342. In this state, the constitution having declared that franchises are property, and that all property in the state not exempt from taxation shall be assessed in proportion to its value, to be ascertained as provided by law (Const., art. XIII, sec. 1), it would seem to follow that the tax must be according to a valuation made by the officer appointed for that purpose. If the state can impose a tax on the franchise of a corporation in the nature of an excise or duty, it does not exclude the taxation by a valuation made by an assessor. (*Spring Valley W. W. v. Schottler*, 62 Cal. 69.) Cited 99 Cal. 38.

343. An assessment of personal property by an assessor entered in the assessment-book as follows: "Value of personal property, exclusive of money and solvent credits, fifteen thousand seven hundred and twenty-five dollars," is sufficient, under section 3650 of the Political Code, although the person assessed gave to the assessor a list of the property in detail. (*Dear v. Weineke*, 94 Cal. 322.)

344. Is the statute allowing the assessor to deduct from solvent debts due the taxpayer the amount of his indebtedness constitutional, query? (*Lick v. Austin*, 43 Cal. 590.) Cited 17 Nev. 156.

345. If assessment for "debts" be too high, it is not therefore void, upon the ground that if legal taxes are blended in the same assessment with illegal, the whole is invalid; but it is merely an overvaluation, which the board of equalization will correct upon proper application. (*People v. Arguello*, 37 Cal. 524.)

346. The provision requiring that "all property in this state shall be taxed in proportion to its value, to be ascertained as directed by law," does not require the value to be found after the rate of taxation is fixed. (*People v. Latham*, 52 Cal. 598.)

347. An objection that a bridge has been assessed at its full value does not affect plaintiff's right to maintain suit to enjoin the collection of this tax, but only goes to the amount of the tax, and not to its validity; and the only remedy of plaintiff was to apply for a reduction of the tax. (*Fall v. City of Marysville*, 19 Cal. 391.)

348. If an assessor errs in his judgment in determining the value of property, the remedy is by application to the board of equalization, and courts will not revise the judgments of assessors upon such questions. (*San Jose G. Co. v. January*, 57 Cal. 614.) Cited 83 Cal. 449; 92 Cal. 614; 99 Cal. 38.

349. The payment of a tax cannot be resisted on the ground that the property on which it was levied was not assessed at its true value. One whose property is not assessed according to its true value must apply to the board of equalization. (*People v. Whyler*, 41 Cal. 351.)

Action against assessor for excessive valuation. See post, 888, 889.

Fraudulent and exorbitant valuation, defense of, duty to tender just amount. See post, 646.

Assessment list as evidence of value. See *Eminent Domain*, 253, 254.

12. Property Subject to Mortgage: Assessment of Satisfied Mortgage.

350. Real property subject to mortgage liens must be assessed in the manner prescribed by section 3650 of the Political Code, and the assessment of the interest of the mortgagor must be complete within itself, so as to show upon its face, without reference to the assessment of the mortgagee, that the value of the mortgage interest is deducted from the value of the land, and the remainder must appear separately in the assessment to the mortgagor. (*Knott v. Peden*, 84 Cal. 299.)

351. In assessing land for taxation, the assessor cannot deduct from its value the amount due on the mortgages by which it is encumbered, and call the remainder its assessed value. (*Lick v. Austin*, 43 Cal. 590.)

352. An assessment of mortgaged land to the mortgagor, in which the remainder of value, after deduction of mortgages therefrom, can only be ascertained by taking three separate assessments of plaintiff and his two mortgagees as one, and deducting the value of the two mortgage interests from the amount assessed to the mortgagor, is invalid, and a tax deed thereunder will pass no title. (*Knott v. Peden*, 84 Cal. 299.)

353. The value of a mortgage given to the regents of the state university should be deducted from the full value of the property mortgaged, and the right of the mortgagor to such deduction is not affected by the circumstance that the mortgage is not taxable, as being the property of the state. (*People ex rel. Attorney General v. Supervisors*, 77 Cal. 136.)

354. Erroneous assessment of mortgage already satisfied is not void. In such case (Pol. Code, sec. 3678) by operation of law the tax on the mortgagee's interest is valid only against the real estate, and payable by the

owner of the land whose estate has been enlarged by the release of the mortgage lien. (*McCoppin v. McCartney*, 60 Cal. 387.)

13. Railroads, Assessment of.

355. If, in an action to recover a tax brought against a railroad company, the company avers in its answer that its superintendent furnished the assessor with a written statement of the real estate belonging to the company, the company cannot, on the trial, be heard to dispute the authority of its agent to give a list of its property, nor to deny that the property contained in the list belonged to the company. (*People v. Stockton etc. R. R. Co.*, 49 Cal. 414.)
Cited 68 Cal. 16.

356. Such statement of property furnished to an assessor is binding on the corporation, and justifies the assessor in adopting it as a correct statement of the property belonging to the company. (*People v. Stockton etc. R. R. Co.*, 49 Cal. 414.)

357. The sworn statement required of the president of railroad corporations by section 3664 of the Political Code is not binding upon the board, and may be disregarded by it in the assessment. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

358. A description of the "roadway," by giving the termini, courses, and distances, is sufficient. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)
Cited 63 Cal. 469.

359. The steamers used by the Central Pacific Railroad Company in transporting its freight-cars across the bay of San Francisco are not included in the property defined by the tenth section of article XIII of the state constitution, the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county in the state, and should be assessed by the local assessors, not by the state board of equalization. (*City and County of San Francisco v. Central Pac. R. R. Co.*, 63 Cal. 467.)

360. The scheme for the assessment, levy, and collection of taxes on railroads situated in more than one county, prescribed by sections 3665 to 3679 of the Political Code, is unconstitutional, as being special legislation not authorized by section 25 of article IV of the constitution. The legislature cannot assume specially to regulate practice in the courts of justice as respects pleadings and suits for railroad taxes; nor pass any special law for the assessment or collection of taxes, except as empowered by section 13 of article XIII, which is limited to legislation necessary, or at least proper, to carry that article into effect, as respects the assessment of railroads, and confers no authority for special legislation as to the levy or mode of collection of taxes thereupon. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

361. Section 9 of article XIII of the constitution (relating to the equalization of county assessment-rolls) has no relation to the assessment of the property of railroad corporations operated in more than one county. (*Central Pac. R. R. Co. v. State Board of Equalization*, 60 Cal. 35.)

362. The provision of the constitution requiring the property of railroad companies operated in more than one county to be assessed by the state board of equalization is not in conflict with the provision of the fourteenth amendment of the constitution of the United States, that "no state shall deny to any person the equal protection of the laws." The fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another by another, each clothed with the duty and responsibility of ascertaining the actual value, does not operate to deprive the owners of either kind of property of legal protection. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

363. Boards of supervisors of the several counties through which run railroads operated in more than one county have no jurisdiction to raise or lower the assessments placed upon the property of such roads by the state board of equalization. (*People v. Supervisors of Sacramento County*, 59 Cal. 321.)
Cited 60 Cal. 28, 29; 97 Cal. 324.

364. It is not necessary, in the present case, to decide whether section 10 of article XIII of the constitution intends to make the assessment by the state board of railroad property the assessment upon which the taxes in cities, etc., on such property shall be collected for local purposes. Even if sections 3664 and 3665 of the Political Code were of no effect so far as they make their assessment the basis of city and town taxation, the assessment involved in this case would be valid for other purposes. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

365. The Political Code, section 3692, provides that the state board of equalization shall assess railroad property, annually, on or before the first Monday in March. The order of assessment thus made need not declare the particular fiscal year or years to which it is applicable. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

366. In this case the order assesses separately the franchise, roadway, roadbed, rails, and rolling stock, and it is therefore unnecessary to determine whether it was obligatory on the board to do so. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

367. The constitution does not in terms require that the assessed value of each item should be separately apportioned, and that the Political Code does not contemplate such separate distribution is sufficiently apparent from section 3650. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

368. By section 3664 of the Political Code the board must meet on or before the third Monday of August to equalize the valuation of property as between the several counties; but a reconsideration (or equalization) of the assessment of railroad property can only be made by the board in case a petition shall be filed by a party interested within five days after the assessments made and entered. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

369. The constitution does not require that the apportionment to cities and towns and to counties shall be one act. (San Francisco etc. R. R. Co. v. Board of Equalization, 60 Cal. 12.)

Act allowing assessment by assessor out of district is void. See ante, 227.

14. Arbitrary Assessment; Modification of Assessment.

370. An assessor cannot make an arbitrary assessment, unless the property owner neglects or refuses to make any statement under oath; and if such statement is returned, no matter how false the assessor may believe it to be, he has no power thereafter to make an arbitrary assessment on the ground of neglect or refusal to return property supposed to be assessable, the proper remedy being either to subpoena or cite the party for examination, or to prosecute him for perjury. (Weyse v. Crawford, 85 Cal. 196.)

371. Section 3633 of the Political Code, providing that if any person, after demand made by the assessor, neglects or refuses to give under oath the statement provided for in section 3629 of the Political Code, etc., the assessor must note the refusal on the assessment-book opposite his name and must make an estimate of the value of the property of such person, and that the value so fixed by the assessor must not be reduced by the board of supervisors, is not unconstitutional. (Oreña v. Sherman, 61 Cal. 101.) Distinguished 67 Cal. 627.

372. Entry on assessment-book opposite name of party assessed, that he had "neglected to return a statement as required by section 3629 of the Political Code," is sufficient. (Oreña v. Sherman, 61 Cal. 101.)

373. Where the owners of a warehouse returned a sworn statement of all their property, including the warehouse, and informed the assessor that they did not own the goods stored therein, nor know who held the storage receipts therefor, but, at his request, gave him a memorandum of their quantity and character, and of the persons to whom storage receipts had been issued, an arbitrary assessment of such goods to the owners of the warehouse by a marginal addition to the sworn statement, on the alleged ground of neglect to return a statement, is without authority of law, and void. (Weyse v. Crawford, 85 Cal. 196.)

Property in warehouse, arbitrary assessment of. See ante, V, 3.

374. Where the duties of an assessor with respect to a particular assessment have ceased, a court has no power to authorize him to amend, alter, or modify the assessment. (Johnson v. Malloy, 74 Cal. 430.)

15. Property Escaping Taxation.

375. Legislature may impose penalty on those who neglect to have their property assessed at the proper time. (Biddle v. Oaks, 59 Cal. 94.) Cited 87 Cal. 500; 97 Cal. 324.

376. Section 3469 of the Political Code, providing for the double assessment of property

which has escaped assessment for the last preceding year, being intended to impose a penalty upon the owner, is not unconstitutional. (Biddle v. Oaks, 59 Cal. 94.)

377. Section 3649 of the Political Code, providing for the reassessment of property which has escaped "assessment" in the preceding year, is not unconstitutional. (City of San Luis Obispo v. Pettit, 87 Cal. 499.)

378. The word "assessment," as used in said section, means a valid assessment. (City of San Luis Obispo v. Pettit, 87 Cal. 499.)

Adding property to roll. See post, VI, 4. Effect of omission to assess property. See post, VIII, 4.

16. Original and Duplicate Assessment-roll; Book Containing Original Assessment.

379. An assessment-roll, in which the columns are arranged in a different order, or under different headings, from the form given in section 20 of the Revenue Act of 1861, may, nevertheless, be a substantial compliance with all the requirements of that section and valid. (People v. Sierra Buttes Quartz Min. Co., 39 Cal. 511.) Cited 45 Cal. 74; 47 Cal. 411.

380. An assessment-roll, in which the name appears in the proper place and column, is not invalid because the name extends beyond the line of that column, or because there is a slight discrepancy in the name, the name given being sufficiently accurate to indicate the person intended. (People v. Sierra Buttes Quartz Min. Co., 39 Cal. 511.)

381. When the assessor has completed his assessment-roll and delivered it to the clerk of the board of supervisors his functions cease. (People v. San Francisco Savings Union, 31 Cal. 132.)

382. The statute requiring the assessor to return the assessment-roll to the clerk prior to the first Monday in August is directory merely; and the failure of the assessor to return it before that time is a matter of which the taxpayer cannot complain. (People v. Eureka etc. Co., 48 Cal. 143.) Cited 97 Cal. 598.

383. The assessor may certify to the assessment-roll after it has been returned to the clerk, and after the first Monday in August, for he does not lose control of the assessment-roll until it has been both certified and returned to the clerk. (People v. Eureka etc. Co., 48 Cal. 143.)

384. The auditor, in making a duplicate of the assessment-book for the tax-collector, must observe and follow such alterations as have been made by the board of supervisors in the exercise of their power in equalizing the assessed value of property, but he must disregard an order of the board canceling an assessment, or any order of the board by which it assumes an authority not conferred upon it by law. (People v. Ashbury, 44 Cal. 616.)

385. While the auditor, in making a copy of the assessment-book for the tax-collector, cannot review or correct the errors of the board of supervisors while acting within the sphere of their authority, still he must disre-

guard any order of the board which it had no jurisdiction to make. (*People v. Ashbury*, 44 Cal. 616.)

386. The auditor, in making a duplicate copy of the assessment-roll, under the act of March 30, 1868, for modifying the grade of certain streets in San Francisco, need not attach thereto a copy of the certificate of the mayor appended to the original roll, certifying to its correctness. (*San Francisco v. Certain Real Estate*, 50 Cal. 188.) Cited 87 Cal. 219.

387. If the assessor in his assessment-roll does not fix the valuation of property by marks in the column of valuation, showing whether the figures indicate dollars, cents, or eagles, the auditor, when he carries out the tax in the duplicate, cannot supply the defect. (*People v. San Francisco Savings Union*, 31 Cal. 132.)

388. The auditor will be compelled, by writ of mandate, to deliver to the tax-collector a correct duplicate of the assessment-book, as made by the assessor, with such alterations only as have been made by the board of supervisors while acting within the sphere of their authority. (*People v. Ashbury*, 44 Cal. 616.)

389. Where a duplicate assessment-roll has been dispensed with by order of the board of supervisors the original assessment-roll is prima facie evidence of the plaintiff's right to recover, in an action to collect a tax. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

Assessment-roll as evidence. See post, XII, 4, i.

390. The assessment-roll, when completed and certified by the assessor to the board of supervisors, is the only evidence of his acts and intentions. (*People v. San Francisco Savings Union*, 31 Cal. 132.) Cited 34 Cal. 574, 575.

391. Independent of a statute authorizing such evidence, parol testimony of the assessor cannot be received to show what the figures in the column of valuation were intended to represent. (*People v. San Francisco Savings Union*, 31 Cal. 132.)

392. In any case the duplicate assessment-roll can only be corrected from data contained in the original roll, as made by the assessor; and, when not so furnished, parol evidence is not admissible to supply its place. (*People v. Hastings*, 34 Cal. 571.)

393. Act of April 2, 1866, so far as it provides for amendments of assessment-rolls, is ineffectual for any purpose, because if the roll, without amendment, contains substance sufficient to make it valid, as an assessment of property, the curative effect of the statute is not needed; and, if it does not, no legislative enactment can either make the assessment, or empower any other officer except the assessor to make it. (*People v. Hastings*, 34 Cal. 571.)

394. In such case the provisions of the curative act, passed April 2, 1866 (Stats. 1865-66, p. 831), do not authorize the supplying of the defects in the duplicate assessment-roll, so as to give it validity. (*People v. Hastings*, 34 Cal. 571.)

395. An assessor is not required to keep a book containing the original list and assessment of each man's property, and, if he does keep such book, entries in it are not a record of his official action, and may be changed by him. (*People v. Stockton etc. R. R. Co.*, 49 Cal. 414.)

396. The "tax list or assessment roll," which must be certified by the assessor and delivered to the clerk of the board of supervisors, is the only record of his final judgment as to the value of the property. (*People v. Stockton etc. R. R. Co.*, 49 Cal. 414.)

Assessment-roll, conclusiveness of. See *Schools*, 49.

Book of assessor as evidence. See *Criminal Law*, 2542.

VI. Boards of Equalization.

1. Creation of.

397. It is within the constitutional powers of the legislature to create a state board for the equalization of the assessed value of property between the different counties of this state. (*Savings and Loan Society v. Austin*, 46 Cal. 415.) Cited 56 Cal. 204, 205.

398. That part of the act creating a state board of equalization which provides that the controller of state shall be one of its members, and the other two shall be appointed by the governor, is not in conflict with the constitution. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

399. The act creating a state board of equalization is unconstitutional, because the members of the board are not elected by the people, and the board is given the power of performing in part the functions of assessors, and because the power conferred on the board, of fixing the rate of state taxation, is a delegation of legislative powers. By Wallace, C. J., Niles, J., concurring. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

Board of equalization, amendment relating to was properly adopted. See *Constitutional Law*, 111.

Board of equalization, construction of constitution. See *Constitutional Law*, 64.

Board of equalization, constitutional provision is self-executing. See *Constitutional Law*, 71.

2. Power to Fix Rate of Taxation.

400. Section 3666 of the Political Code is unconstitutional in so far as it delegates to the state board of equalization the right to fix the rate of taxation, "after allowing for delinquency in the collection of taxes," because it is a delegation of legislative power to said board. (*Houghton v. Austin*, 47 Cal. 646.) Cited 48 Cal. 313, 318; 51 Cal. 245; 52 Cal. 162; 53 Cal. 178, 235, 237; 54 Cal. 522; 56 Cal. 202, 208; 58 Cal. 644; 59 Cal. 333; 60 Cal. 34; 76 Cal. 407.

401. That part of the act creating a state board of equalization which gives to said board the power to fix the rate of taxation for state purposes is not unconstitutional. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

3. Increasing and Lowering Assessment; New Assessment.

402. Section 9 of article XIII of the constitution, so far as it relates to the state board, has reference to equalization between counties; and the same is true of subdivision 9 of section 3692 of the Political Code. (San Francisco etc. R. R. Co. v. Board of Equalization, 60 Cal. 12.)

403. The state board of equalization has power to increase or lower the assessment-roll of a county so as to affect taxes for county purposes. (Baldwin v. Ellis, 68 Cal. 495.)

404. The legislature cannot confer on a state board for the equalization of taxes, appointed by the governor, the power to add to or deduct from the assessed value of property as fixed by the assessors elected by the people, for such power would, in effect, constitute such board of assessors. (Houghton v. Austin, 47 Cal. 646.)

405. The state board has not the power to increase or lower any individual assessment. (San Francisco etc. R. R. Co. v. Board of Equalization, 60 Cal. 12.)

406. The proviso in section 9 of article XIII of the constitution is to be read distributively (*reddendo singula singulis*); that is to say, as authorizing and empowering the state board of equalization to increase or lower the entire assessment-roll of any county, and the county boards to increase or lower the individual assessments upon the rolls of their respective counties. The state board, therefore, has not the power to increase or lower any individual assessment; nor has a county board the power to increase or lower the entire assessment-roll. (Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194.) Cited 59 Cal. 324, 330, 337, 339; 60 Cal. 80; 65 Cal. 465; 68 Cal. 497, 499; 97 Cal. 324.

407. The state board has the power to raise or lower an individual assessment-roll so as to make it conform to the true value of the property; but the action of the state board must succeed that of the county board; and, where an assessment is to be raised, such action can only be taken in the county where the property is situated and after due notice to the party interested. Thornton, J., concurring. (Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194.)

408. The state board has power to increase or lower the entire assessment-roll, or any assessment contained therein, so as to equalize the assessment of the property contained in the roll, and to make it conform to the true value in money of the property assessed. Sharpstein, J., dissenting. (Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194.)

One refusing to make statement cannot have valuation lowered. See ante, V, 3.

Arbitrary assessment, lowering of. See ante, V, 14.

409. The action of the state board of equalization in raising the assessment-roll of a county, under section 9 of article XIII of the constitution, operates upon mortgage assessments. (Schroeder v. Brady, 66 Cal. 212.)

410. The board of supervisors, sitting as a

board for the equalization of taxes, does not exceed its jurisdiction by refusing to accede to an application to reduce the assessed valuation of property. (People ex rel. Pacific Mail S. S. Co. v. Board of Supervisors, 50 Cal. 282.)

411. An order of the board of equalization, adding to the assessed valuation of a person's property, should show upon its face that it is merely increasing the valuation of the particular property placed on the assessment-roll by the assessor. (People v. Reynolds, 28 Cal. 107.)

Cited 97 Cal. 324.

412. If the assessor fixes the assessed value of the property of a person or firm, and the board of equalization afterwards, instead of adding to the valuation of the property so assessed, makes a new assessment, this new assessment is void, even if the party interested receives notice and appears and evidence is taken. (People v. Reynolds, 28 Cal. 107.) Cited 49 Cal. 642; 14 Nev. 142; 2 Or. 211.

Making original valuation. See post, VI, 4. Excessive assessment, remedy. See ante, 347, et seq.

Complaint, application, notice and evidence on raising or lowering assessment. See post, VI, 6.

4. Adding or Striking Out Property; Making Original Valuation.

413. Neither the state board nor the county boards of equalization are authorized to add any property to an assessment-roll. (People v. Dunn, 59 Cal. 328, 331.) Cited 97 Cal. 324, 325.

414. Section 3861 of the Political Code, enabling and requiring the assessor, at the request of the board of equalization, to list and assess property which he has failed to assess, simply extends the power and duty of the assessor, and is not in conflict with the provision of the constitution defining the powers and duties of the state and county boards of equalization; but the exercise of the power granted by it is directly in accord with section 1 of article XIII of the constitution, which requires all property not exempt from taxation to be taxed. (Farmers etc. Bank of Los Angeles v. Board of Equalization, 97 Cal. 318.)

415. The Revenue Act of 1861 does not authorize the board of equalization of a county to add to the assessment-roll other property than that assessed by the assessor. The board may require the assessor to enter on the assessment-roll other property which has not been assessed; but when entered by the assessor, he, and not the board, must give it a proper valuation. (People v. Reynolds, 28 Cal. 107.)

Cited 97 Cal. 324.

416. An order of the board of equalization of a county, finding that a bank had returned a false and incomplete statement of its taxable property, and that it should be assessed in a specified sum for its solvent credits, and ordering the assessor to add to the assessment for solvent credits the sum found to have been omitted, is not an attempt by the board to add other property to the assessment-roll, or to exercise assessorial powers; and it is not

objection to the order that it states the value of the item to be added, instead of simply directing the assessor to add the property to the list and assess its value. The assessment of solvent credits must necessarily be at their face value, and to describe such property is to fix its value. (*Farmers' etc. Bank of Los Angeles v. Board of Equalization of Los Angeles*, 97 Cal. 318.)

Jurisdiction to add property. See post, 436.

417. Board has no power to strike out from assessment, made by the assessor, property assessed by him. (*People ex rel. v. Pacific Mail Steamship Co. v. Board of Supervisors*, 50 Cal. 282.)

418. If no valuation was placed by the assessor upon the property none can be placed upon it by the board of equalization. The board may alter the valuation in order to equalize it, but cannot place the valuation in the first instance. (*Ferris v. Coover*, *Ferris v. Chapman*, 10 Cal. 589.)

See ante, 415.

New assessment. See ante, VI, 3.

5. Equalization of Money, Mortgages, or Franchises.

419. Object which constitution seeks to attain is that the assessments shall be made to accord with the true value in money. (*People v. Dunn*, 59 Cal. 328, 330.)

420. State board cannot add to true valuation of money already assessed to the full value it represents. (*People v. Dunn*, 59 Cal. 328, 331.)

421. In equalization of taxes assessments for money loaned and secured by mortgages and deeds of trust, and which are evidenced by written contracts for the payment of specific sums, do not stand upon the same footing as assessments for money. (*People v. Dunn*, 59 Cal. 328, 332.)
Cited 68 Cal. 499.

422. Mandamus to the defendant as auditor of the city and county of San Francisco, requiring him to obey an order of the state board of equalization, increasing the entire assessment-roll eight per cent, "amounting to the sum of seventeen million, seven hundred and sixty-five thousand and twenty-five dollars." The answer alleged that the total amount assessed included nine million, eight hundred and thirty-one thousand, nine hundred and thirty-two dollars in money, and thirty-two million, eight hundred and sixty-two thousand, two hundred and sixty-nine dollars in mortgages and deeds of trust; and it was claimed that so much of the order as required these assessments to be raised was in excess of the powers of the board, and void. Held, The conclusion from reading the section of the constitution (sec. 9, art. XIII) as a whole is, that it neither authorizes an increase of the valuation of money already assessed at its legal value, nor does it prohibit an increase of all other property so as to make it conform to its actual value in money. The order of the board is to be read as requiring the auditor to add eight per cent to the assessed value of all "property, except money already assessed at its true and only legal value." The portion of the order of the

state board which reads, "amounting to the sum of seventeen million, seven hundred and sixty-five thousand and twenty-five dollars," is mere surplusage, which does not affect the validity of the order. (*People v. Dunn*, 59 Cal. 328.)

Cited 66 Cal. 213.

Raising assessment-roll, effect on mortgage. See ante, 409.

423. In this case the board of supervisors, in the exercise of its power of equalization, assessed the franchise of the water-works by taking the aggregate of the market value of the shares of stock in the company on the 7th of March, 1881, and deducting therefrom the value of the real and personal property of the company, and held the difference to be the value of the franchise. The market value of the shares was shown to the board by the testimony of witnesses. Held, this mode of arriving at the value of the franchise is within the power vested in the board of supervisors, acting as a board of equalization. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69.)

Cited 99 Cal. 38.

424. By the several provisions of the Political Code the power to act on each and every assessment is conferred on the board, and to increase or lower it so as to make it conform to the true value in money of the property mentioned therein, and the board has full power to act on the assessment of the franchise and increase or lower it as provided in section 3673 of the Penal Code. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69.)

Assessment of railroads, equalization of. See ante, V, 13.

6. Procedure on Equalizing Assessment.

425. Boards of supervisors ought not to be held to any great strictness in procedure while sitting as a board of equalization. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69, 103.)
Cited 82 Cal. 217.

426. Where the statute provides that the board of equalization "shall meet on the first Monday in June of each year for the correction of errors in the assessment of personal property, and shall continue in session from time to time until such errors brought to their notice shall be corrected, provided, however, they shall not sit after the third Monday in June"; and where such board met and held sessions on the first and third Mondays of June only, but between said sessions a committee of the board received applications for the correction of assessments, and took testimony, all of which was, on said last session, submitted to and acted on by the board, and when the board closed its session it did not appear that any valuation of personal property was erroneous, held, that this was a proper and legal mode of action on the part of said board. (*People v. McCreery*, 34 Cal. 432.)

427. If an ordinance of a city council, incorporated under the act of 1850, requires a complaint to be filed, and personal notice in writing to be given to a taxpayer, before the board of equalization can raise the assessed

value of his property, such complaint must be filed and notice given before such value can be raised. (*Los Angeles v. Los Angeles Water Works Co.*, 49 Cal. 638.)

428. Where the board of equalization makes an order increasing an assessment, without a complaint having been filed, and the party assessed appears and moves to set aside the order, such appearance does not confer jurisdiction by relation, and a refusal to set aside the order does not make it valid. (*People v. Goldtree*, 44 Cal. 323.)
Cited 2 Idaho, 927; 21 Nev. 176.

429. In order to give the board of equalization jurisdiction to increase the valuation of property beyond the amount at which it has been assessed the filing of a complaint is necessary. (*People v. Goldtree*, 44 Cal. 323.)
Cited 49 Cal. 642; 12 Nev. 94; 14 Nev. 142.

430. The board for the equalization of taxes cannot, under the Revenue Act of 1861, diminish or increase the assessed value of property as fixed by the assessor, unless complaint has first been made to them, and reasonable notice has been given to the party assessed or interested of the day when they will act in the case. (*People v. Reynolds*, 28 Cal. 107.)

Cited 39 Cal. 673; 44 Cal. 324; 12 Nev. 94.

431. A complaint of a district attorney filed with the board of equalization which "complains of the assessment set opposite each name on the assessment-list, and prays the board to hear evidence in each and every case and every name on said assessment-list, as to the value of the property therein assessed, and to change the value as to them may seem just, and that the valuation may be reduced or raised as to them shall seem just and equitable," states no facts, and is nugatory and insufficient to give the board jurisdiction to increase the assessment. (*People v. Flint*, 39 Cal. 670.)

Cited 44 Cal. 324; 49 Cal. 642; 12 Nev. 94; 14 Nev. 142.

432. The board of equalization has no jurisdiction or power to reduce any assessment except upon a verified written application. Held, accordingly, the board exceeded its powers in acting upon the application of C., which was not verified, and in reducing the assessment of H., who made no written application. (*Garretson v. Board of Supervisors of County of Santa Barbara*, 61 Cal. 54.)
Cited 14 Cal. 49.

433. The jurat to an application for a reduction of an assessment, subscribed by the applicant, was as follows, "Sworn to before me this nineteenth day of July, 1881" (signed A. B. Williams, clerk), is sufficient. (*Garretson v. Board of Supervisors of the County of Santa Barbara*, 61 Cal. 54.)

434. The board of equalization has no power to raise the valuation of land as fixed by the assessor, without notice to the owner. The general notice of the sitting of the board, by publication, does not amount to the notice required. (*Patten v. Green*, 13 Cal. 325.)
Cited 62 Cal. 103; 82 Cal. 217; 2 S. Dak. 163.

435. If the board raised the tax without proper notice to the owner their action is

void, and the assessment remains in full force. (*Patten v. Green*, 13 Cal. 325.)
Cited 56 Cal. 206.

436. A notice to a bank to appear before the board of equalization and show cause why its assessment on solvent credits should not be increased from the specified amount assessed to a much larger sum specified in the notice is, in effect, a notice that other solvent credits might be added to the assessment, and gives the board jurisdiction to order such additional assessment to be made. (*Farmers' etc. Bank of Los Angeles v. Board of Equalization of Los Angeles*, 97 Cal. 318.)

437. The reasonableness of the time given by the notice to show cause, in cases where the law prescribes no definite time, must, in a great measure, be left to the discretion of the board of equalization. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69, 103.)

438. When proper notice of a hearing before the board of equalization in respect to an increase of assessment has been given by mail, and there is no showing that the notice was not received in fact, if the rules framed by the board, under the authority of section 3673 of the Political Code, do not prescribe any written return, or any especial mode of proof of service of the notice, the fact of service by mail may be established by any proper legal testimony, either oral or in writing; and if the board are orally informed by the clerk that notice was duly mailed, and his oral evidence upon the hearing of a writ of review shows that such was the fact, the jurisdiction of the board to increase the assessment of the party so notified is sufficiently established to prevent the annulling of the increased assessment for excess of jurisdiction. (*Hagenmeyer v. Board of Equalization of Mendocino County*, 82 Cal. 214.)

439. When the rules of the board of equalization require a notice to be mailed to each person whose interests are to be affected to appear within seven days from the date of the notice, and show cause why a proposed change specified in the notice should not be made, the time for appearance is to be computed as including the date of the notice; so that a notice mailed on the eleventh day of the month will give the board jurisdiction to act on the 18th of the same month. (*Hagenmeyer v. Board of Equalization of Mendocino County*, 82 Cal. 214.)

440. If, under a rule or an order of a board of equalization, a party has notice of the intended action of the board in regard to the assessment of his property in time to have a full and fair hearing, such notice is sufficient. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69, 103; *San Francisco Gas Light Co. v. Schottler*, 62 Cal. 119.)

441. Any defect or ambiguity in a notice to appear before the board of equalization is waived by an appearance before the board, and submission to its action, on the part of the person or corporation notified, and furnishing required evidence as to the property involved. (*Farmers' etc. Bank of Los Angeles v. Board of Equalization of Los Angeles*, 97 Cal. 318.)

442. The appearance of the company on the

notices served by a board of equalization waived all objections to the mere form of the notice. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69, 103.)

443. Section 3681 of the Political Code, requiring ten days' notice of proceedings before a board of equalization, does not apply where notice was served on the party interested, and he appeared before the board in pursuance of it. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69, 103.)

444. The board of supervisors, in its capacity of a board of equalization, had jurisdiction of the person and subject matter in the matters involved in his cause. (*Spring Valley Water Works v. Schottler*, 62 Cal. 69.)

445. If a party objects to the tax on the ground that notice was not given, as required by law, for the meeting of the board of equalization, he must show error in the assessed value of his property to his prejudice. (*Kelsey v. Trustees of Napa*, 18 Cal. 629.)

Irregularity in time of meeting, when no defense. See ante, 206.

446. The board for the equalization of taxes cannot, under the Revenue Act of 1861, add to the valuation of property, as fixed by the assessor, without evidence authorizing them to do so. (*People v. Reynolds*, 28 Cal. 107.)

447. Section 3680 of the Political Code, requiring the board of equalization, on an application to equalize an assessment, to have the evidence taken down and to declare the legal principles it has been governed by, does not change the rule that a writ of certiorari brings up for review, only the question whether the inferior court has acted in excess of jurisdiction. (*Central Pac. R. R. Co. v. Placer County*, 46 Cal. 668.)

448. The statute does not require the board of equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal. (*Central Pac. R. R. Co. v. Placer County*, 32 Cal. 582.) Cited 24 Or. 218.

449. The code does not require the testimony of witnesses examined before the board of equalization to be reduced to writing; and, in the absence of such requirements, it must be presumed that the applicants were examined in accordance with section 3675 of the Political Code. (*Garretson v. Board of Supervisors of the County of Santa Barbara*, 61 Cal. 54.)

Conclusiveness of order as to taking of evidence. See post, VI, 7.

450. If board raises assessed value of property without having acquired jurisdiction to do so the taxpayer must still pay a tax upon the value of his property as assessed. (*Los Angeles v. Los Angeles Water Works Co.*, 49 Cal. 638.)

451. The statute authorizing and prescribing the mode of equalization does not require the taking down, or the preservation in any manner, of the evidence on which equalization may be made by either the board or

clerk of the board. (*Central Pac. R. R. Co. v. Placer County*, 34 Cal. 352.)

Board of equalization, determination of jurisdiction, conclusiveness of. See *Certiorari*, 179, et seq.

7. Order on, Conclusiveness of; Presumption in Favor of Acts of Board.

452. The board of equalization, in passing on the question whether an assessment is too high or too low, acts in a judicial capacity, and its decision is an adjudication. (*People v. Goldtree*, 44 Cal. 323.)

453. The order of the board of equalization, reciting that testimony was taken, and, in effect, that the conclusion was reached from the evidence that the bank had returned a false statement, and had escaped assessment for a specified amount of solvent credits, is conclusive, in a proceeding under a writ of review to annul the order, that evidence was introduced before the board showing such facts. (*Farmers' etc. Bank of Los Angeles v. Board of Equalization of Los Angeles*, 97 Cal. 318.)

454. When the record does not show by affirmative proof that the board of equalization did not act upon evidence before it, its order increasing an assessment after due notice to the party whose interests are affected is conclusive that it did act upon such evidence as was necessary. (*Hagenmeyer v. Board of Equalization of Mendocino County*, 82 Cal. 214.)

455. A refusal of a board of equalization to reduce the assessed value of property, made on a complaint by the party assessed, does not preclude the board from afterwards raising the assessed value of the same property, upon complaint made that it has been assessed too low. (*Central Pac. R. R. Co. v. Placer County*, 46 Cal. 668.)

456. The action of a board of equalization, on an application to change the assessed valuation of property, is not *res judicata*. (*Central Pac. R. R. Co. v. Placer County*, 46 Cal. 668.)

457. The court is not prepared to say that a board of equalization is limited to one application, either to reduce or raise the assessed value of property. (*Central Pac. R. R. Co. v. Placer County*, 46 Cal. 668.)

Order of board raising assessed value. See ante, 411.

Order requiring assessor to add to roll. See ante, 416.

458. Presumption of law is that board of equalization perform their duty and correct any inequality in the assessment of taxes. (*Guy v. Washburn*, 23 Cal. 111.)

Board of equalization, return on certiorari to review acts of. See *Certiorari*, 166, et seq.

VII. Levy of Tax; Rate.

459. The words "assessing and collecting" may be so used as to include the operation called the levy of the tax. (*City of San Luis Obispo v. Pettit*, 87 Cal. 499.)

460. The board of supervisors of Lake county duly adopted an order which recited "that they have this day fixed the rate of

county and district tax to be levied and collected upon each one hundred dollars of the assessed valuation of the county, etc., . . . as follows: state fund, .64; general county fund, .40, etc., . . . total state, county, and district tax, 1880-81, \$2.75." Held, that the order was sufficient, and that the omission of the word "cents" from the various items of the levy did not invalidate it. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

461. A tax is not void because the record of the board of supervisors in levying it is not signed by the chairman and clerk of the board. (*People v. Eureka Lake etc. Co.*, 48 Cal. 143.)

Cited 52 Cal. 23, 34; 93 Cal. 162; 97 Cal. 598.

462. Under the statute of 1863, which provides what a defendant may answer in a suit to recover a tax, an answer which avers that the tax was fraudulently levied for an amount in excess of that authorized by law is good. (*People v. Nelson*, 36 Cal. 375.)

463. An act amendatory of the Consolidation Act, passed in 1866 (Stats. 1865-66, p. 436), provides that "on or before the first Monday of May, annually, the board of supervisors of said city and county shall levy the amount of taxes for state, city, and county purposes required by law to be levied upon all property not exempt from taxation." The order levying said taxes for said year, under which said assessment of defendant's property was made, was passed by said board on the first Monday of May, and only received the approval of the mayor on the following day. Under the Consolidation Act said approval was necessary to give force to said order. The said Revenue Acts require the annual levy of taxes to be made on or before said first Monday of May. Held, (1) that said order was invalid, and said taxes were not legal, so far as they depended on the action of said board; (2) that said state taxes for their levy did not depend on the action of said board, but rested upon the several statutes providing for their levy, but that the levy of said city and county taxes did not depend on said order, and were illegal. (*People v. McCreery*, 34 Cal. 432.)

464. The act of May 4, 1852, "To incorporate the town of Oakland," confers no power of taxation directly, but leaves it to be derived from the general act of March 27, 1850, under which the trustees of towns have power to levy and collect a tax, annually, not exceeding fifty cents on every one hundred dollars of the assessed value of the property, and providing, further, that unpaid taxes should be recovered by a suit in the name of the corporation. Held, that an assessment of two and three-fourths per cent was wholly unauthorized by law, and void. (*Hays v. Hogan*, 5 Cal. 241.)

465. The act of the legislature of March 10, 1874, under which the city of Santa Barbara was incorporated, providing for the levy of an annual tax, not exceeding one per cent, for the payment of bonds and interest and the current expenses of the city, one-third to be devoted to the payment of the interest upon and establish a sinking fund for the payment

of the bonds, did not repeal section 4371 of the Political Code, providing that the direct taxes imposed by a common council in any one year must not exceed two per cent of the valuation of property within the city, but merely suspended its operation as to the city of Santa Barbara; and the act of March 15, 1876, amending the act of March 10, 1874, so as to provide that for the payment of the bonds and interest thereon an annual tax should be levied, not exceeding one-fourth of one per cent, repealed the portions of the act of March 10, 1874, referring to the levy of taxes for current expenses of the city, and leaves section 4371 of the Political Code as the only limitation on the power of the common council in fixing the rate of the levy of the tax to pay the current expenses of the city; and a levy by the council, at the rate of one dollar and fifty cents upon each one hundred dollars of taxable property, is not in excess of its power. (*City of Santa Barbara v. Eldred*, 95 Cal. 378.)

466. The Revenue Act of 1853 provides that the boards of supervisors, or courts of sessions, shall levy, in addition to the state tax, a tax, not to exceed fifty cents on each one hundred dollars, for county purposes, and such other special taxes as may be by law authorized to be collected. (*McDonald v. Griswold*, 4 Cal. 352.)

Cited 16 Cal. 34; 11 Nev. 116; distinguished 5 Cal. 334.

467. Under the first section of the Revenue Act of May, 1853, the court of sessions of Sacramento levied a tax of fifty cents for county purposes, twenty-five cents for funded debt tax, etc. Held, that the words of the Revenue Act, authorizing a tax of fifty cents on each one hundred dollars for "county purposes," ought to be restricted to the current expenses of the year, as an appropriation, leaving the scrip-holders of the county to look for payment to the tax collected for the floating debt. (*McDonald v. Griswold*, 4 Cal. 352.)

Power of board of equalization to fix rate. See ante, VI, 2.

Levy is ministerial act. See Prohibition, 29.

Statute relating to levy does not delegate legislative powers to state board. See Constitutional Law, 177.

Duty to levy to meet bonded indebtedness. See Counties, 68, 69.

Compelling supervisors to levy tax. See Mandamus, II, 13, d.

VIII. Validity of.

1. Equality and Uniformity of.

468. Only limitation upon taxing power of legislature is the provision for equality and uniformity found in the thirteenth section of article IV of the constitution. (*Blanding v. Burr*, 13 Cal. 343.)

469. The thirteenth section of the eleventh article of the state constitution, which provides that "Taxation shall be equal and uniform throughout the state," does not operate as a limitation on the taxing power of the legislature, and apply to every species of taxation, but is to be taken as applying only to

direct taxation on property, as such. It does not require that all should be taxed alike. The legislature, in its discretion, may, therefore, discriminate in the imposition of taxes on certain classes of persons, occupations, or species of property, taxing some and exempting others. (*People v. Coleman*, *People v. Hussey*, 4 Cal. 46.)

Cited 4 Cal. 157; 10 Cal. 489; 13 Cal. 165; 22 Cal. 208; 24 Cal. 244; 51 Cal. 501; 53 Cal. 481; disapproved 34 Cal. 448, 461.

470. State revenue law is not unconstitutional because there is a want of uniformity between the particular laws prevailing in the several counties with regard to the enforcement of the payment of delinquent taxes. (*People v. Central Pac. R. R. Co.*, 43 Cal. 398.)

471. To render taxation uniform it is essential that each taxing district should confine itself to the objects of taxation within its limits; but this with the understanding that the situs of personal property may be the domicile of the owner. (*People ex rel. Long v. Townsend*, 56 Cal. 633.)

Equality and uniformity of. See *ante*, II.

2. Tax Levied Under Repealed Statute, or Where Statute Invalid.

472. Where taxes are levied under a law which is repealed by a subsequent act, unless it be made apparent by clear and unequivocal language that the repealing act was intended to have a retrospective operation, it will be inferred that the intent of the legislature was that the taxes should be collected in accordance with the law in force at the time they were levied. (*City of Oakland v. Whipple*, 44 Cal. 303.)

473. Assessment for fiscal year 1872-73, when under the decisions there was no valid law authorizing the assessment, is void. (*Grimm v. O'Connell*, 54 Cal. 522.)

Tax deed based on void statute. See *Quiet-Title*, 64.

Effect of tax deed under assessment levied by authority of void statute. See *post*, XIII, 7.

3. Double Taxation.

474. The constitution does not authorize or require, but forbids, the double taxation of property. (*People ex rel. Burke v. Badlam*, 57 Cal. 594.)

475. It is not necessary in this case to decide whether the constitution forbids double taxation, but only that the constitution does not command it, and that the legislature has prohibited it. *McKinstry, J.*, concurring. (*People ex rel. Burke v. Badlam*, 57 Cal. 594.)

476. Courts have no authority to declare that solvent debts are not taxable, because to tax them might amount to double taxation. The mode and manner of assessing solvent debts is a matter of legislative discretion. By *Wallace, C. J.*, and *Rhodes, J.* (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

477. Levying tax upon money at interest, as well as upon property mortgaged to secure it, does not present a case of double taxation as against the mortgagee. (*People v. Whar-tenby*, 38 Cal. 461.)

Cited 43 Cal. 336; 46 Cal. 492; 17 Nev. 156.

478. If land subject to a mortgage is taxed, and the debt secured by the mortgage is also taxed, and the tax on the debt is paid by the mortgagee, the mortgagor cannot complain of double taxation. (*Lick v. Austin*, 43 Cal. 590.)

Cited 46 Cal. 483, 492.

479. If a debt for money lent, which is secured by mortgage, is taxed, and the mortgaged property is also taxed, it is double taxation, and a violation of the constitution. By *Crockett, J.*, *Niles, J.*, concurring. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

480. It was the purpose of the first section of the acts of April 1 and April 4, 1870 (*Stats.* 1869-70, pp. 584, 710), to exempt from taxation solvent debts secured by mortgage upon real estate, and not merely to regulate the duties of assessors. (*People v. Eddy*, 43 Cal. 331.)

481. Lender of money is not subjected to double taxation by reason of the statutory provision requiring payment of taxes on money loaned by him, and on solvent debts due him over his own indebtedness; whether said statutory provision results in imposing double taxation upon the borrower of money, when security by way of mortgage or otherwise is given, does not arise in this case. (*People v. McCreery*, 34 Cal. 432.)

Cited 38 Cal. 464; 46 Cal. 483.

482. The roadbed is the foundation on which the superstructure of a roadway rests; the roadway is the right of way, which is property liable to taxation; the rails in place constitute the superstructure. An assessment of these items separately does not constitute double taxation. (*San Francisco etc. R. R. Co. v. Board of Equalization*, 60 Cal. 12.)

483. When money is deposited in a savings bank to be loaned out for the benefit of the depositor if it is taxed to the depositor, and the bank has loaned the money and is taxed upon the note and mortgage, it is double taxation. By *Belcher, J.* (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

484. It would be assessing the same property twice to assess to corporation all of its corporate property, and also to assess to each of the stockholders the shares held by him. (*People ex rel. Burke v. Badlam*, 57 Cal. 594.)

Cited 62 Cal. 112, et seq; 63 Cal. 471.

485. The legislature has the power to declare that the corporate property of corporation shall be assessed to the corporation, and that the same property shall not be again assessed against the stockholders. (*People ex rel. Burke v. Badlam*, 57 Cal. 594.)

486. In a case of double taxation, to entitle a party to relief in the courts, it must appear that the tax has once been paid or tendered. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

487. Because the same subject matter has been twice taxed it by no means follows that both taxes are void, and that it must escape taxation. (*Savings and Loan Society v. Austin*, 46 Cal. 415.)

Cited 51 Cal. 254; 91 Cal. 13; distinguished 70 Cal. 506.

Inhibition only applies to taxation by same state. See ante, 116.

Of property of nonresident. See ante, IV, 18.

4. Tax Partly Void; Effect of Omission to Assess.

488. If the tax levy contains an illegal item such item will not invalidate the levy as to other items, if the levy is so made that the illegal item may be separated from the other items of the levy. (*De Fremery v. Austin*, 53 Cal. 380.)

489. If any part of tax complained of be legal, that part must be paid before the party will be heard to complain of an illegal portion. (*San Jose G. Co. v. January*, 57 Cal. 614.)

490. The omission of an assessor to assess certain parcels of property subject thereto, whether arising from a misapprehension of the law, as by giving effect to void provisions of a statute, or a mistake of fact, will not invalidate his general assessment-list. (*People v. McCreery*, 34 Cal. 432.)

491. It is the duty of assessors to assess all property in their respective districts, counties, etc., subject to taxation, which comprehends all property except that which may be denominated, generally, public property. (*People v. McCreery*, 34 Cal. 432.)

Assessment of property escaping taxation. See ante, V, 15.

5. Legalizing Invalid Assessments.

492. The legislature possesses full power to legalize defective and invalid assessments of delinquent taxes, and to provide for their collection. (*People v. Holladay*, 25 Cal. 300.) Cited 28 Cal. 614; 32 Cal. 108; 34 Cal. 437, 576.

493. The only mode in which defective assessments may be authorized by the legislature to be corrected is to empower the assessor who made the assessment to make the needed corrections, or authorize it to be done by others in his presence and upon his testimony, showing what was intended by the defective matter requiring correction. Per *Sawyer, C. J.* (*People v. Hastings*, 34 Cal. 571.)

494. The foundation of proceedings for apportioning and collecting a tax upon property is the valuation which, under the rule of the constitution, must be made by the assessor, and the legislature cannot supply this defect, if it existed, by any curative act. But all the details of the proceeding in making the valuation are subject to legislative control, and, if error has intervened, it is subject to the curative power of the legislature, provided a valuation good in substance has in fact been made by the assessor, though in mode, form, etc., not conforming to the statute. (*People v. McCreery*, 34 Cal. 432.)

495. When an assessment is so defective as to be totally void the legislature cannot cure it by legislative enactment having a retrospective operation, so as to create an obligation where none existed before. Per *Currey, J.* (*People v. Holladay*, 25 Cal. 300.)

496. Assessment of individual property of a former member of a firm to the firm is void,

and cannot be validated by legislative enactment. (*People v. Sneath*, 23 Cal. 612.)

497. The act of March 19, 1878, "to legalize the assessment of taxes in San Francisco," etc., is not unconstitutional. (*San Francisco v. Spring Valley W. W.* (No. 6470), 54 Cal. 571, cited 54 Cal. 603; *San Francisco v. Spring Valley W. W.*, 54 Cal. 603.)

498. An act of the legislature legalizing assessments for taxes for the fiscal year ending on the first day of March is not void because the constitution provides that the fiscal year shall commence on the first day of July, but the word "fiscal" in the act may be treated as surplusage. (*People v. Todd*, 23 Cal. 181.)

499. The first section of the act of May 17, 1861, entitled "An act to legalize and provide for the collection of delinquent taxes in the counties of this state," legalizes every assessment for taxes made during the three years preceding March 1, 1861, however defectively and imperfectly it may have been made in any respect. (*People v. Holladay*, 25 Cal. 300.)

500. The act of May 17, 1861, was only designed to legalize assessments in some respects formally defective, though substantially good, and was not intended to make good an assessment which was totally invalid for not stating either the kind or quantity of property assessed, or not describing it, when real estate. By *Currey, J.*, *Rhodes, J.*, concurring. (*People v. Holladay*, 25 Cal. 300.)

501. The act of April 4, 1864, legalizing the assessments of property made in 1862 and 1863, does not cure the defect of a want of valuation by the assessor of property assessed during those years. (*People v. San Francisco Savings Union*, 31 Cal. 132.) Cited 34 Cal. 437.

502. The act of 1866, passed for the purpose of legalizing defective assessments, did not legalize complaints, in actions then pending, which were defective by reason of not describing the land assessed. (*People v. Mariposa Co.*, 31 Cal. 196.)

503. Courts have no power to go behind assessments legalized and confirmed by an act of the legislature to inquire into alleged errors and irregularities in the assessment. (*People v. Todd*, 23 Cal. 181.)

504. As to operation of act of 1859, page 123, in validating assessment-roll of 1857, in this case, see opinion. (*Burr v. Hunt*, 18 Cal. 303.)

Informal assessment, legislature may prescribe mode of correcting assessment. See ante, 4.

What defect in assessment cured by statute. See ante, 334.

Curative act relating to amendment of assessment-rolls. See ante, V, 16.

Curative act, nature and validity of. See post, 574.

Statutes curing defects in levy and assessment, validity of. See *Constitutional Law*, VIII, 17.

Omission, supply of. See *Bridges*, 18.

IX. Lien of Tax; Tax as Cloud on Title.

505. Levy of tax created judgment and lien on the property, having the force and effect

of an execution, and could be enforced in the same manner. (*Yuba County v. Adams*, 7 Cal. 35.)

Cited 18 Cal. 381; 30 Cal. 244.

506. An illegal assessment of real property imposes no obligation on the owner to pay the tax for which it was levied, nor does it create a lien therefor on the property assessed. (*People v. Pearis*, 37 Cal. 259.)

507. Lien of tax extends back to the assessment, and the assessment creates a lien which is not extinguished until the tax is paid. (*Reeve v. Kennedy*, 43 Cal. 643.)

508. When, by a change of county boundaries made after land has been assessed for taxes, it falls into another county, the lien of the tax on the land still continues, and the tax-collector of the old county may enforce the collection of the tax by sale. (*Moss v. Shear*, 25 Cal. 38.)

Cited 93 Cal. 420.

509. Under the Revenue Law of 1854 the lien of the state for state and county taxes attached on the first day of March of each year, and continued until the tax was paid. Neither a failure by the officer to include a delinquent tax of one year with the tax of the subsequent year nor a sale of the property for the taxes of the succeeding year divested the lien for the prior tax. (*Cowell v. Washburn*, 22 Cal. 519.)

510. A lien upon real property for a delinquent personal property tax against the owner cannot be extinguished without paying the taxes or selling the property for the payment thereof, and is not barred by the statute of limitations. (*Lewis v. Rothchild*, 92 Cal. 625.)

Cited 99 Cal. 595.

511. A tax is not a cloud upon the title to real estate; and its unlawful collection, by distress or seizure of chattels, is no more than an ordinary trespass. (*Ritter v. Patch*, 12 Cal. 298; *Berri v. Patch*, 12 Cal. 299, cited 36 Cal. 71.)

512. The assessment of taxes and the lien which it creates are matters of public record, of which all purchasers are bound to take notice, and the purchaser of land is bound at his peril to see that taxes have been paid. (*Reeve v. Kennedy*, 43 Cal. 643.)

Lien of judgment. See post, 680.

Lien for taxes payable more than four years before as a defect. See *Vendor and Vendee*, 94.

X. Remission or Cancellation of Tax.

513. A clause in an act imposing a tax, which allows the board of supervisors to remit the tax upon such property as they may deem just, does not render the whole act unconstitutional. (*People v. Whyler*, 41 Cal. 351.)

514. The legislature cannot authorize the board of supervisors of a county to remit a tax, or a part of a tax, within a specified district. An order of the board attempting to do so is null and void, because in conflict with the provisions of the constitution, which requires taxation to be equal and uniform, and which requires all property to be taxed.

(*Wilson v. Supervisors of Sutter County*, 47 Cal. 91.)

Cited 7 Cal. 469.

515. An act authorizing a board of supervisors of a county to remit the taxes, or a part of the taxes, upon any portion of the property within a district is unconstitutional, even if the tax is imposed for local purposes to be expended within the district. (*Wilson v. Supervisors of Sutter County*, 47 Cal. 91.)

516. A board of supervisors has no authority to cancel an assessment of property made by the assessor and placed by him on the assessment-book, and if the board make such order it is a nullity. (*People v. Ashbury*, 44 Cal. 616.)

517. The board of supervisors, sitting as a board of equalization, has no power to cancel an assessment for taxes placed by the assessor upon the assessment-roll. (*People ex rel. Love v. Board of Supervisors*, 44 Cal. 613.)

518. A resolution or order of a board of supervisors canceling a delinquent tax, because it is not collectible, ought properly to specify each particular tax which is canceled. (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)

519. The board of supervisors has no power to cancel any taxes, or the assessment for any taxes, except such as are contained in the list by the auditor and taken by him from the delinquent list, and as to which the collector has made affidavit that "he has not been able to discover any property belonging to or in the possession of the person liable to pay the same [taxes] whereof to collect them." (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)

Cited 50 Cal. 284.

520. Without such affidavit of the collector, that a delinquent tax cannot be collected, and without the concurrence of the board of supervisors with the collector in the opinion that it is not collectible, said board cannot cancel a tax. (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)

521. A resolution of a board of supervisors canceling a tax, without the affidavit of the collector indorsed on the delinquent list, that it is not collectible, is void, and the auditor should proceed with his duty in regard to such tax, in entire disregard of such resolution. (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)

XI. Payment of Tax.

1. Who Liable for; Payment by Mortgagee.

522. Party in possession of a lot, to which another has acquired the title by a deed for a sale for taxes, is under no obligation to pay tax levied after the tax deed is given. (*Maina v. Elliott*, 51 Cal. 8.)

523. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should, in equity, as between him and the defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. (*Kelsey v. Abbott*, 13 Cal. 609.)

Cited 2 Dak. 27.

524. It is the duty of mortgagor of land, who is the owner thereof, when an assessment is made, and the taxes thereon are levied and become payable, to pay the same; and he cannot, by neglecting so to do, and by allowing the land to be sold for the taxes, add to or strengthen his title by purchasing at the tax sale himself, or by subsequently buying from a stranger who purchased at the sale. (*Barnard v. Wilson*, 74 Cal. 512.)

525. The owner of a mortgage is personally liable for the payment of a tax assessed upon it during his ownership of it, and his liability does not depend upon his continued ownership of the mortgage until after the levy of the tax or until the time for payment arrives, and one who owned a mortgage on the first Monday of March, and to whom it was assessed, is not discharged by a mere assignment of the mortgage before the levy of the tax in October of the same year. (*San Gabriel etc. Co. v. Witmer Brothers Co.*, 96 Cal. 623.)

526. Section 3627 of the Political Code, which gives the mortgagor of land who has paid the mortgage tax the right to deduct the amount of the tax from the mortgage at the time of payment, is permissive, and not mandatory or exclusive, in its terms, and does not prevent a mortgagor who has paid the mortgage debt without the deduction of the tax to an assignee of the holder of the mortgage, to whom it was assessed, and who has been compelled to pay the mortgage tax to relieve his property from the lien, from bringing an action to recover the amount paid from the one to whom the mortgage was assessed, whose duty it was to pay it, and whose debt it is. (*San Gabriel etc. Co. v. Witmer Brothers Co.*, 96 Cal. 623.)

Provision as to taxes in mortgage. See *Mortgages*, VII, 3.

Covenant to pay taxes. See *Landlord and Tenant*, IV, 5.

Duty of tenant in common to pay cotenant's taxes. See *Cotenancy*, 30.

Payment of taxes by cotenant. See *Cotenancy*, II, 2.

2. Regulation of; In What Payable; Where Payable; Evidence of Payment.

527. Though a man can only be made to pay a tax according to law, that law may be made as well at one time as another, or by one series of acts as another, and as well after an informal assessment, or no assessment, as before. (*People v. Seymour*, 16 Cal. 332.)

528. Taxes are not debts, within the meaning of that clause of the act which provides that the notes shall be a "legal tender in payment of all debts, public and private." Congress, by these terms, only intended such obligations for the payment of money as are founded upon contract. (*Perry v. Washburn*, 20 Cal. 318.)

Cited 32 Cal. 154; 34 Cal. 681; 61 Cal. 253; 62 Cal. 644; 71 Cal. 73, 245; 2 Nev. 61, 63; distinguished 34 Cal. 623; disapproved 1 Idaho, 210, 212, 218; s. c. 1 Idaho, N. S., 175, 177.

529. "United States notes," issued under the act of Congress of February 25, 1862, are

not receivable for state and county taxes. (*Perry v. Washburn*, 20 Cal. 318.)

530. The acceptance, by a collector of taxes, of a warrant, is not a liquidation of the debt, but the receipt of it by the state treasurer, from the collector, would be a liquidation for which the treasurer would be responsible. (*Scofield v. White*, 7 Cal. 400.)

531. The Revenue Law of 1854 authorized the payment of a portion of the taxes in comptroller's warrants. The acts of 1855 and 1856 provide for the funding of the state debt, and the collection of the revenue in cash, and forbids the treasurer to liquidate any of the debt, except as therein provided. Held, that the act of 1854, allowing payments in warrants, was thereby repealed. (*Scofield v. White*, 7 Cal. 400.)

What may be paid in. See *Swamp and Overflowed Lands*, 186.

532. Taxes are due and payable in the county where the property is first assessed, and if the property, after it has been assessed, be removed into another county, and there assessed, the first assessment is unaffected thereby, and payment of the latter assessment is not a discharge of the former. (*People v. Holladay*, 25 Cal. 300.)

533. The certificate of a tax-collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence, where the tax-collector himself can be called as a witness. (*Powell's Heirs v. Hendricks*, 3 Cal. 427.)

534. In the absence of the tax-collector his receipt for taxes, with proof of its execution, would be admissible. (*Powell's Heirs v. Hendricks*, 3 Cal. 427.)

Payment of taxes as evidence of dedication. See *Dedication*, VI, 2, b.

Payment of taxes as evidence of good faith. See *Fraudulent Conveyances*, 241.

Parol evidence of payment of taxes on loss of tax receipts. See *Evidence*, 42.

Payment of taxes as evidence of possession. See *Ejectment*, 391.

3. Under Protest; Recovery of Money Paid for Tax.

535. Where taxes upon property have been once paid by the owner the lien of the tax is extinguished, and the county has no right or power to sell the land upon another assessment, and there is no consideration for the payment of the purchase money, and he who has paid it is entitled to recover it back. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

536. Under section 3804 of the Political Code, as amended in 1889, where, by accident, oversight, or mistake, the same property has been twice assessed, and the taxes twice collected, the moneys collected by mistake must be refunded. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

537. Under section 3804 of the Political Code, providing that "any taxes, per cent, and costs paid more than once, or erroneously or illegally collected, may, by order of the board of supervisors, be refunded," etc., the word "may" is to be construed as "shall,"

and the supervisors have no option to refuse to provide for refunding the amount so paid. Where the public interest, or private right, or justice, requires that a thing to be done by public officers should be done, the word "may" is generally to be construed as meaning the same as "shall" or "must." (Hayes v. County of Los Angeles, 99 Cal. 74.)

538. Action against a county to recover purchase money paid by plaintiff at a void tax sale. Held, section 3804 of the Political Code does not apply to a case of this kind. There is no rule of law authorizing the plaintiff to recover. (Loomis v. County of Los Angeles, 59 Cal. 456.)

Cited 67 Cal. 505; 68 Cal. 575; 99 Cal. 78; 1 N. Dak. 319.

539. If the items of a person's property are assessed and valued separately, and some of the items are not liable to taxation, and the tax-collector can separate the legal from the illegal portion of the tax, he should receive the legal portion of the tax if tendered to him; and if he refuses to do so, and the whole tax is paid under protest, the person taxed can recover from the collector that portion which is illegal. (Bank of Mendocino v. Chalfant, 51 Cal. 369.)

540. Taxes not justly due, and paid under protest, may be recovered back by suit against the tax-collector. (Falkner v. Hunt, 16 Cal. 167.)

Cited 23 Cal. 113; 46 Cal. 597; 49 Cal. 627; 6 Dak. 482.

541. Where taxes have been illegally assessed, and the tax-collector is about to sell the property for the taxes thus assessed, the tax can be paid under protest and the money recovered back by action. (Guy v. Washburn, 23 Cal. 111.)

Cited 46 Cal. 598.

542. To enable one to recover back a tax illegally assessed, and paid under protest, it must appear that the tax was delinquent, and that the officer to whom it was paid was armed with authority, real or pretended, to seize property, and threatened to do so. (Bank of Santa Rosa v. Chalfant, 52 Cal. 170.)

Cited 71 Cal. 469.

543. A threat by the tax-collector to seize and sell property by virtue of a delinquent list, to satisfy an illegal tax, amounts in law to coercion. (De Fremery v. Austin, 53 Cal. 380.)

544. A threat by the collector to sell lands for taxes, made before the taxes became delinquent, does not amount to coercion. (Williams v. Corcoran, 46 Cal. 553.)

Cited 52 Cal. 81; 53 Cal. 380, 382.

545. Tax deed which is void upon its face does not throw a cloud upon the title, and a threat by the tax-collector to sell property and execute such a deed does not amount to duress. (Wills v. Austin, 53 Cal. 152.)

546. Proof that a tax was paid under a written protest before it became delinquent, and before threats were made to sell property for its collection, is not proof that it was paid under duress. (Bank of Woodland v. Webber, 52 Cal. 73.)

Cited 52 Cal. 171; 53 Cal. 380; 80 Cal. 89.

547. A tax paid under protest, after the delinquent list comes into the hands of the tax-collector for collection by sale of property, and after the publication of the delinquent list, is paid under duress. (Smith v. Farrelly, 52 Cal. 77.)

548. It is not necessary for a person paying tax under protest to state facts in the protest of which the tax-collector has notice. (Smith v. Farrelly, 52 Cal. 77.)

549. A tax-collector is bound to know the limits of the district for which he was elected, and if he enforces the payment of a tax on property outside of said limits a general protest against the payment of the same is sufficient to enable the party paying to recover it back. (Mason v. Johnson, 61 Cal. 612.)

Cited 52 Cal. 81.

550. In case of the payment of the whole tax a protest is not sufficient, unless it specifies such illegal item among the grounds of illegality of the tax. (De Fremery v. Austin, 53 Cal. 380.)

551. In the absence of acts amounting to duress or coercion, the payment of a tax is voluntary, although made under protest. (Dear v. Varnum, 80 Cal. 86.)

552. If a board of equalization increases the assessed value of a taxpayer's property without having acquired jurisdiction to do so, and the money is paid to the tax-collector under protest and under coercion, and there is nothing in the assessment-roll or documents which come to the hands of the tax-collector to notify him that the action of the board of equalization was illegal, the protest must notify him of that fact. (Meek v. McClure, 49 Cal. 623.)

553. An action cannot be maintained to recover back money voluntarily paid in satisfaction of an illegal tax. (Younger v. Board of Supervisors of Santa Cruz County, 68 Cal. 241.)

554. The payment to a tax-collector of the amount of a tax, made before the tax was returned delinquent, was voluntary, although accompanied by a protest in form, and the amount so paid cannot be recovered back. (Merrill v. Austin, 53 Cal. 379.)

555. The payment of taxes, where there is no legal duress will be deemed to have been voluntary, and the money cannot be recovered back. (Wills v. Austin, 53 Cal. 152.)

Cited 78 Cal. 453; 80 Cal. 90.

556. As to the point that the payment here was voluntary, and therefore cannot be recovered back, see facts and opinion. (Douglass v. Mayor etc. of Marysville, 18 Cal. 643.)

557. If plaintiff protesting against tax sale was not owner of property, the sale being unauthorized and void, as purchaser he could take nothing, and therefore might recover the money sued for, under the count for money had and received. (Hays v. Hogan, 5 Cal. 241.)

558. The plaintiff, having protested against a tax sale of his property, purchased the property in order to protect it from a clouded title, made the payments under protest, and a few days after commenced suit for the recovery of the money. Held that this was sufficient no-

tice to the officer to hold the fund, and fixes his liability. (*Hays v. Hogan*, 5 Cal. 241.) Cited 16 Cal. 170; 23 Cal. 113; 49 Cal. 627; distinguished 46 Cal. 596.

559. If a tax is not illegal and void, the facts that the person taxed paid it to the tax-collector under protest, and to avoid a threatened sale of his property for the same, and that such person has commenced or is about to commence a suit against the tax-collector to recover it back, are no sufficient reason why the tax-collector should fail to pay the money into the public treasury at the time required by law. (*People ex rel. Love v. Austin*, 46 Cal. 521.) Cited 52 Cal. 201.

560. The court does not intimate an opinion on the point whether a tax-collector can in any case withhold from the treasury taxes collected by him, on the ground that they were paid under protest, even though actions have been commenced to recover them back. (*People ex rel. Love v. Austin*, 46 Cal. 521.)

561. Section 3804 of the Political Code is not limited in its application to taxpayers alone, but includes and protects the purchaser at a tax sale who pays the taxes; and, if the purchaser pays at such sale taxes after the owner has previously paid, it is a payment "more than once" within the purview of the statute, for which the purchaser or his assignee may recover from the county as provided in that section. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

562. The assignee of a purchaser at a tax sale, who made the purchase under an assessment made to another person than the owner, without knowledge either of the purchaser or the assignee that, prior to the sale, the owner had paid a tax upon the same property assessed to him, may maintain an action to recover back the amount paid by such purchaser for taxes, per cent, and costs, where the board of supervisors has refused to allow a claim therefor. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

563. In an action to recover taxes alleged to have been paid to the tax-collector under duress, to prevent a sale of real estate, if the complaint alleges facts showing that the assessment was void for want of a description sufficient to identify the land, and was raised by the board of equalization without notice to the plaintiff, it follows from such allegations that all the proceedings of the tax-collector in the premises were void, that his threat to sell constituted no duress, and that the complaint does not state a cause of action. (*Cooper v. Chamberlin*, 78 Cal. 450.)

564. The complaint in an action against a tax-collector in his official capacity to recover an amount of money alleged to have been illegally collected from the plaintiff as taxes must aver the fact of the defendant being such an officer. (*Baldwin v. Ellis*, 68 Cal. 495.)

565. Where the complaint in an action to recover back personal property taxes, which are claimed to have been void by reason of an insufficient description of the property in the assessment, and to have been paid under pro-

test, alleges that the plaintiff furnished the assessor with a statement of his assessable property, it will be presumed in support of the assessment, unless the contrary is alleged, that the description in the assessment was identical with that in the statement; and whether the description contained in the statement was correct or not, if the assessor adopted it, the plaintiff will not be heard to complain of its indefiniteness. (*Dear v. Varnum*, 80 Cal. 86.)

566. An allegation in the complaint which, without describing the assessment, merely alleges conjunctively that the assessment did not show "the number, kind, amount, and quality" of the personal property, admits that the assessment did contain at least three of these requirements, and is insufficient as an averment of an inadequate description. (*Dear v. Varnum*, 80 Cal. 86.)

567. In an action to recover back personal property taxes a complaint which merely alleges that at the time the taxes were paid the delinquent list was being published, and which does not aver that any real property was assessed to or owned by the plaintiff upon which the assessment of the personal property was a lien, or that there was any seizure of, or any threat or attempt to seize, the plaintiff's property, fails to show that the taxes were paid under duress or coercion. (*Dear v. Varnum*, 80 Cal. 86.)

568. The state is not a necessary party defendant to an action against the county to recover taxes paid more than once, pursuant to section 3804 of the Political Code, where it does not appear that the state has received any portion of the tax in question. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

569. Where the claim for the refunding of taxes is evidently founded upon the mistake of the collector in selling the property for taxes, when the taxes have been once paid upon it, and the mistake is not discovered by the purchaser or his assignee, until the refusal of the tax-collector to give a deed for such taxes, the claim for a refunding of the taxes from the county is inchoate until such date, and the cause of action is to be deemed as accruing, under subdivision 4 of section 338 of the Code of Civil Procedure, at the date when the mistake and the facts connected therewith were first discovered. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

570. Section 41 of the County Government Act, which provides that all claims shall be presented to and filed with the clerk of the board of supervisors within one year after the last item in the account or claim accrued, is not to be construed as defeating a claim against the county for the refunding of taxes paid by the purchaser more than one year before the presentation of the claim, where such claim is founded upon a mistake of the tax-collector in selling the property, which was not discovered by the purchaser, or the facts upon which the liability of the county depends were withheld from the purchaser, until less than one year before the presentation of the claim. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

Compelling refunding of taxes illegally collected. See *Mandamus*, II, 13, h.

Action to recover back money paid under duress. See *Statute of Limitations*, 188.

Amount paid pending litigation, right to withdraw. See *San Francisco*, 134, 135.

4. Mistake in Payment.

571. Where property has been assessed to an unknown owner and sold for the tax, and a deed executed to the purchaser, the fact that the agent of the owner of the lot paid the tax on the wrong lot by mistake is not such a mistake as a court of equity will relieve against. (*Moss v. Mayo*, 23 Cal. 421.)

Recovery of money paid by mistake. See ante, XI, 3.

XII. Delinquent Tax.

1. Time of Delinquency.

572. Under the act of March 13, 1883, a tax levied for municipal purposes does not become delinquent, and an action for its recovery cannot be maintained, until the board of trustees has by ordinance fixed the time when it must be paid. (*Town of Dixon v. Mayes*, 72 Cal. 166.)

2. Publication and Printing of Delinquent Tax List.

573. The provisions of the Revenue Act of 1857, which requires the tax-collector to publish the delinquent tax list, giving the name of the owner (when known) of all real estate, and the improvements, together with a condensed description of the property, etc., are not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property holder to the state, and these proceedings by publication, etc., are merely modes adopted by the legislature to collect them. If the property be omitted from the delinquent list this does not discharge the property holder, but the defect may be remedied by the legislature. (*Moore v. Patch*, 12 Cal. 265.) Cited 12 Cal. 274; 16 Cal. 344; 20 Cal. 351; 62 Cal. 646.

574. Where the legislature passed an act to remedy the failure on the part of the tax-collector to publish the names of the owners, together with a list of the property, such act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such act is not general, but special, and is passed to meet a given state of facts, and, consequently, that provision of our constitution which provides that "all laws of a general nature shall be uniform in their operation," does not apply. (*Moore v. Patch*, 12 Cal. 265.) Cited 17 Cal. 553.

575. Taking the third section of the act of 1858, together with the first section, it is evident that the intention of the legislature in the passage of the act of 1858 was to substitute the assessment-roll for the delinquent list required by the act of 1857, or, rather, to give full and complete effect to that list as a valid warrant for the collection of the taxes therein mentioned, and then to provide, as is done in

section 3 of that act, for their collection. (*Moore v. Patch*, 12 Cal. 265.)

576. The act of 1858, dispensing with the publication required by the act of 1857, also dispensed with the proof of that fact. (*Moore v. Patch*, 12 Cal. 265.)

577. If a delinquent tax list, and time and place of sale of property for the delinquent taxes, are not published as required by the statute of 1859, the defendant may, under said statute, avail himself of the same as a defense in an action of ejectment brought against him by one claiming under a tax deed. (*Tully v. Bauer*, 52 Cal. 487.)

578. When a statute requires that the delinquent tax list, together with the time and place of sale of the property for the delinquent tax, shall be published in a paper in the city or county, or in a supplement to such paper, such list, time, and place, if published in a supplement, must be published in one the circulation of which is coextensive with that of the paper both in and out of the city and county. (*Tully v. Bauer*, 52 Cal. 487.)

579. Subdivision 23 of section 25 of the County Government Act, which provides that the board of supervisors shall fix the price of all county advertising, and that each county officer shall procure such advertising at a price not greater than that so fixed, repealed so much of section 3766 of the Political Code as required the board of supervisors to contract for the publication of the delinquent tax list by advertising for sealed proposals to do the same, and awarding the advertising of the list to the lowest bidder; and under such subdivision the tax-collector is authorized to select any newspaper in the county and procure the advertising of the list, provided it is done at the price fixed by the board of supervisors, and he cannot be compelled to publish it in any other way. (*Journal Publishing Co. v. Whitney*, 97 Cal. 283.)

580. The fact that the tax-collector advertised for sealed proposals for the publication of the delinquent tax list does not entitle the lowest bidder to a writ of mandate to compel him to advertise the list in the newspaper of such bidder. (*Journal Publishing Co. v. Whitney*, 97 Cal. 283.)

581. A tax-collector has power to contract for publishing the delinquent list of taxpayers, so as to bind the county for payment of the price. He is the agent of the county in this respect, and, for any reasonable exercise of that agency the county is responsible. (*Randall v. Yuba County*, 14 Cal. 219.) Cited 2 Mont. 597; distinguished 20 Cal. 595.

582. Where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax-collector had assented to a contract previously made, or attempted to be made, by the supervisors with another party, for publishing the list, is not enough to affect plaintiffs, if they had no notice of it; and evidence of such assent was properly ruled out. (*Randall v. Yuba County*, 14 Cal. 219.)

583. A demand for printing the delinquent tax list, under a contract made with the board of supervisors, is not a demand legally charge-

able against the county, by reason of a want of authority in the board to make the contract. (*Keller v. Hyde*, 20 Cal. 593.) Cited 2 Mont. 597.

584. The board of supervisors of Alameda county, after advertising for bids for publishing for one year "the proceedings of the board of supervisors, the quarterly reports of the auditor and treasurer, all notices required to be published by the board, and all notices that are required to be published by any county or township officer, that may be ordered published by the board," awarded a contract to the plaintiff for a stipulated price per square. In pursuance of the contract the plaintiffs published the delinquent tax list for that year. The board did not order its publication and refused to make payment therefor. Held, (1) that a publication of such list is a part of the county printing for which the board are authorized to contract; (2) that the terms of the contract embrace such list, though it is not specifically enumerated; and (3) that no order of the board was necessary to make the publication a charge against the county enforceable according to the terms of the contract. (*Times Publishing Co. v. County of Alameda*, 64 Cal. 469.)

Delinquent list as evidence. See post, XII, 4, i.

Improper publication. See ante, 55.

3. Duty of Auditor to Enter on Next Assessment-roll.

585. When any of the taxes of one fiscal year are returned as delinquent it is the duty of the auditor to enter the same on the assessment-roll of the next fiscal year, and then to enter the same upon the duplicate assessment-book, unless they have been canceled by the board of supervisors under the affidavit of the collector required by section 3800 of the Political Code. (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)

586. The statute does not expressly prescribe the time at which the auditor shall enter the delinquent taxes on the next assessment-roll, but the implication is that it should be done before the duplicate assessment-book is delivered to the collector. (*People ex rel. Love v. Ashbury*, 46 Cal. 523.)

Delinquent tax, entry by auditor on assessment-book. See *Mandamus*, 161, 162.

4. Collection of.

a. Discretion of Assessor; Due Process of Law.

587. Under section 3820 of the Political Code the tax assessor has power to enforce the collection of taxes assessed on personal property against such property whenever, in his opinion, the lien upon the real property is insufficient to secure payment of the taxes upon the real and personal property; and the judgment or opinion which the assessor formed, and upon which he acted in exercising the power, cannot be reviewed by the courts, after he has collected and paid over the taxes to the county treasurer. (*County of San Mateo v. Maloney*, 71 Cal. 205.)

588. The constitutional provision that no person shall be deprived of his property with-

out due process of law is not applicable to proceedings by the state to obtain from citizens their proper contributions to the expenses of administering the government. Long established practice, under a similar provision in other constitutions, had fixed this qualification to the meaning of that clause at the time our constitution was adopted. (*High v. Shoemaker*, 22 Cal. 363.)

b. Remedies for; Statute Prescribing Mode of.

589. If a tax has been duly assessed, the owner of the property becomes personally liable for it, and the remedy is not confined to a seizure and sale of it, nor to the enforcement of a lien on it by action. (*City of Oakland v. Whipple*, 39 Cal. 112.) Cited 99 Cal. 601.

590. An action of debt for taxes will not lie when the predicate of the action is a mere assessment upon property. Much depends upon the language of the act creating the tax. If the act merely impose a tax upon property, and provide a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax. If a personal liability be imposed for the tax, and the act is silent as to the mode of enforcement, then an action would lie for the enforcement of the obligation; for the rule is general, that debt lies at common law to enforce a statutory duty, or penalty, or forfeiture. (*State of California v. Poulterer*, 16 Cal. 514.)

591. Manner of collecting taxes rests with legislature, and, when the legislature has prescribed the particular mode, that procedure must be followed, unless it is apparent that it was not intended that such course of procedure should be exclusive. (*People v. Ballerino*, 99 Cal. 598.)

592. Statute relating to collection having prescribed conditions upon which alone the state may proceed by action, the performance of such conditions is essential to the right to maintain the action. (*People v. Ballerino*, 99 Cal. 598.)

593. The twenty-second section of the act incorporating the city of Oakland does not abridge the ordinary remedy by suit for the collection of delinquent taxes, but was intended to afford an additional, summary, and effectual remedy for its collection. (*City of Oakland v. Whipple*, 39 Cal. 112.)

Tax may be enforced the same as an execution. See ante, IX.

Improper publication of delinquent tax list, effect on suit. See ante, XII, 2.

c. Who may Sue for or Collect.

594. The act of April 23, 1880 (Stats. 1880, p. 136), authorizing the bringing of suits to recover delinquent taxes, gives a county the right to maintain an action in its own name for delinquent taxes levied for county purposes; and the fact that it might also have sued in the same action for delinquent state taxes is immaterial, where it does not appear that any other action for the state taxes is pending or has been prosecuted to judgment. (*County of Los Angeles v. Ballerino*, 99 Cal. 598.)

Cited 99 Cal. 601.

595. Section 3899 of the Political Code, which authorizes an action to be brought in the name of the people of the state to recover delinquent taxes under certain circumstances, was not repealed by the act of April 23, 1880 (Stats. 1880, p. 136), which authorizes counties to sue for delinquent county or state taxes. The remedy given by the act of 1880 is cumulative and not exclusive, and does not deprive the people of the state of the right to maintain such an action under section 3899 of the Political Code. (*People v. Ballerino*, 99 Cal. 598.)

596. The constitution of the state allows the legislature to pass a law directing the district attorney of a county to bring actions in the name of the people to recover delinquent taxes, and such law does not interfere with the constitutional duties of the tax-collector. (*People v. Central Pac. R. R. Co.*, 43 Cal. 398.)

597. Attorney general, by virtue of his supervisory power over district attorneys, may assume direction and control of an action brought under the act of April 23, 1880, "prescribing the form of complaint in actions to recover delinquent taxes, and to authorize the bringing of suits therefor." (*County of Sacramento v. Central Pac. R. R. Co.*, 61 Cal. 250.)

Cited 66 Cal. 152; 68 Cal. 16.

598. Tax-collector elected for city cannot collect taxes of adjoining town, even if it has, after his election, and after the levy of the tax, been annexed to the city. (*Mason v. Johnson*, 51 Cal. 612.)

Power of outgoing sheriff to collect. See post, XVII.

Unfinished delinquent tax suits. See District Attorney, 20, et seq.

County may sue in its own name for taxes. See Highways, 120.

Prohibition will not lie to prevent collection of tax. See Prohibition, 27, et seq.

d. Jurisdiction Over Actions.

599. If, in an action to recover a money judgment for unpaid taxes commenced in a justice's court, an answer is filed which puts in issue the legality of a tax, the justice of the peace is ousted of his jurisdiction. (*People v. Mier*, 24 Cal. 61.)

Cited 31 Cal. 221; 52 Cal. 410.

600. In an action brought in a police court to recover taxes, where the answer raises an issue as to the legality of the tax sought to be recovered, it is the duty of the court to transfer the action to the superior court for trial, under the provisions of section 838 of the Code of Civil Procedure, which applies to police courts as well as to justices' courts. (*City of Santa Barbara v. Eldred*, 95 Cal. 378.)

601. Where the verified answer in such action discloses facts which require a transfer of the cause to the superior court, from the time of the filing of the answer the police court is ousted of its jurisdiction to proceed further upon the merits presented by the pleadings, and a judgment rendered therein is void, and the superior court has no appellate jurisdiction to try the case. (*City of Santa Barbara v. Eldred*, 95 Cal. 378.)

602. An action brought under the Revenue Act of 1861, to recover judgment for unpaid taxes, is not a case in equity, but an action at law; and where the amount is less than three hundred dollars the district court has no jurisdiction. (*People v. Mier*, 24 Cal. 61.)

Cited 28 Cal. 328; 34 Cal. 58; 43 Cal. 494; distinguished 30 Cal. 581; 38 Cal. 394, 395.

603. The district courts have no jurisdiction of an action to recover judgment for a tax, where the amount sued for is less than three hundred dollars, and the complaint contains no prayer for the foreclosure of the tax lien. (*Bell v. Crippen*, 28 Cal. 327.)

Cited 30 Cal. 581.

604. If, however, the action is brought under the provisions of the act of May 12, 1862, it is a case in equity, and the district court has jurisdiction, although the amount claimed is less than three hundred dollars. (*People v. Mier*, 24 Cal. 61.)

605. The acts of 1861 and 1862 prescribe the same form of complaint, but the act of 1861 contemplates a mere money judgment, while the act of 1862 authorizes a judgment foreclosing a lien for taxes, with an order of sale, etc., so that the character of the action, whether it is a case in equity or at law, will be determined by the prayer of the complaint. If the prayer of the complaint is for a money judgment the district court will not have jurisdiction, where the amount claimed is less than three hundred dollars; but if the prayer is for the foreclosure of a lien, order of sale, etc., the district court has jurisdiction, regardless of the amount claimed. (*People v. Mier*, 24 Cal. 61.)

Cited 37 Cal. 304.

606. District courts have jurisdiction of actions for collection of delinquent taxes, when the tax amounts to more than three hundred dollars, and also, regardless of amount, when it is sought to enforce the lien of the tax. (*People v. Olvera*, 43 Cal. 492.)

607. The superior court has original jurisdiction in matters involving the legality of a tax, and over an action to recover a tax, the legality of which is put in issue; and where the parties proceed to trial upon the merits in such an action appealed from the police court to the superior court, over which the superior court has no appellate jurisdiction, its original jurisdiction is not affected by the irregular way in which it acquired the jurisdiction over the parties, the consent of the parties to the trial upon the merits being a waiver of the irregularity of procedure. (*City of Santa Barbara v. Eldred*, 95 Cal. 378.)

Complaint must show jurisdiction of the court. See post, 616, et seq., 634.

Admiralty jurisdiction of state court in suit to recover revenue. See Admiralty, 10.

Action to enforce lien of tax, place of trial. See Venue, 32.

Action against corporation to recover taxes, removal of. See Removal of Causes, 3; Prohibition, 60.

e. Time to Bring Action; Action When Barred.

608. The district attorney is not authorized to institute an action for the collection of

delinquent taxes before the certification of the delinquent list. (*County of San Diego v. California etc. R. R. Co.*, 65 Cal. 282.)

609. An action to recover delinquent taxes is not an action "upon a contract, obligation, or liability, not founded upon an instrument in writing," mentioned in section 339 of the Code of Civil Procedure, which must be brought within two years after the cause of action accrues, but is one which arises upon a liability created by statute, other than a penalty or forfeiture, and is barred by the three years' limitation contained in section 338 of the same code. (*County of Los Angeles v. Ballerino*, 99 Cal. 593.)

610. An action brought by the city and county of San Francisco under the act of April 23, 1880, to recover a personal judgment for delinquent taxes, is not an action on a judgment or to foreclose a lien, within the meaning of sections 3716 and 3717 of the Political Code. Such an action is barred by the statute of limitations, when commenced more than seven years after the cause of action accrued. (*City and County of San Francisco v. Luning*, 73 Cal. 610.) Cited 92 Cal. 630; 99 Cal. 595.

Statutes authorizing suits for unpaid taxes of prior years. See ante, 52, et seq.

f. Pleadings in Actions for.

611. The sufficiency of the complaint in an action to recover delinquent taxes must be tested by the rules regulating pleadings in civil actions, and not by section 3670 of the Political Code. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

612. The legislature has power, prior to the adoption of the constitution of 1879, to prescribe the form of the complaint to be used in an action for the collection of delinquent city taxes authorized to be levied and assessed under the charter of the city. (*City of Stockton v. Western Fire and Marine Ins. Co.*, 73 Cal. 621.)

613. Section 21 of the charter of the city of Stockton, approved March 27, 1872, prescribing a general form of complaint to be used in all actions for the collection of city taxes authorized to be assessed and levied under that charter, is not obnoxious to any thing contained in section 6, article XI, of the constitution of 1879, and is still in force. (*City of Stockton v. Western Fire and Marine Ins. Co.*, 73 Cal. 621.)

614. It is not enough in a complaint to aver indebtedness for taxes, but the complaint must show that the taxes were levied upon the property, and when, where, and by whom the levy was made; that the taxes were based upon the assessment averred, and are delinquent and unpaid; and must show how and when the defendant became indebted for taxes, and how and when the five per cent demanded was added to the amount due. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

615. When the complaint avers that the property was duly assessed by an assessor of a district or county (naming it), it is not necessary to further aver that the property was

situated within the jurisdiction of the assessor. (*People v. Leet*, 23 Cal. 161.)

616. A complaint for taxes must not only aver the fact of assessment of property to the defendant, but must show that the defendant is the owner of the property, and that it was situated within the jurisdiction of the person or board making the assessment, and is within the jurisdiction of the court. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

617. In a suit for taxes on real estate, levied, as was alleged, in El Dorado county, the complaint failed to show that said property was within said county, or the revenue district thereof within which it was assessed, or that said revenue district was within said county; held, that the complaint did not state facts sufficient to constitute a cause of action. (*People v. Pearis*, 37 Cal. 259.) Cited 21 Nev. 101.

618. Complaint for taxes must show the authority of the state board of equalization to make and apportion the assessment of railroad property, and show what part of the property assessed is situated in the county to which the apportionment was made. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

619. In this case—suit for delinquent taxes in Colusa county under the act of 1860 (Stats. 1860, p. 246)—the complaint having set forth various items, as state tax, general county fund, school, building, indigent sick and contingent tax, demurrer was filed and overruled, and answer filed. Plaintiff then moved, without notice to defendant, to strike out answer. Granted, and judgment at once entered for plaintiff for the full amount claimed; held, that, as there appears to be no authority for levying the contingent and building tax, the complaint shows no cause of action as to these items, and that the judgment is thus far unauthorized and will be set aside. (*People v. Hager*, 19 Cal. 462.)

620. The averments in the complaint in this case, as to the levy and assessment, are sufficient, under the act of 1860, to put upon defendant the burden of showing that she is not liable. (*People v. Seymour*, 16 Cal. 332.) Cited 23 Cal. 184.

621. A complaint in an action to recover unpaid taxes is sufficient if it avers "that certain sums are due for certain taxes levied in the year 1858, upon certain real estate assessed in the year 1858," without stating that these taxes were levied under an assessment ending on the first day of March, 1858. (*People v. Todd*, 23 Cal. 181.)

622. A complaint to recover taxes must show upon its face a prima facie case of a valid tax assessed and levied, and that it is delinquent. The statute waiving informality in the assessment does not excuse the total want of assessment, which cannot exist without a description showing the general character and situs of the property. The statute nowhere waives informality in the levy of the tax. There is no tax until one is levied, and a complaint for taxes shows no indebtedness without averring the levy. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

623. The statute of 1861, requiring real

estate, in actions to recover taxes, to be described in the complaint with the same particularity as in actions of ejectment, only applies to actions in which the real estate is made a party defendant. (*People v. Leet*, 23 Cal. 161.)
Cited 74 Cal. 455.

624. The fortieth section of the Revenue Act of 1861, which provides that a complaint in an action to recover a tax need not follow the description of the property as found in the assessment, only permits a different description of the property in the complaint from that contained in the assessment, but does not obviate the necessity of showing on the trial a valid assessment of the same land described in the complaint. (*People v. Cone*, 48 Cal. 427.)
Cited 2 N. Dak. 148.

625. If the complaint, in an action to recover judgment for taxes assessed on land and improvements thereon, describes the land assessed by giving its name and metes and bounds, less certain lots sold out of the same, without giving the location and boundaries of the lots sold, the complaint is fatally defective. (*People v. Mariposa Co.*, 31 Cal. 196.)
Cited 39 Cal. 673; 48 Cal. 430; 55 Cal. 289.

626. Where the complaint in an action to recover delinquent taxes enumerates the property in words identical with those in the assessment-book it is sufficient. (*City and County of San Francisco v. Flood*, 64 Cal. 504.)

627. In an action to recover delinquent taxes in the county of San Bernardino, assessed for the year 1860, the complaint should state the assessed value of the real estate, the improvements, and the personal property, each separately. (*People v. Rains*, 23 Cal. 131.)

628. A complaint, under the act of May 17, 1861, which avers that the tax "was levied upon and assessed against personal property," contains no cause of action. The complaint should not only aver that the tax was levied upon and assessed against personal property, but also the kind or kinds of personal property. (*People v. Holladay*, 25 Cal. 300.)
Cited 99 Cal. 601.

629. If an assessment of a tax made during the three years preceding March 1, 1861, is defective in not stating the kind and quantity of property assessed, whether real or personal, or, if real, in not giving its description, the pleader, in an action brought to recover judgment for such tax, may, if the same can be ascertained, insert in his complaint the necessary averments as to kind and quantity or description. (*People v. Holladay*, 25 Cal. 300.)
Cited 64 Cal. 508, 511.

630. A complaint in an action to recover a tax, which alleges that a portion of the real estate assessed to the defendants belonged to other persons, does not state a cause of action. (*People v. Hyde*, 48 Cal. 431.)

631. A complaint in a tax suit which shows only that the property taxed was assessed as the estate of R., deceased, and that the defendants, at the time of the assessment,

owned and possessed it, does not state facts sufficient to constitute a cause of action, because not showing that the property was assessed to any particular party whose duty it was to pay the taxes, or that it was made to unknown owners. (*People v. De Carrillo*, 35 Cal. 37.)

632. Where an act of the legislature provides that the taxes which have been remitted by the board of supervisors shall be exempt from its provisions, it is not necessary to aver in the complaint that the taxes sued for have not been remitted; but that fact, if it exist, should be pleaded in bar of the action. (*People v. Todd*, 23 Cal. 181.)

633. When the statute provides that the district attorney, before commencing suit, shall publish notice to delinquents, it is not necessary to aver in the complaint that this notice was published, but the failure to publish this notice must be taken advantage of by plea in abatement, or it is waived. (*People v. Rains*, 23 Cal. 131.)

634. When a corporation is sued, in a complaint for taxes, there must be an averment of the fact of incorporation, and where, and under what law, so that the court may determine where jurisdiction of its person lies. (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

635. A complaint in an action by the state to recover delinquent state taxes, which fails to allege that the property upon which the tax is delinquent has been offered for sale by the tax-collector, or that the controller directed the tax-collector to offer it for sale, as required by section 3399 of the Political Code as a condition precedent to the right to maintain such an action, does not state facts sufficient to entitle the state to maintain the action; and the defect is not cured by an averment that the defendant procured a temporary injunction restraining the tax-collector from selling the property for delinquent taxes. (*People v. Ballerino*, 99 Cal. 598.)

636. In an action for the collection of delinquent taxes, under the act of May 17, 1861, the complaint must aver the fact of the failure of the tax-collector to collect the delinquent tax by reason of his inability to find, seize, or sell property belonging to the delinquent. A complaint which fails to make this averment shows no cause of action. (*People v. Pico*, 20 Cal. 595.)
Cited 99 Cal. 601.

637. In an action brought by the people to recover judgment for delinquent taxes assessed during the three years preceding March 1, 1861, the complaint is fatally defective if it does not aver that the tax-collector has failed to collect the taxes in question by reason of his inability to find, seize, or sell property belonging to the delinquent. (*People v. Holladay*, 25 Cal. 300.)
Cited 99 Cal. 601.

638. A complaint in an action by the state to recover taxes levied upon a railroad cannot properly join causes of action in favor of the several counties through which the road passes. Several causes of action, when properly joined, must be separately stated, and

must all belong to one class, and affect all the parties to the action." (*People v. Central Pac. R. R. Co.*, 83 Cal. 393.)

639. Where an action to recover a personal judgment for a tax, commenced in a justice's court, is transferred to a district court, an amended complaint may be filed in the district court to enforce a lien on real estate for the tax. (*People v. Nelson*, 36 Cal. 375.)

640. The acts in relation to the collection of delinquent taxes, which compel the defendant to verify his answer, do not change the rule in the forty-sixth section of the Practice Act, "that where the complaint is not verified, a general denial of its allegation in the answer will put in issue all its material allegations." (*Rowley v. Howard*, 23 Cal. 401.)

641. An answer to a sufficient complaint in a suit for taxes on real property brought against the property and the alleged owner assessed therewith, which denies only that the personal defendant was, at the time of the assessment, the owner of the property or any part thereof, without further denying in him all claim, title, or interest therein, is not such a denial as, by the Revenue Act, section 42, is permitted to be made, and it raises no issue as to the liability, as sought in the action, of either defendant. (*People v. Pearis*, 37 Cal. 259.) Cited 21 Nev. 101.

642. It is not sufficient in a pleading to state in general terms that a valuation of property is "unjust, disproportioned, and unequal," without stating clearly and distinctly wherein the alleged valuation is "unjust, disproportioned, and unequal." (*Guy v. Washburn*, 23 Cal. 111.) Cited 71 Cal. 245.

643. In an action for taxes against the administrator of a decedent a denial that he had in his possession on the first Monday in March personal property of a value corresponding to that on which the assessment was based is merely a denial of the value of the property as fixed by the assessor, which cannot be investigated in the action to recover the tax, but could only be made the subject of an application to the board of equalization for a reduction of the tax. (*San Francisco v. Pennie*, 93 Cal. 465.)

644. If a complaint in an action to recover judgment for taxes avers that the tax is for an assessment of defendant's "claim to and possession of" lands, an answer setting up as new matter that the lands are public lands of the United States, contains no defense. (*People v. Frisbie*, 31 Cal. 146.)

645. Where the assessment to an administrator of an estate of a decedent refers to an inventory on file a denial in the answer in an action to recover the tax, that the inventory was on file on the first Monday of March, is equivalent to an admission that it was on file at any subsequent day, which would be sufficient to support the reference to it as the assessment which might have been made at any time after the first Monday in March, and before the first Monday of June. (*San Francisco v. Pennie*, 93 Cal. 465.)

646. An answer in an action to recover a

delinquent tax, which seeks to defend against the collection of the tax upon the ground that the assessment was fraudulently and corruptly made at an exorbitant valuation, with the intention of discriminating against him and causing him to pay more than his share of the public taxes, but which fails to allege that the defendant ever paid or offered to pay what would have been right for him to pay upon what he concedes would have been a fair valuation of his property, and fails to offer to pay what the court shall ascertain to be just, fails to state facts constituting an equitable defense to the action; and it is not error for the court to exclude evidence offered by him to show the real value of the land and the discrimination made against him in the assessment. (*County of Los Angeles v. Balserino*, 99 Cal. 593.) Cited 99 Cal. 601.

Delinquent tax, correction of complaint in action for. See Appeals, 3149.

g. Parties; Action Against Executor.

647. It is not error to make real estate party, as in proceedings in rem. in an action to collect taxes. (*People v. Rains*, 23 Cal. 131.)

648. Where an assessment of taxes is made against a special administrator of the estate of a decedent his liability therefor is official, and not personal, and an action may be brought for collection of the tax against an executor who succeeds the special administrator as the custodian of the estate. The cause of action is for taxes due from the estate, and is properly brought against its custodian. (*San Francisco v. Pennie*, 93 Cal. 465.)

Claims for taxes against estate need not be presented. See Estates of Deceased Persons, 78.

h. Summons, Service of.

649. In suits for the recovery of taxes, to obtain a valid judgment in rem against the real estate, it is necessary that the process should be served in the manner directed by the statute, viz., by posting a copy in some public place thereon. (*Gillis v. Barnett*, 38 Cal. 393.)

650. If there be, however, sufficient service of process upon the owner a personal judgment against him is valid, under an execution upon which the land may be sold. (*Gillis v. Barnett*, 38 Cal. 393.)

651. The provisions of the Revenue Acts of 1862 and 1864, as to service of summons on real estate in tax cases, do not repeal the provisions in the Revenue Act of 1861 upon the same subject, but are merely cumulative. (*Truman v. Robinson*, 44 Cal. 623.)

652. In an action to recover judgment for taxes, in which real estate is made a party, the summons on the real estate may be served by delivering a copy thereof to the person or persons in possession, or by posting a copy in some public place thereon, as provided in the Revenue Act of 1861, or by publishing the summons for eight weeks, as provided in the act of 1862. (*Truman v. Robinson*, 44 Cal. 623.)

653. In an action to collect delinquent taxes

service by posting a copy of the summons on the real estate and improvements described therein, in compliance with section 41 of the Revenue Act of May 17, 1861, is sufficient to authorize a judgment against the land and improvements so served. (*People v. Fox*, 39 Cal. 621.)

654. The statute under which such service was made is not superseded by the act of May 12, 1862. (*People v. Fox*, 39 Cal. 621.)

655. If the statute for the collection of a tax and the enforcement of its lien on real estate provides that a summons may be served by delivering a copy to each defendant, but if the personal defender cannot be found, by posting a copy for twenty days at the courthouse door, and that no personal judgment shall be rendered unless the person against whom it is rendered shall have been personally served, a personal judgment, rendered on a service made by posting a copy at the courthouse door, is erroneous, and will be reversed if attacked by direct appeal. (*People v. Bernal*, 43 Cal. 385.)

656. Whether such judgment is void, so that it may be attacked collaterally, not decided. (*People v. Bernal*, 43 Cal. 385.)

657. In a tax suit a recital in the decree "that all the owners and claimants of the property have been duly summoned to answer the complaint herein and have made default in that behalf," there being nothing contradictory to it in the record, is conclusive, in a collateral proceeding, that the court acquired jurisdiction of the owner of the premises. (*Eitel v. Foote*, 39 Cal. 439.)

658. Ejectment. Plaintiff deraigned title under a judgment entered July 13, 1871, in an action for taxes against certain unknown defendants, sued by fictitious names, and the land in controversy; which recited that "all owners and claimants of the property had been duly summoned to answer the complaint, and had made default." Judgment for the plaintiff and order denying a new trial affirmed, on the authority of *Truman v. Robinson*, 44 Cal. 623, and *Branson v. Caruthers*, 49 Cal. 374. *McKee, J.*, dissents. (*McCoy v. Morrison*, 61 Cal. 363.)

659. Under the act of April 3, 1860, "providing for the collection of delinquent taxes in the city and county of Sacramento," where several lots are assessed to unknown owners by fictitious names, and suits are instituted for the collection of the several taxes, there is no valid objection to having one affidavit for and one order of publication of summons apply to the several cases. In such case the publication of one summons gives the court jurisdiction in each case. (*Moss v. Mayo*, 23 Cal. 421.)

660. In a suit to enforce a lien for taxes, if the complaint is not verified, service of summons cannot be made by publication and posting, without making an affidavit and procuring an order of publication, as in other cases. (*Martin v. Parsons*, 50 Cal. 499.)

661. The return of service by the sheriff, on the party in possession, where no appearance is made, is prima facie evidence that the person served was the person in possession

within the meaning of the statute. (*People v. Fox*, 39 Cal. 621.)

662. If the statute requires the service of summons on the real estate to be made by delivering a copy to the person in possession thereof, and by posting a copy in some public place thereon, a return by the sheriff that he posted a copy on the premises, without stating that it was posted in a public place on the premises, will not support a judgment, if attacked by direct appeal. In like manner the judgment will be reversed, unless the return fails to show that a copy was delivered to a person in possession of the premises, or that there was no person in possession. (*People v. Bernal*, 43 Cal. 385.)

Personal service, necessity of to validity of judgment. See post, XII, 4, j.

Action to enforce tax, want of service of summons, enjoining judgment. See Injunctions, 60.

I. Evidence and Presumptions.

663. In an action by a county to recover state and county taxes the assessment-roll, in the form prescribed by law, is prima facie evidence of the plaintiff's right to recover. (*Modoc County v. Churchill*, 75 Cal. 172.) Cited 96 Cal. 636.

664. A defective assessment-roll may be introduced in the trial of a tax suit to show that the taxes were not legally assessed, but cannot avail in a collateral attack on the judgment. (*Eitel v. Foote*, 39 Cal. 439.)

665. In making the duplicate assessment-roll or a certified copy prima facie evidence of a right to recover the statute makes the roll or the copy some evidence that the person named did own the property specified. Held, therefore, notwithstanding the testimony of the defendant that he did not have any money at the time of the assessment, the finding of the court below on this point against the defendant will be sustained. (*San Francisco v. Phelan*, 61 Cal. 617.)

666. Under the Revenue Act of March 28, 1874, the delinquent list was prima facie evidence of every fact necessary to maintain an action for taxes. (*People v. Donnelly*, 58 Cal. 144.)

667. The delinquent list of taxpayers, in a city incorporated under the act of 1850, is not prima facie evidence of the correctness of the prior proceedings by which the tax was levied and assessed. (*Los Angeles v. Los Angeles W. W. Co.*, 49 Cal. 638.)

668. In an action brought under the act of 1861, to recover a delinquent tax, if there is a defense interposed, it is necessary for the district attorney to show by the delinquent list, or the original or duplicate assessment-roll, that a tax had been assessed and levied. The fact that the second section of the act provides that the defendant shall not be allowed to set up or show any informality in the levy or assessment as a defense does not obviate the necessity for such proof. (*People v. Waterman*, 31 Cal. 412.) Cited 46 Cal. 102.

669. In an action to collect a delinquent tax it will be presumed that the assessor in

making the assessment acted in accordance with the law, and it is incumbent on the defendant to show that his acts were unauthorized. (*City and County of San Francisco v. Flood*, 64 Cal. 504.)

Evidence of assessment. See ante, V, 16.

j. Judgments and Findings in; Appeal From.

670. In an action by a county to recover a tax the judgment should distinguish between the amounts due the state and county respectively. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17, cited 68 Cal. 16; *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14.)

671. In an action under the act referred to, the clerk of the superior court has no power (notwithstanding an order of the court) to enter a judgment for a single sum which is less than the amount alleged in the complaint to be due for state tax, county tax, penalties, etc. (*County of Sacramento v. Central Pac. R. R. Co.*, 61 Cal. 250.) Cited 66 Cal. 25; 68 Cal. 16.

672. If an assessment of land to numerous persons as an entirety be legal it would be the duty of the court, in giving judgment for delinquent taxes upon the land, to ascertain by its judgment what particular undivided interests in the land were delinquent, and to exonerate from the lien for the delinquent tax the interests of those who had already paid their proportion of the general burden. (*People v. Shimmins*, 42 Cal. 121.)

673. The validity of a judgment in a tax suit must be tested by the same rules, and is subject to attack in the same mode and by the same means as a judgment in an action of any other class. (*Eitel v. Foote*, 39 Cal. 439.) Cited 50 Cal. 75.

674. Upon the question whether a judgment is merely voidable or absolutely void there is no distinction between judgments for taxes and judgments for other causes of action. (*Mayo v. Ah Loy*, 32 Cal. 477.)

675. When there is no appearance of the personal defendant a judgment against him is erroneous, unless it is shown that he was personally served with the summons. (*People v. Fox*, 39 Cal. 621.)

676. Although the statute does not require the assessed value of property to be alleged in the complaint in an action to recover taxes, yet, if it is alleged, and the record shows that a judgment was rendered for a greater sum than the total amount of county and state taxes authorized to be levied by law, the judgment will be reversed. (*People v. Hastings*, 26 Cal. 668.)

Personal judgment, validity. See ante, XII, 4, h.

Default may be entered in action for delinquent taxes. See Defaults, 3.

Joint action for taxes, several judgments, when proper. See Judgments, 545.

Duty of court commissioners on default in suit. See Court Commissioners, 3.

Default, entry of is not necessary. See Defaults, 27.

Recitals in judgment, conclusiveness of. See Judgments, 467, 468.

Necessity of service, and recital of service in. See ante, XII, 4, h.

677. The decree of a court of competent jurisdiction, for the sale of lands alleged to be delinquent in the payment of taxes, is conclusive on the owner and on the premises of the truth of the matters adjudged, and no mere collateral inquiry can be allowed on that point. (*Mayo v. Foley*, 40 Cal. 281.) Cited 46 Cal. 137.

Collateral attack on judgment, assessment-roll as evidence on. See ante, XII, 4, i.

678. Allegation in complaint in equity to set aside judgment for a tax, that no notice was given of the proceedings, or any of them, which resulted in the judgment for the tax, is an allegation of law, and not of fact. (*Stokes v. Geddes*, 46 Cal. 17.) Cited 74 Cal. 501.

679. A judgment, regular on its face, enforcing a lien for a tax, and which the court had jurisdiction to render, will not be set aside in equity at the suit of the owner of the land taxed for irregularities in levying and assessing the tax of which the purchaser had no notice. (*Stokes v. Geddes*, 46 Cal. 17.) Cited 49 Cal. 99.

680. A judgment rendered becomes a lien only on the property of the persons against whom it is rendered; and, where no judgment is rendered, either against the real owner by name or the fictitious person representing such real owner, a court of equity will enjoin the purchaser from dispossessing the real owner by a writ of assistance obtained under the tax deed. (*Moss v. Mayo*, 23 Cal. 421.)

681. Where the findings show a sufficient assessment a statement in the findings that there was an "attempted" assessment for personal property taxes may be disregarded. (*San Francisco v. Pennie*, 93 Cal. 465.)

682. Where an action is commenced against a person alleged to be the owner of real estate, and the real estate, to recover judgment for taxes assessed on the same, and the court finds as a fact that the person sued is not the owner of the real estate, and renders judgment in his favor, but against the real estate, and an appeal is taken by the person made defendant from the judgment in his favor, but not from the judgment against the real estate, he cannot assign as error any proceedings which affect the real estate, and, as the judgment does not injuriously affect him, it will be affirmed. (*People v. Wilson*, 26 Cal. 127.)

683. In an action for state and county taxes, after a judgment had been entered for the plaintiff by the clerk, upon an offer made by the defendant and accepted by the district attorney to allow judgment for a specified amount, less than the amount sued for, the attorney general moved to set aside the judgment, and, upon a denial of his motion, took this appeal. Held, the order was appealable, and the attorney general was authorized to take the appeal. (*County of Sacramento v. Central Pac. R. R. Co.*, 61 Cal. 250.)

State suing for taxes, right of appeal. See Appeals, 385.

k. Costs in.

684. Where an action was brought for less than ten dollars tax, under the act of March 28, 1874, "levying a tax for state purposes for the twenty-fourth and twenty-fifth fiscal years, and to provide for the enforcement thereof," and final judgment was entered therein prior to the passage of the act of March 15, 1876, "to regulate proceedings for the collection of taxes, and to prevent oppressive costs," the defendant is not entitled to have the judgment satisfied or the action dismissed on payment into court of the amount sued for without costs. (*People v. Latham*, 53 Cal. 386.)

Statute requiring defendant to pay attorney's fee and costs. See ante, 54.

Costs and charges. See post, 884.

Suit for delinquent taxes, fees of justice. See *Justices of the Peace*, 105.

l. Interest and Percentage.

685. It is within the power of the legislature to enact that delinquent taxes shall bear interest in the same manner as a debt, to regulate the rate, and to require interest on the state's portion of delinquent taxes to be paid to the state, and go into its treasury. (*People ex rel. Attorney General v. Reis*, 76 Cal. 269.)

686. Interest is not to be charged on the delinquency in December, unless the taxes remain unpaid on the third Monday in March following. (*People ex rel. Attorney General v. Reis*, 76 Cal. 289.)

687. Section 3803 of the Political Code allows interest at two per cent per month only on the delinquent taxes mentioned in the sections immediately preceding, which remain unpaid until the third Monday of March. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17, cited 68 Cal. 553, 76 Cal. 278; *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14.)

688. Section 3803 of the Political Code, authorizing the tax-collector to include interest on the delinquent tax at the rate of two per cent per month, does not apply to a sale made by the tax-collector to collect a delinquent tax in the first instance. (*Harper v. Rowe*, 53 Cal. 233.)
Cited 68 Cal. 553; 76 Cal. 278.

689. The provision of section 3803 of the Political Code, for the collection of interest upon delinquent taxes at the rate of two per cent per month from the time they were first delinquent until paid, applies to all delinquent taxes, including such as are due to the state, as well as those which are due to the counties, or the city and county of San Francisco. The interest upon delinquent taxes due to the state belongs to the state. (*People ex rel. Attorney General v. Reis*, 76 Cal. 269.)

690. Conceding that interest on delinquent taxes due to the state is a penalty, or forfeiture in the sense of a penalty, as a mulct for a default or wrong, it is not such a penalty or forfeiture as is required to be paid into the county treasury for the use of the county where the person against whom the recovery is had resides, as provided by section 3386 of the Political Code. That section refers only

to penalties and forfeitures recovered by action, and not to the interest on delinquent taxes which is obtained by the ordinary method of collection without suit. (*People ex rel. Attorney General v. Reis*, 76 Cal. 269.)

691. In an action to recover delinquent taxes, brought under section 3870 of the Political Code against a railroad company, operated in more than one county, a judgment in favor of the plaintiff should not include interest on the taxes at the rate of two per cent per month from the time of the delinquency. Section 3803 of the Political Code, providing for the recovery of such interest, only applies to the taxes mentioned in the sections immediately preceding it. (*People v. North Pacific Coast R. R. Co.*, 68 Cal. 551.)
Cited 76 Cal. 278.

692. The five per cent is not a substitute for the tax or a penalty for its nonpayment, but one of the means prescribed for obtaining the tax itself by offering an inducement to pay it when due. (*High v. Shoemaker*, 22 Cal. 363.)

Cited 99 Cal. 596; 21 Nev. 394.

693. The provisions of section 13 of the Revenue Act of 1857, that the tax-collector shall add to the tax of a delinquent five per cent, and enforce the collection of the same, in connection with the tax by sale of the property, is constitutional, and a sale made in pursuance thereof passes a valid title. (*High v. Shoemaker*, 22 Cal. 363.)

694. The addition of five per cent imposed by act of 1858, on the third Monday in October, upon the taxes of delinquents, may be recovered in the action, along with the unpaid taxes, as well as the cost of advertising. (*People v. Todd*, 23 Cal. 181.)

695. The district attorney of Lake county, in an action to recover a tax, is entitled to the percentage provided for in the act of March 5, 1870. (*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17.)

696. The five per cent upon the amount of a delinquent tax, which under section 3770 of the Political Code the tax-collector is directed to collect in addition to the delinquent tax, is not such a penalty or forfeiture as is excepted from the operation of section 338 of the Code of Civil Procedure, which prescribes a three years' limitation for the bringing of actions, "upon a liability created by statute other than a penalty or forfeiture," or as falls within the provisions of section 340 of the same code, requiring an action upon a statute for a penalty or forfeiture to be brought within one year after the cause of action accrues. (*County of Los Angeles v. Ballerino*, 99 Cal. 593.)

m. Payment into Treasury.

697. The money received in a suit for taxes in pursuance of a stipulation of the parties, and the judgment of the circuit court by the attorney general, although less in amount than that sued for, was a part of the revenue of the state, and should be paid and received into the state treasury. (*Rooney v. Marshall*, 69 Cal. 647.)

698. It is the duty of a tax-collector, under the code, on the first Monday of each month,

to pay to the county treasurer all money collected by him as taxes for the state and county, even if the tax is illegal, and the money is paid to the collector under protest. (*San Francisco v. Ford*, 52 Cal. 198.)

699. Where the sheriff, as ex officio tax-collector, received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions, held, that although the court of sessions had no power to levy taxes, yet the defendant, being the agent or trustee of the county, was estopped from denying the right of the county to recover. (*Placer County v. Astin*, 8 Cal. 303.)
Cited 51 Cal. 277; 70 Cal. 215.

Duty of tax-collector to pay money into treasury. See ante, XI, 3.

Mandamus to compel state treasurer to receive delinquent taxes. See *Mandamus*, 132.

5. Sale.

a. Nature of.

700. Proceedings on tax sales are strictissimi juris. (*Ferris v. Coover*, 10 Cal. 632, affirmed in this; *Kelsey v. Abbott*, 13 Cal. 609.)
Cited 16 Cal. 344.

701. Principles applicable in other judicial sales are applicable to sales under judgments enforcing liens for taxes. (*Jones v. Gillis*, 45 Cal. 541.)
Cited 50 Cal. 75.

b. Power to Sell; Enjoining Sale.

702. Collector of taxes in Oakland had no right to summarily sell the property, on which the taxes were unpaid at public sale, as the taxes could only be recovered by suit. (*Hays v. Hogan*, 5 Cal. 241.)

703. Revenue Act of 1857 does not authorize sales for taxes assessed prior to its passage, but only for the fiscal year or years following its passage. (*Burr v. Hunt*, 18 Cal. 303.)

Sale, enjoining. See *Injunctions*, II, 12.

Purchaser, right to enjoin execution sale. See *Injunctions*, 111.

c. Undivided Interest; Designating Property; Selling Smallest Possible Portion.

704. When the assessment is not of an undivided interest in but of an entire tract or parcel of land the tax-collector has no power or authority to sell an undivided interest therein for the nonpayment of taxes. (*Roberts v. Chan Tin Pen*, 23 Cal. 259.)

705. Whether, under an assessment to several persons of a tract of land in solido, and as an entirety, an undivided interest can, in any case, be sold for a delinquent tax, query? (*People v. Shimmins*, 42 Cal. 121.)

Sale of undivided interest, when void. See post, 737.

706. The owner of the property assessed, and, in default of his doing so, the tax-collector, has a right to designate, at or before the time of sale, any portion less than the whole tract which will be sold; but, when this designation is made, the parcel sold must be particularly located by metes and bounds in

the general tract, so that the purchaser may know its exact boundaries, and what part of the tract remains unsold. (*Roberts v. Chan Tin Pen*, 23 Cal. 259.)
Cited 80 Cal. 396.

707. A sale of land for taxes to the highest bidder in one parcel, and not to the person who would take the smallest or least quantity of the land and pay the tax due, is illegal, and a deed given in pursuance of it is absolutely void. (*Hewell v. Lane*, 53 Cal. 213.)
Cited 70 Cal. 320.

708. Under the statutes of 1861 and 1862 a sale of land for taxes to the highest bidder, instead of to the person who would take the least quantity of the land and pay the judgment and all costs, is void. (*Reynolds v. Lincoln*, 71 Cal. 183.)

709. If property sold for taxes is offered for sale to the party who would take the least quantity of the land and pay the tax, it cannot be objected that the entire lot was sold for the taxes, if no smaller part was bid for. (*Hewes v. McLellan*, 80 Cal. 393.)

710. At a sale of land under execution of a judgment for taxes it is competent for the sheriff to sell the same to the purchaser who will take the smallest quantity to pay the judgment and costs. (*Gillis v. Barnett*, 38 Cal. 393.)

711. If the statute directs the officer who sells land under a judgment for delinquent taxes to sell the smallest quantity that any purchaser will take and pay the judgment for the tax and costs, a deed of the officer who made the sale, which recites that he had sold the premises to the grantee, who was the highest bidder therefor, is void, and conveys no title. (*Carpenter v. Gann*, 51 Cal. 193.)

712. A tax deed which recites that the tax-collector offered the land on which the tax was levied for sale as one parcel, instead of offering it to the person who would take the least quantity and pay the tax, is void. (*Frink v. Roe*, 70 Cal. 298.)
Cited 80 Cal. 396.

d. Who may Purchase.

713. One who is under any legal or moral obligation to pay taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title either by purchasing at the sale himself, or by suffering a stranger to buy and then purchasing from him. (*Moss v. Shear*, 25 Cal. 38.)

Cited 27 Cal. 318; 33 Cal. 425; 36 Cal. 146; 326; 38 Cal. 223; 39 Cal. 356; 58 Cal. 258; 74 Cal. 518; 90 Cal. 464; 2 Col. 594; 2 Dak. 27.

714. If a person is in possession of land, claiming the same as his own, it is his duty to pay the taxes, although he has no paper title, and is a trespasser; and under such circumstances he cannot acquire an outstanding title by neglecting to pay the taxes, and allowing the land to be sold for the same, and purchasing at the sale. The rule is the same if the possession is such that it would give the possessor title by the statute of limitations. (*Barrett v. Amerein*, 36 Cal. 322.)
Cited 39 Cal. 357; 2 Dak. 27.

715. One who is under a moral or legal obligation to pay the taxes is not in a position to become a purchaser at a sale for such taxes; and if such person permits the property to be sold, and buys it in, either in person or indirectly through the agency of another, he does not thereby acquire any right or title to the property, but his purchase is deemed a mode of paying the taxes. (*Christy v. Fisher*, 58 Cal. 256.)

Cited 80 Cal. 347; 24 Or. 385.

716. One whose duty it was to pay the taxes upon real property cannot gain an advantage, in respect to the title, by allowing the same to be sold for taxes and buying it in himself, or by buying it from a stranger who bought it at the sale. (*Coppinger v. Rice*, 33 Cal. 408.)

Cited 36 Cal. 146, 326; 38 Cal. 223; 39 Cal. 357; 51 Cal. 10; 2 Dak. 27.

717. A party in possession, whose duty it is to pay the tax, can derive no advantage from a sale for the tax which he ought to have paid without a sale. (*Relly v. Lancaster*, 39 Cal. 354.)

Cited 2 Dak. 27.

718. One who is in possession of land, claiming it as his, when it is assessed for taxes, cannot, by failing to pay the tax and allowing the land to be sold for the same, and becoming the purchaser, and obtaining a sheriff's deed, acquire a title to it. (*McMinn v. Whelan*, 27 Cal. 300.)

Cited 36 Cal. 146, 326; 38 Cal. 223; 39 Cal. 356; 2 Dak. 27.

719. A party against whom a tax is levied cannot obtain any title to property by purchase of it at a sale for the payment of the taxes which he should have discharged. (*Garwood v. Hastings*, 38 Cal. 217.)

Cited 2 Dak. 27.

720. A purchase of land, at a sale of the same for taxes, by the agent of one who was in possession thereof, either by himself or his tenants, does not pass or otherwise affect the title to such land. (*Bernal v. Lynch*, 36 Cal. 135.)

Cited 36 Cal. 326; 39 Cal. 357.

721. A tenant in common is under an obligation to pay the taxes upon the common land, and cannot, by neglecting to pay the same, and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by buying from a stranger who purchased at the sale. (*Emeric v. Alvarado*, 90 Cal. 444.)

722. If a party fails to pay the tax, permits the premises to be sold, and buys them in, he can derive no benefit from the sale; except that, in equity, the amount paid would probably be considered an advance to the judgment debtor. And this, though the premises were bid in by one of two partners, while the possession under the sheriff's sale was by both partners. The duty to pay the tax was several, as well as joint. (*Keelsey v. Abbott*, 13 Cal. 609.)

Cited 14 Cal. 34; 27 Cal. 318; 36 Cal. 146, 326; 38 Cal. 223; 39 Cal. 356; 58 Cal. 259.

723. One who is under no legal or moral obligation to pay taxes is not precluded from purchasing at the tax sale, although in pos-

session at the time the assessment was made or when the land was sold. (*Moss v. Shear*, 25 Cal. 38.)

Mortgagor, right of to purchase. See ante, 524.

Purchase by cotenant at. See Cotenancy, II, 2.

Effect where one in adverse possession purchases at tax sale. See Adverse Possession, 112.

Purchaser by court commissioner at sale, when set aside for fraud. See Court Commissioners, 5.

Agreement to purchase at sale for plaintiff. See Nonsuit, 25.

e. Validity of.

A. Sale Under Local Statute.

724. A tax sale made under a local statute prior to the adoption of the constitution of 1879, forbidding local legislation, is not subject to objection on the ground that the law contravened section 25 of article IV of the constitution. (*Rollins v. Wright*, 93 Cal. 395.)

B. Authorized Assessment; Insufficient Description.

725. One of prerequisites to validity of tax sale is authority under which the taxes are assessed. (*Norris v. Russell*, 5 Cal. 249.)

Cited 1 Dak. 257.

726. If the description of the tract sold at the time of the sale is general, as "fourteen feet" in a certain lot, the sale is void for uncertainty, and the defect cannot be cured by inserting a proper description in the certificate of purchase or collector's deed. (*Roberts v. Chan Tin Pen*, 23 Cal. 259.)

Cited 80 Cal. 395.

C. Land Sold Must be Liable.

727. Property sold for taxes must at time of sale be liable for entire amount of tax for which it is sold, or the sale will be void. (*Bucknall v. Story*, 36 Cal. 67.)

Cited 46 Cal. 552, 660; 51 Cal. 638; 67 Cal. 490; 76 Cal. 267.

728. Property must at the time be liable for all the taxes for which it is sold; and where property was sold at one sale for both state and county taxes, added together in a single sum, and the county taxes were illegally levied, the entire sale was void. (*Hardenburgh v. Kidd*, 10 Cal. 402.)

Cited 15 Cal. 586; 36 Cal. 71, 73; 46 Cal. 552.

D. Sales in Aggregate; in Excessive Amount.

729. A particular tract of land, and improvements situated upon a different tract, although owned by and assessed to the same person, cannot be sold together for the aggregate amount of the assessments. If such a course be pursued the sale is void both as to the land and the improvements. (*Knox v. Higby*, 76 Cal. 264.)

730. If a sale of land for a delinquent tax is made for a sum in excess of the tax and legal costs the sale is void, unless the excess is less than the smallest fractional coin authorized by law. (*Treadwell v. Patterson*, 51 Cal. 637.)

Cited 53 Cal. 236; 67 Cal. 483, 490; 76 Cal. 267.

731. A sale of land for a sum in excess of that authorized by law is void. (*Harper v. Rowe*, 53 Cal. 233, cited 67 Cal. 483, 76 Cal. 267; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485, cited 76 Cal. 267; *Knox v. Higby*, 76 Cal. 264.)

732. A tax sale for one dollar in excess of the amount authorized by law is void. (*Axtell v. Gerlach*, 67 Cal. 483.)

733. The fact that the amount of taxes and costs recited in the certificate of tax sale is fifty cents less than that recited in the tax deed will not vitiate the tax sale or tax deed, or show that the sale was for a sum in excess of the taxes and legal costs. If the property was, in fact, sold for an excessive sum, that fact may be shown to invalidate the sale; but the presumption is in favor of the regularity of official action. (*Doland v. Mooney*, 79 Cal. 137.)

Cited 80 Cal. 394, 395.

734. Slight mistake made by collector in computing amount of taxes and cost, by which the property was sold for a small sum more than the amount actually due, does not invalidate the sale, particularly when it is not made to appear that the owner of the land suffered any injury by the mistake. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

735. The expense of filing a certificate of sale in the recorder's office is not a proper item of costs to be charged by the collector at the sale. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

736. On a sale for taxes levied under the act of April 15, 1880, providing for the protection of lands subject to overflow, an item of fifty cents for the cost of preparing the delinquent list, and an item of fifty cents for the cost of the certificate of sale, included in the amount for which the sale was made, are illegal charges, and fatal to the validity of the sale. (*Axtell v. Gerlach*, 67 Cal. 483.)

Cited 76 Cal. 267.

737. Under a judgment in a tax suit, in favor of the people against an undivided interest, equal to fifty-five thousand three hundred and forty-four acres, in certain real estate, the sheriff sold an undivided interest, equal to five thousand acres, for the amount of the judgment and costs—including in the latter fifty cents for filing with the recorder a duplicate certificate of sale—the interest sold being the smallest undivided interest that any purchaser would take and pay the amount demanded. In an action to quiet title, brought by the original owner of the land against defendants, holding under the sale, held, (1) that the provisions of section 8 of the act of May 12, 1862 (*Hittell's Gen. Laws*, art. 6479), that no more of the property should be sold than was necessary to pay the judgment and costs, authorized the sheriff to include the accruing costs in the amount for which the sale was made, and that the fifty cents for filing the duplicate certificate of sale was rightly charged; and (2) that the property assessed and directed to be sold, being an undivided interest, a specific tract could not be sold, and the sheriff was therefore authorized to sell an undivided interest. Held, further, objection being made to certain recitals in the sheriff's deed, that, as the statute did not

provide for the form of the deed in such cases, the objectionable matter was mere surplusage, and did not affect the validity of the deed. (*Harper v. Rowe*, 55 Cal. 132.)

Sale of smallest possible portion. See ante, XII, 5, c.

E. Sale Under Erroneous Judgment or Tax Partly Void.

738. If a judgment for a tax enforces a lien on real estate, not only for the tax on the land, but also for the owner's tax on personal property, and the latter is erroneous, a sale made under the judgment is not void, nor can it for that reason be impeached in an action brought to set it aside. (*Reeve v. Kennedy*, 43 Cal. 643.)

739. If land be sold for taxes, a part of which are valid and a part illegal, the whole sale and the tax deed will be void. (*Wills v. Austin*, 53 Cal. 152.)

Tax partly void. See ante, XII, 5, e, C.

F. Refunding Money Paid on Void Sale.

740. If a tax sale is absolutely void the payment of the tax by the purchaser stands on the footing of a voluntary payment, not made at the request of the owner of the land, and which a court of equity will not require him to refund. (*Harper v. Rowe*, 53 Cal. 233.)

Cited 67 Cal. 484, 505; 68 Cal. 575.

G. Validating Void Sales.

741. The acts of March 28 and 30, 1874, did not have the effect to validate tax sales void under the law as it existed when the sales were made, for the reason that property cannot be taken "without due process of law." (*Harper v. Rowe*, 53 Cal. 233.)

Cited 54 Cal. 522; 13 Or. 252.

f. Title and Rights of Purchaser.

A. Caveat Emptor.

742. The doctrine of caveat emptor, as applied to purchasers at tax sales, has no application to cases where the attempted sale for taxes is absolutely void by reason of the taxes having been previously paid. (*Hayes v. County of Los Angeles*, 99 Cal. 74.)

B. Priority of.

743. As a general rule a sale and conveyance in due form for taxes extinguishes all prior liens, whether for taxes or otherwise. (*Dougherty v. Henarie*, 47 Cal. 9.)

Cited 50 Cal. 16.

744. Where an action has been commenced in due time to enforce the collection of a street assessment in San Francisco, and a third party subsequently procured a tax deed to the premises, held, that under the Revenue Law, as amended in 1859, the deed extinguished the lien for the street assessment. (*Dougherty v. Henarie*, 47 Cal. 9.)

745. Title acquired by later sale for taxes must prevail over that acquired by a sale for taxes of a prior year. (*Ohandler v. Dunn*, 50 Cal. 15.)

746. A title acquired by a sheriff's deed, in pursuance of a sale for a delinquent tax, will prevail over a title acquired by a similar deed for the tax of the previous year, even if the

sale for the oldest tax was made after the sale for the latter tax. (*Anderson v. Rider*, 46 Cal. 135.)

Cited 50 Cal. 16.

Tax title acquired by mortgagor passes to purchaser at foreclosure. See *Mortgages*, 803.

Tax title to school land, statute, when begins to run in favor of. See *Statute of Limitations*, 57.

O. Irregularities, How Affect.

747. A purchaser of property at a tax sale, which is invalid by reason of irregularity in the proceedings for the levy and the sale, acquires no rights to the property which either a court of law or equity can enforce. (*Greenwood v. Adams*, 80 Cal. 74.)

748. Defendant cannot, in ejectment, for the purpose of defeating title acquired by a sheriff's deed executed under a sale made on a judgment foreclosing a lien for taxes, avail himself of defects in the assessment-roll, of which the purchaser had no notice when he purchased, and which, if they had been shown in the tax suit, would have defeated a recovery. (*Jones v. Gillis*, 45 Cal. 541.)
Cited 49 Cal. 99; 74 Cal. 16.

749. A purchaser of land at a tax sale, made under a judgment enforcing a lien for a tax, which judgment is regular on its face, is not affected by any matters outside the judgment of which he had no actual notice. (*Stokes v. Geddes*, 46 Cal. 17.)
Cited 50 Cal. 75.

Purchaser, how affected by recitals in return. See post, XII, 5, h.

D. Rents and Profits.

750. The purchaser at sheriff's sale of land sold on execution issued on a judgment recovered for taxes is not entitled to receive the rents and profits during the period allowed for redemption. (*Mayo v. Woods*, 31 Cal. 269.)

Enjoining dispossession of real owner by holder of deed. See ante, 680.

Writ of assistance on tax sale. See *Assistance*, 21, 22.

E. Purchaser, or One Acquiring Title from Purchaser; When a Trustee.

751. Where the owner of real property about to be sold for taxes requests another to purchase it, and furnishes him money therefor, and the latter buys it in at the tax sale in his own name, he becomes a resulting trustee for the owner, although he made no express promise to purchase it for the latter. (*O'Connor v. Irvine*, 74 Cal. 435.)

752. S., having been furnished with money by J. to pay the taxes on J's homestead, failed to do so, and, in consequence, the land was sold for taxes to another, who afterward, by the procurement of S., and for his benefit, assigned the certificate to M.; and M., having received the tax deed, conveyed the land for the benefit of S., and, by his direction, to S's wife. Afterward, S., holding a power of attorney from J. to sell and convey the lot, executed a deed of conveyance of it in fee to M., in the name of J., but without consideration, and for his own benefit. Held, in an

action by the wife of S. against the wife of J. and her tenant, that both deeds were fraudulent and void, and that the plaintiff derived no title under them. (*Shay v. McNamara*, 54 Cal. 169.)

Breach of agreement to buy at tax sale for plaintiff. See *Damages*, 95.

F. Pleading Tax Title.

753. Whenever a tax title is specially set forth in a pleading it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions has been complied with. This necessity is not obviated by the provisions making the tax deed proof of certain facts. (*Russell v. Mann*, 22 Cal. 131.)
Cited 35 Cal. 449; 7 Nev. 172.

754. In pleading a tax title it is necessary to aver those facts which, by sections 18 and 22 of the Revenue Act of 1857, are required to be stated in the tax deed. (*Russell v. Mann*, 22 Cal. 131.)

755. A pleading, setting up a tax title, must aver distinctly for what year the tax was assessed, and, failing to do so, is demurrable. (*Russell v. Mann*, 22 Cal. 131.)

756. It will not be inferred that a tax was levied for a certain year from an averment that in that year the assessor entered the levy on the assessment-roll. (*Russell v. Mann*, 22 Cal. 131.)

757. Whether, under the provisions of the Revenue Act of 1857, it would be sufficient, in pleading a tax title, to state that the property "was assessed," without stating the acts done to constitute the assessment, or the officer by whom or time of year when done, query? (*Russell v. Mann*, 22 Cal. 131.)

g. Certificates of Sale.

758. When a certificate of tax sale and tax deed conform substantially to the requirements of the Political Code it is error to refuse to admit the deed in evidence in an action to quiet title founded thereupon. (*Doland v. Mooney*, 79 Cal. 137.)

759. The tax certificate and deed are not required to recite the name of the owner of the property, but only that of the person assessed; and, it must be presumed, in the absence of proof to the contrary, that the person assessed was known to the assessor to be the owner. (*Hewes v. McLellan*, 80 Cal. 393.)

760. It is not ground of objection to a certificate of tax sale and a tax deed thereunder that the certificate recites that the bidder "offered to take the least quantity of said property, or the smallest portion of interest therein," when the certificate and deed both show by the description of the premises sold that quantity was offered and only quantity was sold. (*Doland v. Mooney*, 79 Cal. 137.)

761. A recital in the certificate of tax sale and tax deed of the nonpayment of the costs of publication will not vitiate the sale or deed, if it does not appear that the amount for which the property was actually sold included any thing for costs of publication. (*Doland v. Mooney*, 79 Cal. 137.)

762. The filing for record of a certificate of

tax sale being a public duty of the recorder for which no fees are provided, the presentation of such certificate by the tax-collector to the recorder for filing is a sufficient filing, so far as affects the rights of the purchaser, although the recorder does not mark it filed, because of the nonpayment of fees demanded by him. (*Rollins v. Wright*, 93 Cal. 395.)

763. Sheriff's certificate of sale made under a sale for the tax will not be set aside in equity at the suit of the owner for irregularities in levying and assessing the tax. (*Stokes v. Geddes*, 46 Cal. 17.)

764. The allegation in the complaint as to the tax sale is that the property "was duly sold to satisfy the aforesaid taxes, at public auction, by the tax-collector of the said county of El Dorado, to A. Mierseon, to whom a certificate of said sale was delivered by said tax-collector." There is no allegation that either of the steps referred to by sections 3766, 3767, or 3768 of the Political Code had been taken. Section 3776 declares that the certificate of the sale shall state certain matters. There is no allegation that the certificate stated either of those matters. The allegation in the complaint is that "a certificate of said sale was delivered." Held, the certificate of tax sale is not evidence of any matters not therein recited, nor of any matter necessarily preceding its valid existence. (*Hall v. Theisen*, 61 Cal. 524.)

Canceling certificate of tax sale. See *Quiet-ing Title*, 65.

h. Return of Sale.

765. It is the general rule that a grantee under a tax deed valid on its face is not affected in any of his rights by recitals in the sheriff's return of the tax sale contradicting the recitals in the deed. (*Hewell v. Lane*, 53 Cal. 213.)

766. A sheriff may voluntarily correct his return of a tax sale after the return has been filed, but he cannot be compelled by the court to correct the return against his will. (*Hewell v. Lane*, 53 Cal. 213.)

Cited 76 Cal. 345.

Conflict between recitals in deed and return. See post, XIII, 4.

i. Redemption.

767. Right of redemption comes entirely from statute, and is subject to all the limitations and conditions imposed by the statute. (*Quinn v. Kenney*, 47 Cal. 147.)

768. A person claiming the right to redeem land from a tax sale, under an alleged mortgage lien which was absolutely extinguished by the lapse of time before the tax sale was made, is not such a party in interest as is entitled to redeem the land under section 3780 of the Political Code. (*Hughes v. Cannedy*, 92 Cal. 382.)

769. Where real property was sold for taxes, and the time for redemption had expired prior to the amendment in 1885 of section 3785 of the Political Code, requiring notice of redemption to be given, no such notice was necessary to the validity of a tax deed. (*Haaren v. High*, 97 Cal. 445.)

770. A notice to redeem from a tax sale, pre-

liminary to a demand for a deed, pursuant to section 3785 of the Political Code, must state the amount then due, and, if the amount therein stated is in excess of the amount then actually due, the time for redemption does not expire, and the tax deed given thereunder conveys no title. (*Reed v. Lyon*, 96 Cal. 501.)

771. The sufficiency of a notice to redeem, under section 3785 of the Political Code, which was offered in evidence by the respondent, and excluded by the trial court as insufficient, will not be inquired into upon an appeal by the opposite party, as the appeal does not bring the excluded evidence before the appellate court. (*Landegran v. Peppin*, 86 Cal. 122.)

772. Under section 12 of the Code of Civil Procedure, providing that in the computation of time in which an act provided by law is to be done, the first day is excluded and the last included, a tax deed showing that the notice to redeem was served on the twenty-fifth day of July, 1888, and fixing August 23, 1888, as the time when the purchaser would apply to the tax-collector for a deed, is invalid as giving only twenty-nine days' notice previous to the expiration of the time of redemption, instead of the thirty days required by section 3785 of the Political Code. (*Landegran v. Peppin*, 86 Cal. 122.)

773. A tax deed to land conveys no title, where it affirmatively appears therefrom that the notice from the purchaser to the owner required by section 3785 of the Political Code (as amended March 12, 1885) notified the owner that the land had been sold for a smaller amount of money than it actually was sold for. (*Landegran v. Peppin*, 86 Cal. 122.)

Cited 92 Cal. 387.

774. One who is the owner in fee and in the possession of the lots sold for taxes retains the right of redemption indefinitely, until a notice is given and a deed applied for in accordance with the provisions of section 3785 of the Political Code. (*Hughes v. Cannedy*, 92 Cal. 382.)

775. The act of 1885, requiring the purchaser at a tax sale to give to the owner thirty days' notice of the application for a deed, and extending the time for redemption until such notice is given, is constitutional, and applies to all applications for deeds made after the act took effect. (*Oullahan v. Sweeney*, 79 Cal. 537.)

Cited 92 Cal. 387; 93 Cal. 399; distinguished 95 Cal. 200.

776. The statutory notice limits the period of redemption, and, until the prescribed notice is given, the redemptioner is not called upon to redeem, and may insist upon a strict construction of the statute. Although a substantial, rather than a literal, conformity to the statute may possibly be considered sufficient, its express requirements cannot be avoided on the ground that they serve no useful purpose. (*Reed v. Lyon*, 96 Cal. 501.)

777. The fee of three dollars allowed for service and proof of service of the notice to redeem is no part of the sum due at the date of the notice, and no part of such fee can be included in the notice of the sum due. (*Reed v. Lyon*, 96 Cal. 501.)

778. If a purchaser of land at a sale made by a sheriff for delinquent taxes does not pay the price bid until five months after the sale, and then receives a sheriff's deed at the expiration of six months from the time of sale, although the sheriff's deed conveys the legal title, yet a court of equity will recognize the right of the owner to redeem at any time within six months from the day the purchase money was paid, and will compel the sheriff's grantee to convey the legal title. (*Maina v. Elliott*, 51 Cal. 8.)

779. In an action to recover possession of land, where the defendant claimed title under a tax deed, a finding by the court that the property was sold by the tax-collector to the defendant in the proceedings for the collection of delinquent taxes for the year 1883, and that a deed was executed therefor on July 7, 1885, sufficiently shows by unavoidable inference that the sale could not have been later than March, 1884, and that the year allowed for redemption after the sale had expired before the execution of the tax deed, and before the taking effect of the amendment to the Political Code requiring notice of redemption. (*Haaren v. High*, 97 Cal. 445.)

780. To extend the time for redemption is to alter the substance of the contract, and a fortiori would a law giving a right to redeem, when, by the law under which the purchase was made, the right to the deed has become absolute. (*Rollins v. Wright*, 93 Cal. 395.)

781. A person redeeming from a tax sale made by the collector of taxes, under a judgment recovered for the tax, must pay the whole amount of the judgment, even if he own only an undivided interest in the land; but the payment does not redeem any land other than that which the redemptioner owned at the time of the tax sale. (*Quinn v. Kenney*, 47 Cal. 147.)

782. If the land is sold in separate parcels by the officer a redemption of distinct parcels can only be made by paying the whole sum bid on any distinct piece sold separately. (*People ex rel. Presburg v. McEwen*, 23 Cal. 54.)

783. After a sale of lands under a judgment recovered for taxes a redemption cannot be made by paying a portion of the bid equal to the interest of the redemption in the parcel sold. (*People ex rel. Presburg v. McEwen*, 23 Cal. 54.)
Cited 6 Or. 340.

784. Section 3779 of the Political Code, requiring the purchaser at a tax sale to reconvey upon "payment of the purchase money and fifty per cent added thereon," does not apply to a void sale. (*Harper v. Rowe*, 53 Cal. 233.)
Cited 86 Cal. 139.

785. Where lands are assessed to several persons jointly by the Revenue Law of 1860, the owner of an undivided portion may pay his proportion of the tax, and thus release his portion of the land from the lien of the tax; but unless he makes this payment before a sale is made of the land under a judgment recovered for the tax this right is gone, and a redemption can only be effected by a payment of the entire judgment and all

charges. (*People ex rel. Presburg v. McEwen*, 23 Cal. 54.)
Cited 23 Cal. 596.

786. Where an entire tract of land has been sold on a judgment recovered against the same or the owner thereof for taxes the owner of an undivided interest in the land cannot redeem his undivided portion from the sale by a payment of his proportion of the judgment and costs. (*Mayo v. Marshall*, 23 Cal. 594.)
Cited 6 Or. 340.

787. If sufficient money is paid to the county treasurer to redeem land sold for taxes, and the payment is made for the purpose of effecting a redemption, and a receipt is taken, the redemption is effected, even if the receipt is not filed with the recorder, and recorded by him. (*Cooper v. Shepardson*, 51 Cal. 298.)

788. If land sold for taxes is redeemed the redemption has the effect of defeating a deed afterward given to the purchaser. (*Cooper v. Shepardson*, 51 Cal. 298.)

789. A deed of land under a tax sale is only prima facie evidence that no redemption had been effected; and the party who makes the redemption may, in ejectment on the title acquired by the deed, prove that a redemption was effected. (*Cooper v. Shepardson*, 51 Cal. 298.)

790. In an action by a minor to redeem from a tax sale, brought after the deed has been executed by the tax-collector, the proper decree, if the purchaser at the tax sale has not conveyed or encumbered the property, is, that he convey the same to the plaintiff, and, if such purchaser bring into court and tender to the plaintiff such deed, the court may decree that the plaintiff accept it, and recover costs. (*Quinn v. Kenney*, 47 Cal. 147.)
Cited 55 Cal. 541, 542.

791. In an action to redeem from a tax sale, where the purchaser at the sale and several others are made defendants, with an allegation that such purchaser has conveyed his interest in the certificate to the other defendants, a finding by the court that the purchaser at the tax sale still retains the property, and has not encumbered it, estops the other defendants in any future litigation. (*Quinn v. Kenney*, 47 Cal. 147.)

XIII. Deeds.

1. Law Must be Strictly Complied With; Presumptions; Repeal of Statute.

792. By the doctrine of the common law a party claiming under a tax deed must show that all the requirements of the law, from the first to the last, have been complied with. Though the statute has altered the rule, and made the deed prima facie evidence of the conveyance of all the title of the delinquent, it does not dispense with the necessity of the officer reciting in the deed the authority under which he acted. The deed has no validity as an independent conveyance. It depends upon the statute, and if, by any of its recitals, it appears that any material requisition of the law has been omitted, the deed is void. (*Ferris v. Coover*, *Ferris v. Chapman*, 10 Cal. 589; cited 13 Cal. 619, 14 Cal. 133, 28 Cal. 112, *Lachman v. Clark*, 14 Cal. 131.)

793. The fact that a tax deed is *prima facie* evidence of certain facts makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof. (*Kelsey v. Abbott*, 13 Cal. 609.)

794. To sustain a title by virtue of a tax-collector's deed it has, by the best authorities, been held, that every prerequisite to the exercise of the power of sale by the officer must be shown to have been accomplished. (*Norris v. Russell*, 5 Cal. 249.)

795. If, from lapse of time since the execution of a tax deed and possession by the purchaser under it, presumptions could be indulged in support of any of the preliminary acts essential to the exercise of the power of sale, they could only be in favor of the acts between the assessment and the execution of the deed, and not of the assessment itself, which was the foundation of all subsequent proceedings. (*Keane v. Cannovan*, 21 Cal. 291.)

796. The tax-collector's deed, to be evidence of title, must be made in pursuance of a law giving it that effect; and where lands were sold for taxes assessed under the act of 1854, and the deed was not made until after the passage of the act of 1857, repealing the act of 1854—assuming that it does so repeal—the deed is not evidence of title. (*Burr v. Hunt*, 18 Cal. 303.)

Strict compliance with statute. See post, 801.

2. By Whom Executed.

797. It is not necessary, before introducing a tax deed in evidence, to prove that the person by whom it was executed held the office of tax-collector at the time when the sale was made. (*Wetherbee v. Dunn*, 32 Cal. 106.)

798. A tax deed executed by a sheriff as tax-collector by his undersheriff is not admissible in evidence, and vests no title in the grantee. (*Lathrop v. Brittain*, 30 Cal. 680.)

Compelling sheriff to execute tax deed. See *Mandamus*, II, 12, j.

3. Notice of Application for Deed.

799. A notice posted on the premises, by a purchaser at a tax sale, of an application for a deed, which fails to state that the property had been sold for delinquent taxes, or to give the date of the sale, or the amount for which the property was sold, as required by section 3785 of the Political Code, is fatally defective; and a deed issued to such purchaser by the tax-collector under such notice is issued without authority, and is null and void. (*Hughes v. Cannedy*, 92 Cal. 382.)

800. Section 3785 of the Political Code as amended in March, 1885, providing that notice must be given by a purchaser of real property at a tax sale of his application for a deed, does not apply to a purchaser whose right to a deed had become absolute by expiration of the time for redemption before the taking effect of the amendment, no such notice having been required prior thereto. (*Rollins v. Wright*, 93 Cal. 395.)
Cited 97 Cal. 446, 447.

Notice to owner to redeem. See ante, XII, 5, i.

4. Form of and Recitals in.

801. Where statute prescribes particular form of tax deed, the form becomes substance, and must be strictly pursued, or the deed will be void. (*Hubbell v. Campbell*, 56 Cal. 527, cited 64 Cal. 456; *Grimm v. O'Connell*, 54 Cal. 522.)

Cited 56 Cal. 532; 64 Cal. 456, 512; 97 Cal. 574.
Form of. See ante, XII, 5, g.

802. It was not necessary, under the Revenue Act of 1854, to recite in a tax deed the various acts showing a compliance on the part of the revenue officers with the several conditions of the statute. These acts, if inserted in the deed, are *prima facie* evidence; but, if not inserted, may be proved aliunde. (*Moss v. Shear*, 25 Cal. 38.)
Cited 90 Cal. 465.

803. It is not necessary that a deed for taxes recite each act of the officers in making the assessment and levying the tax, etc., but a general recitation of the conclusions resulting from those acts is sufficient. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

804. It is not necessary in the recitals in a tax deed, given for land sold for the taxes of 1857-58, to state in what manner the tax had been levied or the rate of taxation, nor for what amount the land was assessed by the assessor, nor that a certificate of sale was filed with the county recorder. (*Wetherbee v. Dunn*, 32 Cal. 106.)

805. A tax deed which omits to recite the matters recited in the certificate of sale, including a statement of the time when the purchaser will be entitled to a deed, is void. A recital in the deed that the certificate of sale contained the matters required by law is not a substantial recital of the matters required to be contained in the certificate of sale. (*Hughes v. Cannedy*, 92 Cal. 382.)

806. The omission from a tax deed of a recital in the certificate of sale as to the time at which the purchaser would be entitled to a deed is fatal to its validity. (*Anderson v. Hancock*, 64 Cal. 455.)
Cited 64 Cal. 512; 92 Cal. 386.

807. Under the provision of the code, which requires the deed to contain the recitals contained in the certificate of sale, it is sufficient that the deed recites the fact that the time when the purchaser will be entitled to a deed was contained in the certificate of sale without an independent recital thereof as a fact. (*Hewes v. McLellan*, 80 Cal. 393.)

808. A recital in the tax deed that the date of service of the notice of redemption was the twenty-fifth day of July, 1888, and that the time specified therein for the redemption of the land sold for taxes, and when the purchaser would apply for his tax deed, was the twenty-third day of August, 1888, will control the recital that the thirty days' notice was given as required by section 3785 of the Political Code. (*Landregan v. Peppin*, 86 Cal. 122.)
Cited 96 Cal. 380.

809. Recitals in a tax deed contrary to those in the return of sale cannot be regarded, and invalidate the deed. (*Reynolds v. Lincoln*, 71 Cal. 183.)

810. A tax deed is not subject to objection because it recites that fifty cents was charged for the certificate of sale, instead of for the duplicate certificate, as allowed by statute. The recital showing but one charge of fifty cents, the error in the recital is wholly immaterial. (*Hewes v. McLellan*, 80 Cal. 393.)

Recitals in. See ante, XII, 5, g; post, XIII, 6.

Recitals in, when surplusage. See ante, 737.

5. Description in.

811. The description of property in tax deed must be certain of itself, and not such as to require evidence aliunde to make it certain. (*Keane v. Cannovan*, 21 Cal. 291.) Cited 38 Cal. 224; 55 Cal. 288.

812. A tax deed in which the property is described as follows: "A lot on Dupont street, one hundred and thirty-seven feet and six inches from the northwest corner of Washington street, with the improvements thereon 12x100," is void for uncertainty of the description. (*Keane v. Cannovan*, 21 Cal. 291.)

813. A tax deed which describes the property conveyed as "Block No. 25. less a lot belonging to Bryant, 70 by 137½, in the southeasterly corner," is not void on the ground that the description of the premises is insufficient, nor because it was assessed by that description. (*Wetherbee v. Dunn*, 32 Cal. 106.)

814. If the description of the land assessed is definite and accurate in the assessment, and is inserted in the tax deed, and the purchaser at the sale buys a portion of it for the taxes and costs, such description in the tax deed of the portion sold as will enable its boundaries to be determined by extrinsic evidence, applying the description in the deed to the land, is sufficient. (*Brunn v. Murphy*, 29 Cal. 326.) Cited 32 Cal. 107.

815. In an action to quiet title the plaintiff offered in evidence a deed made to him by the tax-collector of the county in which the description of the land was as follows: "Situate, lying, and being within the county of San Bernardino and described thus: An undivided one-half interest in and to that certain piece, parcel, or tract of land containing one thousand two hundred and eighty acres, situated in Rancho Muscupiabe, known as the Sylvester Bryant tract, bounded and particularly described as follows: Bounded north by the base of mountains, or north boundary of said Rancho Muscupiabe; east by range line between township No. one north and ranges three and four west, S. B. M.; on the south by that part of San Bernardino Rancho owned by Holmes & Golding; on the west by lands owned by Severance Brothers, the said one-half interest containing six hundred and forty acres, more or less, with improvements on the same, was by said Wm. Davies." The deed was objected to on the grounds (among others) that description of the land was insufficient, and that certain alleged erasures had not been accounted for. The court excluded the deed, but afterwards granted a new trial. Held, the description is sufficient. It does not appear by the record that there were

any erasures in the deed. (*Anderson v. Hancock*, 61 Cal. 88.)

False call in, effect on. See ante, 278.

6. Effect and Conclusiveness of; Deed as Evidence.

816. The forty-fifth section of the Revenue Act of 1861, relating to the effect of a deed of land sold for taxes, has not been repealed. (*Mayo v. Haynie*, 50 Cal. 70.)

817. A judgment in an action in rem to enforce a lien on land for a tax cannot be held to enlarge the operation of the deed given by a sheriff under a sale on the judgment, beyond the limitations of the statute by force of which the judgment was rendered. (*Mayo v. Haynie*, 50 Cal. 70.)

818. The sheriff's deed executed under a judicial sale for taxes is not prima facie or conclusive evidence of his power to sell; but his power to sell, to recite a sale in his deed, and to make the deed, must be proved by the judgment and execution. (*People v. Doe*, 31 Cal. 220.)

Cited 75 Cal. 178; 4 Nev. 152.

819. The provision of section 3787 of the Political Code that a tax deed shall be "conclusive evidence of the regularity of all other proceedings" refers to the acts and proceedings required to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of the tax deed, and not to the acts required to be done by the applicant for the deed, under the statute subsequently enacted, in reference to serving notice upon the owner thirty days previous to the expiration of the time for redemption, or thirty days before he applies for a deed; and, in the absence of the proof of such notice, the tax deed is no evidence of title. (*Miller v. Miller*, 96 Cal. 376.) Cited 96 Cal. 504.

820. Section 3786 of the Political Code, making the recital of the matters required to be recited in tax deeds prima facie evidence of their truth, and section 3787 of the same code, providing that as to all other matters the deed is conclusive, are valid and effective, and do not deprive the property owners of any substantial rights because limiting their defense to the proof of such matters as show that they do not justly owe the tax, and not allowing them to assail the regularity of proceedings not affecting their substantial rights. (*Rollins v. Wright*, 93 Cal. 395.) Cited 96 Cal. 381.

821. The conclusiveness of a tax deed under section 3787 of the Political Code, as to the proceedings, from the assessment to the execution of the deed, other than those mentioned in section 3786 of the same code, relates only to acts and proceedings required to be done and had at the hands of the public officials intrusted with the various steps leading up to the execution of a tax deed, and not to acts required by the applicant for the deed, in respect to the statutory notice of redemption. (*Reed v. Lyon*, 96 Cal. 501.)

822. A tax deed is conclusive evidence that proper proof was made of publication by filing with the clerk and recorder of the county

the affidavit required by section 3769 of the Political Code. (*Haaren v. High*, 97 Cal. 445.)

823. The recital in a tax deed as to whom the property was assessed is conclusive. Held, accordingly, that a deed which recited that the property had been assessed to "unknown owners, and to all owners and claimants known and unknown," was void. (*Brady v. Dowden*, 59 Cal. 51.)
Cited 64 Cal. 2; 78 Cal. 147; 87 Cal. 502.

824. A deed of land, executed by an officer under a sale made on a judgment enforcing a lien for a tax, cannot be held to have an effect which the statute under which the judgment was rendered says it shall not have. Such deed is not, therefore, conclusive evidence of title against one who paid the tax and was not a party to the judgment. (*Mayo v. Haynie*, 50 Cal. 70.)
Cited 54 Cal. 524.

825. Our statute makes tax-collectors' deeds prima facie evidence of title. (*Norris v. Russell*, 5 Cal. 249.)
Distinguished 5 Cal. 321.

826. Section 90 of the Revenue Act of May 15, 1854, providing that a tax deed should be prima facie evidence of certain things, was expressly repealed by section 55 of the Revenue Act of April 29, 1857, and the mere introduction of a tax deed acquired under the former act, without other evidence, does not make out a prima facie title, but proof of the preliminary steps necessary to vest the power of sale is essential. (*Emeric v. Alvarado*, 90 Cal. 444.)

827. Such a deed is prima facie evidence that all the proceedings in relation to the tax were regular and in accordance with law, and the burden of showing that any irregularity occurred is thrown upon the one asserting its invalidity. (*O'Grady v. Barnhisel*, 23 Cal. 287.)

828. A deed executed by a collector of taxes for property sold for nonpayment of taxes, which recites generally that the property was duly assessed, and that the taxes were levied upon it according to law, is prima facie evidence of title in the grantee, and is entitled to be received in evidence as such without any further proofs. (*O'Grady v. Barnhisel*, 23 Cal. 287.)
Cited 29 Cal. 327; 32 Cal. 107.

829. A tax deed establishes the assessment prima facie, and it is not necessary for the grantee to show, in an action by him to quiet title, that the one to whom the property was assessed had title thereto, but the burden is on the defendant to establish the contrary. (*Rollins v. Wright*, 93 Cal. 395.)
Cited 96 Cal. 381.

830. The statute which makes a tax deed prima facie evidence of the transfer of the title of the delinquent applies only to deeds executed upon a sale for taxes levied subsequent to its passage. A tax deed executed previous to the passage of the statute is not admissible as evidence of title without proof that all the requirements of the law authorizing its execution had been complied with. (*Keane v. Cannovan*, 21 Cal. 291.)
Cited 25 Cal. 141; 38 Cal. 487, 488.

831. A tax deed reciting a lawful assessment is only prima facie evidence that the property was assessed as required by law, resting upon a disputable presumption that the recital conforms to the certificate of sale; and, where the certificate of tax sale shows an unlawful assessment, its introduction in evidence as a foundation for the admission of the deed not only proves that the property was not lawfully assessed, but also that the tax deed, not conforming to the recitals of the certificate, does not contain the recitals required by law. (*De Frieze v. Quint*, 94 Cal. 653.)

Deed as prima facie evidence. See ante, 802.

Statute making deed prima facie evidence does not dispense with strict compliance. See ante, XIII, 1.

832. In absence of statute declaring that recitals in tax deed shall convey the title to the land therein described, and shall be prima facie evidence of title, the burden is cast on the party claiming under the deed of proving that the recitals are true. (*Pierce v. Low*, 51 Cal. 580.)

833. When the complaint in ejectment is general in its terms, and makes no mention of deeds, and the answer is equally general in its denials, and on the trial plaintiff relies on tax deeds to recover, the defendant has a right to introduce any evidence allowed by the statute to show the invalidity of the tax deeds, or the title acquired under them. (*Roberts v. Chan Tin Pen*, 23 Cal. 260.)
Cited 70 Cal. 320.

834. If the plaintiff relies on tax deeds to recover, the defendant has a right to show that the land assessed to him included a tract in which he had no right, title, interest, or claim. (*Roberts v. Chan Tin Pen*, 23 Cal. 260.)

835. The prima facie evidence of title furnished by the recitals of a tax deed is overturned by showing that the assessment was illegal. (*Bidleman v. Brooks*, 28 Cal. 72.)

Conflict between name in deed and certificate. See post, 842.

Tax deed as evidence. See Evidence, 174.

Deed as evidence of title. See Adverse Possession, 100, et seq.

Title by grantor under tax deed passes to grantee. See Deeds, 284.

7. Validity of; Canceling; Aiding by Proof.

836. A tax deed depends for its validity upon a lawful assessment. (*Brady v. Seaman*, 30 Cal. 610.)

837. A tax deed for state taxes purporting to have been levied for the fiscal year 1872-73, when, under the decisions of the supreme court, there was no valid law authorizing a state tax to be levied for that year, would be void on its face, so far as it related to the state tax. (*Wills v. Austin*, 53 Cal. 152.)
Cited 53 Cal. 235; 382; 54 Cal. 522.

Tax deed is void without assessment. See ante, V, 4.

Deed based on void assessment is void. See ante, 288, et seq.

838. If tax is illegal and void, sale under it is a nullity, and a deed of property sold for

such tax conveys no title. (*Low v. Lewis*, 46 Cal. 549.)

839. A finding that there was no tax assessment or tax levy upon certain property for a particular fiscal year is not a finding of facts upon which the appellate court can determine the validity of a paper purporting to be a tax deed. (*Emeric v. Alvarado*, 64 Cal. 529.)

840. Such deed is not void because the purchase money at the tax sale was not paid to the sheriff until some time after the sale, provided the sheriff accepted of it. (*Anderson v. Rider*, 46 Cal. 135.)

841. If a sheriff sells land on a judgment enforcing the lien of a tax, and the purchaser does not pay the price bid by him until five months after, and the sheriff then gives him a certificate of sale bearing date the date the sale was made, and at the end of six months from the day of sale gives him a deed, and there was no stipulation for a credit between the sheriff and the purchaser, the deed is not void, but passes the legal title. (*Maina v. Elliott*, 51 Cal. 8.)

842. If the certificate of sale of property for taxes is made to "Michael Dundon," and the deed under the certificate is made to "Patrick Michael Dundon, Jr.," and it appears in proof that there were two persons, Michael and Patrick Michael, and there is no evidence that Patrick Michael acquired the right of Michael by assignment, the deed is not admissible in evidence without proof that the two names are for the same person. (*McMinn v. Whelan*, 27 Cal. 300.)

843. A tax deed which is void on its face does not affect the title, and its registration gives no notice to any person. (*Oglesby v. Hollister*, 76 Cal. 136.)

844. When the tax is valid, but the sale irregular, equity will not cancel the tax deed at the suit of the owner of the land, without a tender of the taxes to the purchaser. (*Hibernia Savings and Loan Society v. Ordway*, 38 Cal. 679.)

845. But where the purchaser of the tax title has made the purchase by collusion with the owner, with the view of defrauding a mortgage creditor of the owner, a tender of the amount of the taxes is not necessary. (*Hibernia Savings and Loan Society v. Ordway*, 38 Cal. 679.)

Void deed, title will be quieted without payment. See *Quieting Title*, 76.

846. A void tax deed cannot be made valid by proof of a valid assessment. (*Hearst v. Egglestone*, 55 Cal. 365.)
Cited 61 Cal. 525; 68 Cal. 591; 77 Cal. 487; 78 Cal. 147.

847. If a tax deed recites a void assessment it is void, and it cannot be shown that there was in fact a valid assessment. The plaintiff must recover, if at all, on his tax deed, supported by evidence of the regularity of the prior proceedings, if the same are attacked. He cannot recover on the tax-roll or delinquent list. (*Grimm v. O'Connell*, 54 Cal. 522.)

Cited 55 Cal. 367; 63 Cal. 39; 68 Cal. 591; 77 Cal. 487; 78 Cal. 147; 80 Cal. 76, 77; 89 Cal. 61; 92 Cal. 386, 387; 97 Cal. 574; disapproved 78 Cal. 148.

848. A tax deed which recites an assessment of the land to a certain person named, "and all owners and claimants," is void upon its face, and cannot be validated by proof of a regular assessment. (*Works J.*, dissenting. (*Pearson v. Creed*, 78 Cal. 144.)

849. If a tax deed is void the defendant cannot rely on the assessment as translativ of the title. (*Wilson v. Atkinson*, 68 Cal. 590.)

Evidence of invalidity of deed. See ante, XIII, 6.

Uncertainty in description. See ante, XIII, 5.

As dependent upon form of deed and recitals in. See ante, XIII, 4.

Defective notice of application. See ante, XIII, 3.

Validity where notice to redeem is defective. See ante, XII, 5, i.

Deed, enjoining. See *Injunctions*, II, 12.

Tax deed of public lands, rights of holder. See *Public Lands*, XVI.

Complaint in suit to remove cloud. See *Quieting Title*, 108.

Tax title, validity of, will not be litigated in foreclosure. See *Mortgages*, 665.

Deed, alteration of. See *Alteration of Instruments*, 5.

Presumption as to acts of officers acting under statutory authority. See *Offices and Officers*, 92, et seq.

XIV. Poll Taxes.

850. By section 3891 of the Political Code, it is made the duty of the auditor to deliver the poll-tax blanks to the assessor. (*Mitchell v. Crosby*, 46 Cal. 97.)

851. Collection of poll taxes or of license taxes, or of any taxes other than taxes upon property, may be transferred from one to another class of officers at the will of the legislature, although those duties may have pertained to one of those officers when the incumbents were elected. (*Mitchell v. Crosby*, 46 Cal. 97.)

852. The Revenue Act of 1860 repealed the act of April, 1858, concerning the collection of poll taxes, etc., in the county of Sierra; and under the provisions of the Revenue Act of 1861, the sheriff of that county is the collector of poll and license taxes, as well as the tax on property. (*People ex rel. Kirkpatrick v. Grippen*, 20 Cal. 677.)

853. Under section 862 of Municipal Corporation Act of March 13, 1883, giving to towns of the sixth class power to impose and collect a street poll tax, money levied and collected therefor belongs to the municipality, and not to the state, and the state has no interest therein, within the meaning of section 428 of the Penal Code. (*Ex parte Sam Wah*, 91 Cal. 510.)

XV. Bridge and Road Tax.

854. If an act creates a district within a county, and authorizes the supervisors to levy a tax upon the property therein for the purpose of building a bridge, the property within the district cannot be assessed for the tax by an assessor elected by the county, nor can the

tax be collected by a collector elected by the county. (*Smith v. Farrelly*, 52 Cal. 77.)

855. It was not necessary that ordinance of city of Nevada, under the act of 1861 levying a bridge tax on the assessment of 1860, need not provide for adding to or modifying the assessment of 1860, the act itself having provided for the correction of the list. (*Kelsey v. Trustees of Nevada*, 18 Cal. 629.)

Bridges, assessment for. See Bridges, II.

856. An act of the legislature authorized a tax for road purposes upon property along a road in a portion of Santa Clara county, and provided that it might be assessed by the county assessor, and it was so assessed. Held, that the assessment was void, because not made by an assessor elected by the electors of the district. (*Williams v. Corcoran*, 46 Cal. 553.)

Cited 47 Cal. 617; 49 Cal. 421; 52 Cal. 80.

857. A charge imposed by law upon the assessed value of all property, real and personal, in a district, is a tax, and not an assessment, although the purpose be to make a local improvement on a road. (*Williams v. Corcoran*, 46 Cal. 553.)

858. An assessment of land which does not show the road district within which the land is situated is defective. (*Knott v. Peden*, 84 Cal. 299.)

859. The tax levied in Sacramento county for the wagon-road from the eastern boundary line of said county, through El Dorado county to Carson Valley, under the act of 1858 is constitutional. (*People v. Seymour*, 16 Cal. 332.)

Road tax. See Highways, VI.

Validity of road tax. See post, XVI.

Road tax, posting proclamation of election for. See Elections, 23.

Road assessment, separation of dollars from cents. See Highways, 118.

XVI. School Tax.

860. Assessment for a special school tax must be made by an assessor elected by the qualified electors of the school district. (*People v. White*, 47 Cal. 616; cited 49 Cal. 421; *People v. Stockton etc. R. R. Co.*, 49 Cal. 14.)

861. The introduction in evidence of an assessment-book, which is by statute *prima facie* evidence, not only of the assessment and of the amount of the unpaid taxes, but also of the fact that all the forms of law in relation to the assessment and levy have been complied with, is sufficient proof of the validity of a road tax and special school tax, which are required to be levied by the supervisors and to appear upon the assessment-book. (*San Gabriel Valley Land and Water Co. v. Witmer Brothers Co.*, 96 Cal. 623.)

862. A special tax for school purposes can only be levied after the question has been submitted to the qualified electors of the district, in the manner pointed out by the statute. (*People v. Castro*, 39 Cal. 65.) Cited 52 Cal. 72, 621.

863. The holding of such an election is a jurisdictional fact, and it is therefore necessary to aver it with precision, and in such

manner as to admit of a direct issue upon the facts averred. (*People v. Castro*, 39 Cal. 65.)

864. When the answer denies that any election to authorize the tax was ever held, and, upon the trial, there was no attempt to prove the holding of an election, a nonsuit should be granted. (*People v. Castro*, 39 Cal. 65.)

865. If it be shown that land on which tax was assessed did not belong to defendant, but to other persons in the actual occupation thereof, holding the title under recorded deeds, the fact establishes a legal fraud, which vitiates the entire assessment. (*People v. Castro*, 39 Cal. 65.)

866. The thirty-seventh section of the act of April 6, 1863, authorizing a special tax for school purposes to be levied in any school district in this state, is not repealed as to the county of San Mateo by section 9 of "An act to define and limit the compensation of officers and reduce public expenses in the county of San Mateo," passed February 6, 1864, nor by section 12 of "An act to provide for the continuance and election of a board of supervisors in the county of San Mateo," etc., approved March 24, 1864. (*People v. San Francisco etc. R. R. Co.*, 28 Cal. 254.)

867. The general statute in relation to filing answers in cases for the collection of taxes applies to suits for the collection of taxes levied by school districts. (*People v. Nelson*, 36 Cal. 375.)

School taxes. See Schools, IX.

Action for school tax, clerk cannot enter default. See Defaults, 32.

XVII. Assessors, Tax-collectors, or Sheriffs Acting as Tax-collectors.

Who to collect tax. See ante, XV, XVI.

868. The clause, to wit: "Assessors and collectors of town, county, and state taxes shall be elected by the qualified electors of the district, county, or town in which the property taxed for state, county, or town purposes is situated," contained in section 13 of article XI of the constitution, is imperative and mandatory, and restricts the power of the legislature to a particular mode of providing such assessors and collectors in the first instance, subject to such mode of filling vacancies which may be occasioned by the death, resignation, or other legal disability of the incumbent as the constitution has and statute law may provide. (*People ex rel. Rynerson v. Kelsey*, 34 Cal. 470.) Cited 39 Cal. 359; 47 Cal. 664.

869. Legislature is not prohibited from creating more than one revenue district in a county and providing for the election of assessors and collectors of revenue in each district. (*People v. Central Pac. R. R. Co.*, 43 Cal. 398.) Cited 67 Cal. 118.

870. Offices of sheriff and tax-collector, although held by same person, are separate and distinct offices. (*People v. Ross*, 38 Cal. 76.) Cited 76 Cal. 2, 116, 607; 19 Nev. 205; 10 Or. 128; 1 Wyo. 333.

Bond where sheriff acts as tax-collector. See Sheriffs, 13, 14.

Tax-collector, sheriff as. See Sheriffs, III. Separation of offices. See Offices and Officers, 124.

Sheriff as tax-collector, statute repealing law relating to. See Statutes, 242.

Offices of sheriff and tax-collector are distinct. See Bonds, 104.

871. Legislature may by law devolve the office and duties of tax-collector upon the incumbent of any other elective office, but such law must precede the election of such officer, and his election must be by the qualified electors of the tax-collector's district. (People ex rel. Rynerson v. Kelsey, 84 Cal. 470.) Cited 76 Cal. 118.

872. A sheriff is a ministerial or executive officer solely, and there is no constitutional prohibition against his exercising the duties of tax-collector, where the law consolidating two offices was passed prior to his election. (Merrill v. Gorham, 6 Cal. 41.) Cited 9 Cal. 292; 14 Cal. 16; 34 Cal. 476; 11 Nev. 141.

873. Under the act of March 28, 1868, "to regulate salaries and fix the compensation of certain county officers," the sheriff of Tuolumne county, elected at the general election of 1869, became ex officio collector of taxes from and after the first Monday of March, 1870. (Trout v. Gardiner, 39 Cal. 886.) Cited 41 Cal. 438.

874. When code mentions assessors, it means district assessors as well as county assessors, so long as the present district assessors remain in office. (Mitchell v. Crosby, 46 Cal. 97.) Cited 67 Cal. 118.

875. Although legislature cannot by law transfer duties of office of tax-collector from a person elected as such to one who was not so elected, yet it may provide for the election of a person as tax-collector who may enter upon the discharge of his duties before the expiration of the term of a tax-collector elected under the law as it previously existed. (Mills v. Sargent, 36 Cal. 379.)

876. The constitution affixes no period of tenure to the office of tax-collector, nor does it provide for any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The legislature may direct how it shall be filled, and how its duties shall be discharged. (People ex rel. Attorney General v. Squires, 14 Cal. 12.)

877. The legislature has the authority to provide that assessors may appoint deputies with power to perform official acts in the names of their principals, and an assessment made by such deputies is valid. (Meek v. McClure, 49 Cal. 623.)

878. A sheriff, whose term of office has expired, has no right to collect the state and county tax, as unfinished business, from the assessment list which came into his hands while in office. (Fremont v. Boling, 11 Cal. 380.)

879. The taxes of 1855, after March, 1856, are not of the unfinished business of the outgoing sheriff, for the reason that after the set-

tlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. (Fremont v. Boling, 11 Cal. 380.)

880. There is no irreconcilable conflict between the amendatory act of 1853 and the Revenue Acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired was intended to provide for the period intervening between October and March, the time of his settlement. (Fremont v. Boling, 11 Cal. 380.)

881. The legislature has the power to enact a law directing the collector of taxes for a county to pay one-half of the compensation allowed him by law for the collection of the same into the county treasury, for the benefit of the general fund. (Solano County v. Neville, 27 Cal. 465.) Cited 30 Cal. 176; 36 Cal. 622.

882. If the statute allows a collector of taxes, for his own use, a percentage for collections of state tax, and also a percentage on the amount of county tax collected, and provides that he shall pay the percentage allowed him on the county tax into the county salary fund, and that it shall become a part of said fund, the collector cannot claim the percentage to be paid into the salary fund as his own fees or property. (Donahue v. El Dorado County, 49 Cal. 248.)

883. A tax-collector of a county is entitled to the commissions or fees allowed by law only for taxes collected by himself. He cannot be allowed commissions for taxes recovered in an action brought by the district attorney on behalf of the county. (Boggs v. County of Placer, 65 Cal. 561.)

884. Section 211 of the County Government Act, being unconstitutional, did not operate to repeal section 3770 of the Political Code by implication as being inconsistent therewith; but section 164 of the same act as originally enacted (Stats. 1883, p. 361), providing that the salaries and fees therein provided for should be in full compensation for all services rendered by the officers therein named, being constitutional and valid, operated to repeal section 3770 of the Political Code, providing that the tax-collector must collect, in addition to the taxes due on the delinquent list, and five per cent added thereto, fifty cents on each lot separately assessed, one-half of which should go to the county, and the other to the collector for preparing the list. (County of Orange v. Harris, 97 Cal. 600.)

885. Where by a statute it was required that a certain sum should be annually divided by the board of supervisors among the collectors of taxes of a county, for their salaries, and the only rule of division prescribed was that "the due proportion" of each collector should be paid to him, held, that by "the due proportion" was intended such portion of the sum as the board of supervisors should determine, in view of the services required of each collector. (Faughnan v. Tuolumne County, 35 Cal. 133.)

886. The collector of taxes for the city and county of San Francisco is not entitled to any commissions or salary for the collection of that portion of the revenues assessed and collected for the use of said city and county. (*People ex rel. Hunt v. Supervisors of San Francisco*, 28 Cal. 429.)

887. The tax-collector of a county cannot, either in his individual or official capacity, maintain an action against the county to recover the reasonable value of services performed by him in collecting county license taxes imposed by an ordinance of the board of supervisors passed after his term of office commenced, whether the collection of such license taxes was a part of his official duties as tax-collector, or not. If, however, such services are no part of the duties of the tax-collector, and a promise to pay therefor is implied, the implication would be overcome by proof that the tax-collector performed the services under the supposition that it was a part of his official duty, and without any expectation of receiving additional compensation. (*Rowe v. County of Kern*, 72 Cal. 353.)

888. A complaint against a county assessor, and the sureties upon his official bond, alleging that the assessor willfully and against law assessed a tract of land belonging to plaintiff at an unlawful and false valuation specified, which was largely in excess of a sum alleged to be its highest actual value for agricultural purposes, to plaintiff's damage in a specified sum, does not state a cause of action. The averment of the value of the property is insufficient, as its value for all purposes must be considered by the assessor in ascertaining the amount at which it would be taken in payment of a just debt due from a solvent debtor, which constitutes its full cash value; and the averment that the assessment was willful and against law, without an averment that he acted maliciously, and with intent to wrong or injure the owner of the property, does not negative the presumption that he simply erred in judgment, for which he is not liable to an action, the only remedy for such error being by application to the board of equalization. (*Ballerino v. Mason*, 83 Cal. 447.)

889. An assessor is required to exercise his best judgment in determining as to the value of property to be assessed, and the presumption is that his official duty has been regularly performed. (*Ballerino v. Mason*, 83 Cal. 447.)

890. The superior court has no jurisdiction of an action against a tax assessor to recover damages alleged to have been caused by reason of a wrongful and fraudulent assessment made by him, if the amount claimed is less than three hundred dollars. (*Perkins v. Ralls*, 71 Cal. 87.)

Duty to pay money collected into treasury. See ante, XII, 4, m.

Power of to contract for printing tax list. See ante, XII, 2.

Office of tax-collector is constitutional. See *Sheriffs*, 2.

County assessor of Alameda county. See *Alameda County*.

Assessor of Ventura county, compensation of. See *Ventura County*.

Tax-collector of San Joaquin county, act relating to. See *San Joaquin County*.

Tax-collector, judicial notice as to who is. See *Judicial Notice*, 18.

Single action on tax-collector's bond. See *Bonds*, III, 10, b.

Actions against tax-collector. See *Statute of Limitations*, 186, et seq.

Action against administrator of tax-collectors. See *Executors and Administrators*, VII, 3, e.

Mandamus against tax-collector. See *Mandamus*, II, 12, k.

Tax-collector cannot be restrained by prohibition. See *Prohibition*, 28, 29.

Tax-collector, jurisdiction of quo warranto proceedings against. See *Quo Warranto*, 5, 6.

Tax-collector, bond of, complaint in action on. See *Bonds*, 123, 124.

Bond of tax-collector, validity. See *Bonds*, 74.

Tax-collector, sureties of, liability of. See *Suretyship*, 43, et seq.

Fees of tax-collector. See *Fees*, 10, et seq.

Power of supervisors to allow sum to tax-collector. See *Supervisors*, 74.

Tax-collector, compensation. See *Offices and Officers*, 124.

Tax-collector, indictment for embezzlement by. See *Criminal Law*, 1522.

Accusation against for misconduct. See *Offices and Officers*, 264.

Misappropriation of taxes illegally collected. See *Offices and Officers*, 244.

Obstructing officer in collection of tax. See *Criminal Law*, 2506.

TAX-COLLECTORS.

See *Taxation*, XVII.

TEACHERS.

See *Schools*, VI.

TEAMSTERS.

Exemptions of implements of. See *Exemptions*, II, 1.

TEHAMA COUNTY.

Statute relating to tax in, repeal of, what is not. See *Statutes*, 226.

TELEGRAMS.

Contracts, telegrams, whether constitute. See *Contracts*, I, 2, d.

TELEGRAPH COMPANIES.

1. Telegraph companies, in contemplation of law, are common carriers, and are subject to the rules of law governing the same. (*Parks v. Alta California Tel. Co.*, 13 Cal. 422.)

2. Under the provisions of the Civil Code telegraph companies are not common carriers, but must use "great care and diligence in the transmission and delivery of messages." (*Hart v. Western Union Tel. Co.*, 66 Cal. 579.)

3. A stipulation providing that the liability of the company for any mistake or delay in the transmission or delivery of a message, or

for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated, by sending it back to the office which first received it, and pays half the regular rate additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company. (*Hart v. Western Union Tel. Co.*, 66 Cal. 579.)

4. If the agent of a telegraph company at one of its stations, with power to delegate his authority, employs another person to transmit and receive messages, and such other person sends a false message purporting to come from the cashier of a bank, directing another bank to pay a fictitious person a sum of money, and the sender then personates the fictitious person and obtains the money, without any neglect on the part of the bank, the telegraph company is responsible to the bank for the same. (*Bank of California v. Western Union Tel. Co.*, 52 Cal. 280.) Cited 82 Cal. 81.

5. Assumed, for the purposes of the decision, that an agent of a telegraph company has no authority to appoint a sub-agent to perform his duties in sending and receiving dispatches. (*Bank of California v. Western Union Tel. Co.*, 52 Cal. 280.)

6. A complaint against a telegraph company which alleges that the plaintiff's assignors presented a message to the company, which the company undertook to forward, but that by reason of its gross negligence and carelessness the message was erroneously worded, whereby the senders of the telegram were damaged in a certain sum, but which fails to allege either a contract in writing to transmit the message, or a consideration for the company's undertaking to transmit it, states no cause of action. (*Acheson v. Western Union Tel. Co.*, 96 Cal. 641.)

7. An averment in the complaint that by reason of the negligence and gross carelessness of the telegraph company in forwarding the message, the senders "were prevented from buying and purchasing a lot of hops, consisting of one hundred and fifty-two bales, averaging one hundred and eighty pounds per bale, at eight and one-half cents per pound, and amounting to two thousand three hundred and twenty-five dollars and sixty cents," and that by reason thereof the senders and "were damaged in the sum of six hundred eighty-four dollars," is insufficient to show any special damage, for want of averments showing that plaintiff suffered loss from not buying the hops at the named price, and cannot support a judgment for more than nominal damages. A judgment by default for the damages specified in the complaint will be reversed upon appeal. (*Acheson v. Western Union Tel. Co.*, 96 Cal. 641.)

8. In an action to recover damages beyond the amount stipulated the burden of proof is on the plaintiff to show such willful misconduct or gross neglect. (*Hart v. Western Union Tel. Co.*, 66 Cal. 579.)

9. Where A. contracts with a telegraph company to have his dispatch transmitted, authorizing his agent to secure a debt due him from a third party, by attachment, and this service is so negligently performed that other creditors of the common debtor obtain the first attachment, and exhaust the assets of the debtor—which would not have been the case had the telegraph company performed its contract within a reasonable time—the company is liable not only for the cost of the dispatch, but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. (*Parks v. Alta California Tel. Co.*, 13 Cal. 422.) Cited 16 Nev. 228.

10. A complaint in an action against a telegraph company alleging that through the gross neglect of the defendant in wrongfully addressing a telegram, causing a delay in its delivery, the plaintiff was prevented from receiving an appointment as deputy city assessor, at a specified monthly salary, which he would have received if the message had been promptly delivered, and that he had sustained damage to the amount of five months' salary, for which judgment is prayed, is subject to a general demurrer upon the ground that the damages are too speculative and uncertain to be recovered. (*Kenyon v. Western Union Tel. Co.*, 100 Cal. 454.)

11. Where a telegraph company fails to transmit a message, upon compliance by the person contracting with it, with the conditions required by section 154 of the Act of 1850 (370), an action for the penalty given by the act lies in favor of such person. (*Thurn v. Alta Tel. Co.*, 15 Cal. 472.)

12. The sum to be recovered is a penalty for a breach of the duty to transmit the message, and the act is, in this action, a penal law, to be strictly construed. (*Thurn v. Alta Tel. Co.*, 15 Cal. 472.)

13. Under the above section the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He may, probably, do this by his agent or servant; but, when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown. (*Thurn v. Alta Tel. Co.*, 15 Cal. 472.)

14. Proof as follows: "I am superintendent of the California State Telegraph Company, and operator in their office at San Francisco. July 2d plaintiff came to our office and delivered a message to be transmitted to Jackson, and paid for transmitting it there. The message was, 'Alta Express Co., Jackson: If you have package for me, forward immediately.' Signed, 'C. Thurn.' In the margin of the message sent were the words, 'F., July 2d.' Few words passed when the message was delivered; no express agreement that the California State Telegraph Company should forward the message to Sacramento, and employ the Alta California Telegraph Company to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendant's

line from Sacramento." C. Thurn, the plaintiff, sues the Alta Telegraph Company for the penalty, under the one hundred and fifty-fourth section of the act of 1850 (370). Held, that, under these facts, he is not the person making or offering to make the contract, within the meaning of the act, and cannot recover; that the only contract proven is a contract by the State Telegraph Company to send the message, or have it sent; and a contract, on its part, to contract on its own account with the Alta Telegraph Company to send the message. (*Thurn v. Alta Tel. Co.*, 15 Cal. 472.)

15. If the message, in this case, had not been transmitted, plaintiff might have held the State Telegraph Company responsible. (*Thurn v. Alta Tel. Co.*, 15 Cal. 472.)

16. The act of May 3, 1852, granting to Allen & Burnham the exclusive right to a line of telegraph between Sacramento and San Francisco is constitutional. (*California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.) Denied 48 Cal. 515, et seq.

17. The provision in the act of May 3, 1852, granting to Allen & Burnham the exclusive right to a telegraph line between San Francisco and Sacramento, that "no existing law shall be so construed as to conflict or interfere with the provisions of this act," did not operate as a repeal of the general corporation law so far as to take away the right of forming corporations to build lines between those cities, but only to subject subsequent builders to the prior exclusive privileges of the grantees. (*California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.)

Western Union Telegraph Company, taxation of franchise. See Taxation, 150.

TELEPHONE.

Use by notary. See Acknowledgments, 80.

TELLERS.

Service of process on teller of bank. See Banks and Banking, 91.

TENANCY AT WILL.

See Landlord and Tenant, III, 2.

Right of tenant to sue in forcible entry. See Forcible Entry and Unlawful Detainer, 27.

TENANCY BY SUFFERANCE.

See Landlord and Tenant, III, 3.

TENANCY FOR YEARS.

See Landlord and Tenant III, 1.

TENANCY FROM MONTH TO MONTH.

See Landlord and Tenant, III, 1.

TENANCY FROM YEAR TO YEAR.

See Landlord and Tenant, III, 1.

TENANTS.

See Landlord and Tenant.

TENANTS IN COMMON.

See Cotenancy.

TENDER.

Legal Tender act. See Payment, II, 8.

1. To constitute a valid tender the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing but produce and offer to pay it to the other party, on the performance by him of the requisite condition. (*Englander v. Rogers*, 41 Cal. 420.) Cited 97 Cal. 151.

2. An offer of payment by a check payable two days after sight is not a valid tender. (*Beauchamp v. Archer*, 58 Cal. 431, 435.)

3. A tender of legal tender notes in payment of a note payable in gold coin is not a discharge of the debt. (*Vilhac v. Biven*, 28 Cal. 406.)

4. If, by the laws of the United States, there is more than one kind of lawful money a legal tender in payment of debts, and the plaintiff in an action is entitled to a judgment payable in a particular kind of money, a plea of tender which avers the tender to have been made in lawful money of the United States is insufficient. The plea should aver that the tender was made in the kind of money the plaintiff is entitled to receive. (*Magraw v. McGlynn*, 26 Cal. 420.)

Legal, treasury notes are for county bonds. See Bonds, 59.

Legal tender. See Executions, X, 5; Payment, II, 3.

5. A tender made was held to be bad for insufficiency in the amount. (*Fisk v. Miller*, 63 Cal. 367.)

Sufficiency of. See Pawnbrokers.

On taking land for road, necessity and sufficiency. See Highways, 65, et seq.

Overlooking interest when not material. See Pledges, 90.

Of amount less than due. See Bills and Notes, 471.

Premium, sufficiency of. See Insurance, 64.

Release, tender of, sufficiency. See Rescission of Contracts, 95, et seq.

Reasonable time, whether question of law. See Insurance, 65.

Condition does not vitiate, when. See Pledges, 88.

Insufficient allegation of. See Landlord and Tenant, 342.

Deposit in court, necessity of. See Vendor and Vendee, 259.

Plea of is good without bringing money into court. See Pledges, 91.

Keeping tender good. See Executions, X, 5; Mortgages, 493.

Price, time of tender of. See Vendor and Vendee, XI, 1.

Insufficient, effect of. See Mortgages, 133.

Inquiring where money obtained. See Executions, X, 5.

Check, tender of payment. See Banks and Banking, V, 2, a.

Pledgor, tender by. See Pledges, VIII.

Payment, tender of. See Mortgages, XV, XX, 7.

Fare, tender of. See Common Carriers, IV, 4, a.

6. A tender is not invalidated by insuffi-

ciency in the amount tendered, if no objection be made at the time as to the amount. (*Oakland Bank of Savings v. Applegarth*, 67 Cal. 86.)

7. A pledgee, who, at the time of a tender of the indebtedness to secure which the pledge was given, admits its sufficiency, cannot afterwards object to the tender on the ground that it was accompanied by conditions to which he was not bound to accede. (*Barnhart v. Fulkerth*, 73 Cal. 526.)

Waiver of by refusal. See *Landlord and Tenant*, 343.

Waiver of by denial of right. See *Specific Performance*, 132.

Failure to object to tender waives defect in. See *Vendor and Vendee*, 99.

8. A tender, though sufficient to enable a party to maintain an action upon a dependent covenant, condition, or agreement, is not equivalent to performance; and, when suit is brought, the plaintiff must show a continuous readiness to perform after the tender. (*Redington v. Chase*, 34 Cal. 666.)

9. Tender does not satisfy or extinguish obligation, nor does the offer to comply with the commands of a judgment amount to a satisfaction. (*Redington v. Chase*, 34 Cal. 666.)

10. Where B. sells and delivers to C. certain personal property, with an agreement then made that C. is to resell and redeliver upon B's executing and delivering to C. certain notes, and B. subsequently tenders these notes and demands the property, and C. refuses to take the notes or surrender the property, and the whole transaction on the part of C. was a fraud, his intention being to get hold of and keep the property, held, that the tender of the notes did not vest the ownership thereof in C., and that he cannot sue on them; that the fraud takes the case out of the rule that a tender of specific personal property vests the title thereto in the tendor. (*Lammott v. Butler*, 18 Cal. 32.)

Effect of. See *Mortgages*, 902.

When not a satisfaction. See *Swamp and Overflowed Lands*, 298.

As performance. See *Defaults*, 176.

Surety, exoneration of by. See *Appeals*, 767; *Suretyship*, IV, 5, c.

11. A tender, as far as the computation of interest is concerned, must be considered as a payment. (*Hidden v. Jordan*, 39 Cal. 61.)

12. A tender of the principal sum due, with the stipulated interest up to the time of the tender, puts a stop to the accruing of interest from the date of the tender. (*Patterson v. Sharp*, 41 Cal. 133.)

13. It is a general rule that a defendant who pleads a tender to entitle himself to costs must not only aver a tender, but that he has always been and is ready to pay the sum tendered, and the money must be brought into court. (*Bryan v. Maume*, 28 Cal. 238.)

Costs on. See *Costs*, I, 6.

14. Where a tender is made of the full amount due before suit is brought, and the tender is kept good and brought into court, the judgment should be for plaintiff for the

amount tendered, and for defendant for his costs. (*Curiac v. Abadie*, 25 Cal. 502.) Cited 5 Utah, 425.

15. Evidence of tender made after commencement of action, of the amount of the purchase money then due, is not admissible unless it is pleaded. (*Hegler v. Eddy*, 53 Cal. 597.) Cited 92 Cal. 527.

How averred. See *Specific Performance*, 137.

Admissible under general issue. See *Assumpsit*, 72.

Necessity of tendering deed before suing for price. See *Vendor and Vendee*, XI, 5, c.

TERMS.

Imposition of, on allowing amendment. See *Pleading and Practice*, XI, 4.

Imposition of on opening default. See *Defaults*, IX, 8.

Imposition of on motion for new trial. See *New Trial*, XI, 2.

Office, term of. See *Offices and Officers*, XIII.

TERMS OF COURT.

See *Courts*, IV.

TESTAMENTARY CAPACITY.

See *Wills*, VII, 3.

TESTAMENTS.

See *Wills*.

Testamentary instruments as evidence. See *Evidence* III, 4.

TESTIMONY.

What is. See *Evidence*, I.

TEXT BOOKS.

See *Schools*, VIII.

THEATERS.

Inmates of low theater, credibility of as witness. See *Witnesses*, IX, 5.

Complaint for getting up theater on Sunday. See *Criminal Law*, 2662.

Noisy amusements, prohibition of. See *Constitutional Law*, 444.

THIRTEENTH AMENDMENT.

See *Constitutional Law*, 9, 10.

THREATENED INJURIES.

Enjoining. See *Injunctions*, II, 5.

THREATENING LETTERS.

See *Criminal Law*, XXI, 53.

THREATS.

As justification. See *Criminal Law*, XXI, 31, e, C.

Evidence of to show malice. See *Slander*, 40.

Evidence of. See *Criminal Law*, XXI, 31, i, I.

TIA JUANA FLOODS.

Act for relief of sufferers from is void. See Constitutional Law, 411.

TIDE LAND COMMISSIONERS.

Salaries of. See Controllers, 14.
Deed of. See San Francisco, 285.

TIDE LANDS.

See Swamp and Overflowed Lands, II.

Beach and water lots of San Francisco. See San Francisco, XIV, 10.

Water front of San Francisco. See San Francisco, XIV, 10, a.

Sale of. See Swamp and Overflowed Lands, V.

TIDE WATERS.

See Swamp and Overflowed Lands, II;
Watercourses, II, 2.

Extending streets into tide water. See San Francisco, XI.

Wharves built into. See Wharves, III.

TIMBER.

See cross-references under Growing Trees.

TIMBER LANDS.

See Public Lands, 308, 309.

TIME.

1. When time is important, courts will inquire into a day, or fractional portion of a day. (People v. Beatty, 14 Cal. 566.)

2. Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act was done. (Graig v. Godfrey, 1 Cal. 415.)

3. Although in some cases courts will not take cognizance of fractions of a day, to determine which of two acts was first in point of time, yet the rule is necessarily departed from when the question whether one legal right shall have priority over another depends upon the order of events occurring upon the same day. (Hoyt v. San Francisco etc. R. R. Co., 87 Cal. 610.)

4. Where it is necessary to give effect to contracts and carry out the intention of parties the first day is, by the courts, included, or excluded, as the case requires, there appearing to be no uniform rule on the subject, but, when a time for deliberation is allowed, the exclusive rule should be adopted. (Price v. Whitman, 8 Cal. 412.)
Cited 5 Dak. 349.

5. A stipulation extending the time within which to answer to and including a specified day which falls on Sunday entitles the defendant to answer at any time during the succeeding Monday. (Blackwood v. Outting Packing Co., 71 Cal. 461.)

Sundays, effect of on computation of time. See Statutes, I, 2.

Last day falling on Sunday. See New Trial, 416.

Sundays, computation of in calculating lay days. See Shipping, 8.

Computation where last day falls on holiday. See Appeals, 415.

Computation of time. See Taxation, 439, 772.

Computation of on note. See Statute of Limitations, VI, 4, e.

Computation of time, return of bill. See Statutes, I, 2.

Holidays. See Holidays.

6. Section 1054 of the Code of Civil Procedure, giving the superior court power to extend the time within which certain acts may be done, does not apply to an act which is required to be done in the justice's court within the time limited by the statute, in order to give the superior court jurisdiction to act in the case at all. (McCracken v. Superior Court, 86 Cal. 74.)

7. It is always within the power of a court, when exercising proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. (Wood v. Fobes, 5 Cal. 62.)

8. The case of Muir v. Galloway, 61 Cal. 498, in so far as it holds that the superior court may by the entry of two or more orders (the first or any order or orders preceding the last expiring on Sunday) extend the period of time within which any of the acts mentioned in section 1054 of the Code of Civil Procedure may be performed for a longer period than authorized by that section if only one order of extension is made, doubted, and the question declared to be an open one. (Reay v. Butler, 99 Cal. 477.)

Extension, time to serve notice of appeal, extension of. See Appeals, 562.

Extension, power to extend time to appeal. See Appeals, IV, 2.

Extension, appeal, undertaking on, time for filing may be extended. See Appeals, 681.

Extension of time for filing statement. See New Trial, V, 7, c.

Extension of time of giving notice of motion for new trial. See New Trial, V, 3, c, D.

Extension, order extending review of by certiorari. See Certiorari, III, 2, a.

Extension of time to answer, motion to dismiss is not. See Pleading and Practice, 236.

Extension of time to file petition for rehearing. See Appeals, 3223.

Extension, time cannot be extended by renewal of motion. See Appeals, 418.

Extension, order extending time, construction of. See Appeals, 1873.

Extension, order extending time beyond statutory length. See New Trial, 420.

Extension, power to extend time to prepare bill of exceptions. See Appeals, VI, 1, d.

Extension, power of judge of different county to extend. See New Trial, 421.

Extension, service of injunction does not enlarge. See Injunctions, 301.

Extension of on contract, validity of. See Municipal Corporations, 211.

Extension of time on contracts. See Contracts, IV, 2, c.

Extension of time on note. See Bills and Notes, V.

Extension of time to sue. See Homesteads, XII, 5, a.

Extension of time of mortgage. See Mortgages, XVI.

Extension of, effect on surety. See Suretyship, IV, 5, d.

Extension of time of payment. See Payment, III.

Acceptance, time for. See Dedication, II, 5; Vendor and Vendee, I, 2.

Accounting, time to seek. See Partnership, XIII, 1.

Agent's acts, ratification of, time of. See Agency, III, 7, f.

Affidavit on application to purchase land, time of filing. See Public Lands, 388.

Alimony, time of making allowance. See Marriage and Divorce, III, 6, c.

Allegation as to time of promise, evidence admissible. See Variance, 14.

Amendment, time of. See Pleading and Practice, XI, 5.

Answer, time for. See Pleading and Practice, IX, 1.

Appeal, time within which appeal to be taken. See Appeals, IV.

Appeal, service of notice of, time for. See Appeals, V, 5, e, B.

Appeal, time for, when commences to run. See Appeals, IV, 2.

Appeal, transcript on, time to file. See Appeals, VI, 4, c.

Appointment by governor, time of. See Offices and Officers, III, 2.

Assessment, time of. See Taxation, V, 5.

Assignments, time of. See Assignments of Contracts, III.

Attachment, issuance of, time of. See Attachments, II, 4.

Contest of probate of will, time for. See Wills, X, 9, a.

Continuance, time of application. See Continuance, III, 2.

Death, time of. See Criminal Law, XXI, 31, g, E.

Declaratory statement, time of filing. See Public Lands, IX, 3.

Delinquency, time of. See Taxation, XII, 1.

Delinquent tax suit, time to bring. See Taxation, XII, 4, e.

Delivery, time of. See Deeds, IV, 3; Sales, IV, 7.

Demand, time of. See Bills and Notes, IX, 3.

Distribution, time for. See Estates of Deceased Persons, IX, 2.

Election contest, institution of, time for. See Elections, XIII, 5.

Elections, time of holding. See Elections, V.

Erasures, presumptions as to time of making. See Alteration of Instruments, 16.

Essence of contract, time as. See Vendor and Vendee, X, 1.

Essence of contract, time when is. See Contracts, IV, 2, b.

Evidence of time of crime. See Criminal Law, XVIII, 14, k.

Executions, time of issuance of. See Executions, I, 3.

Execution, sale under, time of. See Executions, IX, 2.

Homestead declaration, time to file. See Homesteads, IV, 1.

Indorsement, time of, presumptions as to. See Bills and Notes, VII, 4.

Indictment or information, time in. See Criminal Law, XIV, 7, d.

Instructions, time to offer. See Instructions, XVII, 1.

Intervention, time of. See Intervention, III.

Judgment on appeal, time for rendition of. See Appeals, XII, 1.

Judgment, failure to file decision within statutory time, new trial for. See New Trial, IV, 12.

Judgment, statute requiring decision within particular time is directory. See Judges, 16, et seq.

Judgment, entry of, time of. See Judgments, II, 8, e.

Judgment, motion to set aside, within what time to be made. See Judgments, XIV, 4.

Land contest, commencement of, time for. See Public Lands, XVII, 3.

Letters, application for, time for. See Executors and Administrators, I, 2.

Meaning of "thereupon." See Arbitration and Award, 14.

Nonsuit, at what time granted. See Nonsuit, IV.

New trial, statement on motion for, time for preparation of. See New Trial, V, 7, c.

Nonpayment, notice of, when to be given. See Bills and Notes, X, 2.

Notice of motion for new trial, time of giving. See New Trial, V, 3, c.

Notice of motion for new trial, time of filing. See New Trial, V, 3, d.

Objections, time of. See Evidence, X, 6, d.

Official bonds, time to file. See Bonds, III, 2.

Options, time of exercise and waiver of. See Vendor and Vendee, X, 4.

Payment, time of. See Sales, XII, 2.

Performance, time of. See Contracts, IV, 2.

Performance of covenant to build where no time specified. See Landlord and Tenant, 51.

Presentment of claims, time of. See Estates of Deceased Persons, VI, 3, b.

Railroad, commencement and completion of work, time for. See Railroads, X, 4, c.

Reasonable or practicable time. See Contracts, IV, 2, a.

Reasonable. See Insurance, 65.

Reasonable time implied, where none specified. See Vendor and Vendee, 121, et seq.

Reasonable, what is. See Sheriffs, 68.

Reasonable for acceptance. See Vendor and Vendee, I, 2.

Reasonable time for payment where no time provided. See Vendor and Vendee, XI, 1.

Reasonable time for performance, what is not. See Vendor and Vendee, X, 1.

Reasonable, for ratification. See Infancy, 18.

Reasonable, instance of. See Streets, 527.

Reasonable, what is, how determined. See Mines and Mining, 341.

Reasonable is question of law. See Bills and Notes, 168.

Redemption, time of. See Executions, X, 2; Mortgages, XX, 8.

Referees' reports, time of filing. See Reference, IX, 2.

Relation. See Relation.

Sale, proceedings for, when to be com-

menced. See *Estates of Deceased Persons*, VII, 4, c.

Sheriff's deed, time of execution of. See *Executions*, XI, 2.

Specific performance, suit for, within what time to be brought. See *Specific Performance*, V, 3.

Statement, settlement of, time of. See *Appeals*, VI, 1, h, O.

Statute, return of, time of. See *Statutes*, I, 2.

Statute specifying time for performance of act is directory. See *Statutes*, VIII, 23; *Taxation*, 214.

Statute prescribing time for filing statement is directory. See *Banks and Banking*, 98.

Statute as to time of filing inventory is directory. See *Executors and Administrators*, 114.

Statute as to time of filing findings is directory. See *Findings*, 27.

Statute fixing time for filing papers is directory. See *Filing*, 1.

Statute fixing time for return of jury is directory. See *Jury and Jurors*, 57.

Statute shortening. See *Mechanics' Liens*, 193.

Street contract, failure to complete in time and extension of. See *Streets*, XV, 3.

Street contract, commencement of performance of, time of. See *Streets*, XV, 1.

Summons, time of service of. See *Summons*, IV, 4.

Tender of price, time of. See *Vendor and Vendee*, XI, 1.

Tender of deed, time of. See *Vendor and Vendee*, X, 3.

Variance in time of proof of, utterance of slander. See *Slander*, 32, 33.

Van Ness ordinance, commencement of action under, time of. See *San Francisco*, XIV, 7, g.

Venue, application for change of, time of making. See *Venue*, II, 7, a.

Warranty, breach of, time of. See *Sales*, VII, 4, a.

Will, within what time petition to revoke to be filed. See *Wills*, 144.

TITLE.

1. One deraining title to property through corporation must prove the legal existence of the corporation. The recitals in deeds, that the grantor was a corporation, do not prove such corporate existence as against one claiming the property through another source of title. (*Sonoma County W. Co. v. Lynch*, 50 Cal. 503.)

2. Where a party has entered into the enjoyment of an estate, under two claims, one of which is good and the other bad, he will be regarded as having entered under the better claim. (*Wood v. Curran*, 99 Cal. 137.)

Titles of particular persons. See *particular title*.

Title to particular property. See *particular title*.

Statutes, title of. See *Constitutional Law*, VIII, 2; *Statutes*, VIII, 13.

Appeal, title of cause on. See *Appeals*, X.

Proceedings in contempt, title of. See *Contempt*, V, 1.

Mistake in. See *Verdict*, 16.

Defective title of action in affidavit. See *Venue*, 148.

Action involving title to real estate, what is. See *Vendor and Vendee*, 382.

Accession, title by. See *Accession*.

Definition of. See *Adverse Possession*, 209.

Color of, entry under. See *Adverse Possession*, II, 6.

Color of, definition of. See *Definitions*, 5.

Abandonment. See *Abandonment*.

Failure to acquire title as abandonment of homestead. See *Homesteads*, XIV, 5.

Divesting by abandonment. See *Public Lands*, 114.

Claiming under one title is no abandonment of other. See *Vendor and Vendee*, 49.

Failure to assert. See *Estoppel*, 105.

Forfeiture, whether divests. See *Forfeiture*.

After-acquired title. See *Dedication*, III; *Deeds*, VIII, 4; *Mortgages*, VII, 5; *Pledges*, V.

Acquired subsequent to judgment. See *Judgments*, X, 9, c.

After-acquired as a defense. See *Ejectment*, XI, 2.

Acquired pending action must be set up by supplemental answer. See *Supplemental Pleadings*, 15.

Amendment setting up title acquired pending action. See *Pleading and Practice*, XI, 9.

Common source of, estoppel. See *Estoppel*, 29, et seq.

Evidence as to. See *Evidence*, IX, 13, a; *Quieting Title*, III, 10.

Opinion as to. See *Evidence*, V, 5, b.

Possession as evidence of. See *Possession*, VI.

Evidence of, power to determine sufficiency. See *Constitutional Law*, 18.

Evidence of title in action for diversion. See *Watercourses*, 424, 425.

Receipts, admissions in, as evidence of. See *Receipts*.

Certificate of purchase as evidence of title. See *Public Lands*, XIV, 13.

Possession of pueblo grant as evidence of title. See *Mexican Lands*, II, 4, q.

Evidence as to admissible under what allegation. See *Vendor and Vendee*, 336.

Vendor of personalty is competent witness to prove title. See *Witnesses*, 149.

Vendor with warranty of title is not competent witness. See *Witnesses*, 151, 152.

Presumption of title in grantee. See *Dedication*, 4.

Knowledge of one's own title. See *Notice*, I.

Bond for. See *Vendor and Vendee*, VII.

Conveyance by executor in individual name conveys title. See *Public Lands*, 696, et seq.

Where deed taken in name of third person. See *Vendor and Vendee*, IV.

Condition as to approval of. See *Mortgages*, 467.

Void deed conveys none. See *Deeds*, 208.

Equitable, stipulation for deed gives. See *Stipulations*, 27.

Perfect title. See *Vendor and Vendee*, VIII, 6.

Perfect and imperfect titles. See *Mexican Lands*, I, 23, d.

Perfect equity is equal to. See Equity, II.

Equitable, whether will support ejectment. See Ejectment, III, 4.

Equitable, when a complete title. See Partition, 53.

Defects in. See Vendor and Vendee, VIII.

Defect as defense in suit for specific performance. See Specific Performance, V, 11.

Defective, burden of proof of. See Specific Performance, 201.

Defect or failure, rescission for. See Rescission of Contracts, III, 5.

Curative act, title under, when passes. See Public Lands, XIX, 9.

False representations as to. See Vendor and Vendee, 35.

Return of bill of sale does not revert. See Sales, 283.

Decree, whether vests title. See Use and Occupation, 3.

Decision does not confer title. See Public Lands, 593.

Decree in suit to enforce trust, whether passes title. See Use and Occupation, 3.

Judgment in trespass does not transfer title. See Trespass, 86.

Levy, effect of on title to personal property. See Attachments, IV, 3.

Warranty of. See Auctions, III; Sales, VII, 3, a.

Warranty of, limitation of action for breach of. See Statute of Limitations, VI, 4, b.

Equity, jurisdiction of over. See Equity, III, 3, b.

Assumpsit, title not litigated in. See Assumpsit, I.

Trying in condemnation proceedings. See Eminent Domain, IX, 7.

Contempt, title cannot be tried in. See Contempt, V, 8.

Litigation of title in prohibition. See Prohibition, 67.

Litigation of questions of title in mandamus. See Mandamus, III, 12.

Litigation of title in action on street assessment. See Streets, XVI, 25, e.

Question of title not considered on application for homestead. See Homesteads, XVI, 9.

Power of probate court to inquire into. See Homesteads, 470; Probate Courts, 19.

Power of street commissioners to determine. See Streets, 136.

Adverse, litigation of in foreclosure. See Mortgages, XIX, 12.

Outstanding, purchase of. See Cotenancy, II, 2.

Outstanding, as defense. See Ejectment, XI, 1.

Outstanding, trespasser cannot set up. See Trespass, 44.

Outstanding, evidence of in action to quiet title. See Quieting Title, 146, 147.

Whether reinvested by failure to perform. See Contracts, IV, 7.

Quieting. See Quieting Title.

Allegations of. See Ejectment, V, 3, a; Injunctions, 154.

Slander of title. See Slander, IX.

Abstract of title. See Vendor and Vendee, VIII, 2.

Searchers of records. See Searchers of Records.

TOLL-ROADS.

See Turnpike Companies.

TOLLS.

See Bridges, IV; Harbor Commissioners.

Wharfage and dockage. See Wharves, VII. Pilotage is not toll. See Pilots and Pilotage, 3.

Illegal note for is void. See Bills and Notes, 39.

Promise to pay is nudum pactum, when. See Contracts, 13.

On logs floated from another state. See Constitutional Law, 31, et seq.

TONNAGE.

Duty on. See Wharves, VI.

TOOLS.

Exemption of. See Exemptions, II.

TORTS.

See Forcible Entry and Unlawful Detainer.

Word "debt" does not include claim arising out of. See Partnership, 300.

1. An action will not lie against one who, from malicious motives, but without threats, violence, falsehood, deception, or benefit to himself, induces another to violate his contract with the plaintiff, with whom he does not stand in the relation of master and servant, or any other personal relation. (*Boyson v. Thorn*, 98 Cal. 578.)

2. An act which does not amount to a legal injury cannot be actionable because it is done with a bad or malicious motive or intent. Malicious motives make a bad act worse, but cannot make that a wrong which in its own essence is lawful. (*Boyson v. Thorn*, 98 Cal. 578.)

3. Where damage is shown to have been caused by an unlawful act, no negligence need be proven; but it is necessary in such case to establish every element showing the act to be unlawful. (*Galvin v. Gualala Mill Co.*, 98 Cal. 268.)

4. Cause of action arising out of tort is not assignable. (*Oliver v. Walsh*, 6 Cal. 456.)

5. Recovery of verdict in action for a personal tort does not change the character of the claim to a debt which can be assigned. (*Lawrence v. Martin*, 22 Cal. 173.)

6. A party injured by joint tort feasons may bring separate suits against them, and proceed to judgment in each, and no bar arises to any of them until satisfaction is received. (*Dawson v. Schloss*, 93 Cal. 194.)

7. A wrongdoer who contributes to a damage cannot escape liability because his proportional contribution to the result cannot be accurately measured. (*Learned v. Castle*, 78 Cal. 454.)

Distinct, joinder of actions for. See Joinder and Severance of Actions, I, 2, g.

Several, injury to several parcels forms single tort. See Joinder and Severance of Actions, 75.

Joint, release of one, effect of. See Release.

Joint, new trial as to one. See Appeals, 8100.

Joint, several verdict. See Malicious Prosecution, 80.

Agent, torts of. See Agency, V, 2.

Executors de son tort. See Executors and Administrators, XIII.

False imprisonment. See False Imprisonment.

Fraud. See Fraud.

Libel. See Libel.

Malicious or wrongful attachment. See Attachments, X.

Malicious prosecution. See Malicious Prosecution.

Negligence. See Negligence.

Nuisances. See Nuisances.

Seduction. See Seduction.

Slander. See Slander.

Trespass. See Trespass.

Trover. See Trover.

Child, liability of parent for torts of child. See Parent and Child, V.

Liability of husband for torts of wife. See Husband and Wife, I, 4.

Willful omission of duty. See Offices and Officers, VII, 3.

Liability of municipality for wrongful acts of officers. See Municipal Corporations, XIII, 2.

Officers, misconduct of. See Offices and Officers, XVI, 2.

Limitations of actions of tort. See Statute of Limitations, VI, 11.

Actions arising out of torts and contracts, joinder of. See Joinder and Severance of Actions, I, 2, d.

Proper and necessary parties in actions of tort. See Parties, VII, 4.

Waiving tort to sue in assumpsit. See Assumpsit, IV.

Change of action for tort into contract, and vice versa. See Pleading and Practice, 566, et seq.

Judgment in gold coin in action of tort. See Appeals, 3034.

Affirmative relief not obtainable in action for. See Cross-complaint, 4.

Repeated or continuous, judgments in actions for. See Judgments, X, 9, g.

Damages in actions for. See Damages, V.

Judgments in, interest on. See Interest, 55.

Survival of action for. See Abatement, 40.

TOWAGE.

Liquidated damages in contract for hiring lighter. See Damages, 19, 20; Bailments, 5, et seq.

1. It seems that the towing a vessel out to sea by a steamer is the transportation of property so as to bring the case within the law of common carriers. (*White v. Steam-tug Mary Ann*, 6 Cal. 462.)

2. Whether a steam-tug is a common carrier or not, she holds herself out to the world for engagement in a business for hire, requiring prudence, skill, and the use of adequate means to perform the contracts which she undertakes, and this constitutes a stipulation of their existence, which, by clear construction, enters into the contract and forms a part of it. (*White v. Steam-tug Mary Ann*, 6 Cal. 462.)

3. The fact that the owner of the ship lost while being towed to sea was the agent for the owners of the steam-tug does not relieve the latter from any of the obligations under which they contract with others. (*White v. Steam-tug Mary Ann*, 6 Cal. 462.)

4. Fact that vessel lost while being towed out to sea is insured does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance, for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. (*White v. Steam-tug Mary Ann*, 6 Cal. 462.)

TOWNS.

See Municipal Corporations.

TOWNSHIP.

Boundary lines of. See Public Lands, 75.

TOWNSITES.

See Public Lands, XII.

TRACKS.

Railroad. See Railroads, V.

TRADE.

Contracts in restraint of. See Restraint of Trade.

TRADING PARTNERSHIP.

Formation of by mining partnership. See Partnerships, VI, 5.

TRADEMARKS.

I. Definition and Object of.

II. Recording With Secretary of State.

III. Right to at Common Law.

IV. Territorial Limits of.

V. What Constitutes, and What may be Used as.

VI. Infringement of and Remedies for.

I. Definition and Object of.

1. A trademark is a word or device adopted or devised and used by the manufacturer or vendor of goods to designate the origin or ownership of his goods. (*Burke v. Cassin*, 45 Cal. 467.)

2. The object of a trademark is to indicate by its own meaning, or by association, the origin or ownership of the article to which it is applied. (*Eggers v. Hink*, 63 Cal. 445.)

II. Recording With Secretary of State.

3. Since the adoption of the codes, no one can acquire the exclusive right to the use of a name or trademark in this state, except by filing it for record with the secretary of state, as provided by section 3197 of the Political Code. (*Whittier v. Dietz*, 66 Cal. 78.)

III. Right to at Common Law.

4. Right of property in trademark is recognized by common law, and does not in any manner depend for its inceptive existence or

support upon statutory law, although its exercise may be limited or controlled by statute. (*Derringer v. Plate*, 29 Cal. 292.) Cited 86 Cal. 79.

5. By the common law the manufacturer of goods, or the vendor of goods for whom they have been manufactured, has a right to designate them by some peculiar name, symbol, figure, letter, form, or device, whereby they may be known in the market as his own and be distinguished from other like goods manufactured or sold by other persons; and, when original with him, the owner of such mark will be protected by the courts in its exclusive use, but only so far as it serves to indicate the origin and ownership of the goods to which it is attached, to the exclusion of such symbols, figures, and combination of words which may be interblended with it, indicating their name, kind, or quality. (*Falkinburg v. Lucy*, 35 Cal. 52.) Cited 39 Cal. 504; 45 Cal. 481.

IV. Territorial Limits of.

6. The right of property in a trademark is not limited in its enjoyment by territorial bounds, but may be asserted and maintained wherever the common law affords remedies for wrongs, subject only to such statutory regulations as may properly be made concerning the use and enjoyment of other property. (*Derringer v. Plate*, 29 Cal. 292.)

V. What Constitutes, and What may be Used as.

7. A label, at common law, is not a trademark, but when a manufacturer or seller of goods adopts a label to distinguish his goods from those of another, he is entitled to be protected in its use, and others will be enjoined from using the same, or a colorable imitation thereof. (*Burke v. Cassin*, 45 Cal. 467.)

8. Name of manufacturer or seller of goods may be used as a trademark, and the adoption of the same name as a trademark for goods of the same kind, by a person of a different name, is "piracy of a trademark." (*Burke v. Cassin*, 45 Cal. 467.)

9. Words which are merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trademark. (*Schmidt v. Brieg*, 100 Cal. 674.)

10. A word, figure, etc., in common use, which indicates the name, nature, kind, quality, or character of the article cannot be appropriated as a trademark. (*Burke v. Cassin*, 45 Cal. 467.)

11. Terms in common use to designate a trade or occupation, in connection with other words indicating that a particular class of merchandise of the same general description is specially dealt in, cannot be exclusively appropriated by any one as a trademark. (*Choynski v. Cohen*, 39 Cal. 501.) Cited 100 Cal. 678.

12. By the terms "peculiar name, letters, marks, devices, figures, or other trademark or name," as used in the statute concerning trademarks, (*Hittell's Laws*, art. 7134), is not meant the established and proper names by which the "articles" to which they are attached and by which they are known in the market, nor

something indicating their actual kind, character, or quality, but by them is meant, as the subjects of protection against infringement, something new, not before in use—something of the manufacturer's own invention, or first put to use by him—something peculiar to him, and not common to him and others—something which is intrinsically foreign to the "articles" themselves, and only serves to designate them because it has been fancifully put to that use, in disregard of all natural relations. (*Falkinburg v. Lucy*, 35 Cal. 52.)

13. The statute does not vest in the manufacturer or vendor, as the case may be, any exclusive property in the "articles" manufactured or sold, nor in their names or the words which most aptly and properly describe them; and even if such were the proper construction of the statute, it would be void for want of power in the legislature to enact it. (*Falkinburg v. Lucy*, 35 Cal. 52.)

14. If the statute goes beyond the common law, and embraces within its protection matter which relates to kind, character, or quality of "articles," it is not perceived why it does not trench upon the law of copy and patent rights, and is therefore void. (*Falkinburg v. Lucy*, 35 Cal. 52.)

15. It is suggested, but not decided, that the terms used in the statute, to wit: "To designate it as an article of peculiar kind, character, or quality," were inadvertently incorporated in it under a mistaken notion of the functions of a trademark, and that in respect of those terms the statute can have no intelligible operation. (*Falkinburg v. Lucy*, 35 Cal. 52.)

16. Word "schnapps," which has long been in use to designate gin manufactured at Schiedam, cannot be appropriated as a trademark for gin in the United States, even if its former use had been confined to Europe. (*Burke v. Cassin*, 45 Cal. 467.)

17. Word "Schiedam" cannot be adopted as a trademark, because it has long been used to denote quality or kind. (*Burke v. Cassin*, 45 Cal. 467.)

18. The word "aromatic," when employed to express one of the qualities of liquor, cannot be protected as a trademark. (*Burke v. Cassin*, 45 Cal. 467.)

19. Where there is nothing in the complaint upon which a judgment awarding to plaintiff the exclusive right to manufacture the beverage of "Sarsaparilla and Iron" as against the defendants can be predicated, the plaintiffs are not entitled to a decree restraining the defendant from preparing, putting up, offering for sale, or selling the beverage in question, or from selling it under the name of "Sarsaparilla and Iron," and such injunction is erroneous. (*Schmidt v. Brieg*, 100 Cal. 672, 674.)

20. The words "Sarsaparilla and Iron" are generic terms, used for the purpose of indicating not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself, and are not the proper subjects of exclusive use as a trademark. (*Schmidt v. Brieg*, 100 Cal. 672, 674.)

21. Sign placed over man's place of business with row of beer barrels painted on it, and the letters "P. B." stamped on the head of the barrels, and the words "Depot of the Celebrated" placed above, and the words "Philadelphia Beer" placed below, the barrels, would relate only to the description of the beverage dealt in by him, and cannot be protected as a trademark. (*Eggers v. Hink*, 63 Cal. 445.)

22. Name established for hotel is a trademark, in which the proprietor has a valuable interest, which a court of equity will protect against infringement. (*Woodward v. Lazar*, 21 Cal. 448.)

What may be used as at common law. See ante, III.

Words "Antiquarian book store" cannot be appropriated as trademark. See *Choynski v. Cohen*, 39 Cal. 501.

VI. Infringement of and Remedies for.

23. The statute of 1863 concerning trademarks does not take away the common-law remedy for the protection of the same from those who do not register their trademark according to the provisions of the act. (*Der-ringer v. Plate*, 29 Cal. 292.)

24. An imitation of a label used on goods is such a colorable representation thereof as is calculated to produce in the mind of the purchaser of goods the impression that they were manufactured or sold by the person whose label has been imitated. (*Burke v. Cassin*, 45 Cal. 467.)

25. No trader can adopt a trademark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled. (*Schmidt v. Brieg*, 100 Cal. 672, 674.)

26. Where a person has established a business in the manufacture and sale of goods, and carries it on under a given name or with a particular mark, whether the words and devices adopted by him constitute a trademark or not, another person cannot assume the same name or mark, or the same with a slight alteration, in such a way as to induce others to deal with him in the belief that they are dealing with the person who has given a reputation to the name or mark. (*Pierce v. Guittard*, 68 Cal. 68.)
Cited 100 Cal. 680.

27. Independent of the validity of trademarks a competing business firm is bound to deal fairly in placing its rival article upon the market; and, if it clearly appears that the defendant has closely imitated the plaintiff's label and style, and has done obvious damage to his business through unlawful business methods employed, the plaintiff is entitled to relief upon the ground of fraud, and may enjoin such imitation. (*Schmidt v. Brieg*, 100 Cal. 672, 674.)

28. An intentional imitation of a trademark which is so close as to be likely to deceive an ordinary purchaser will be enjoined, notwithstanding the fact that an attentive inspection would disclose differences in many respects between the two trade-

marks. (*Sperry v. Percival Milling Co.*, 81 Cal. 252.)
Cited 100 Cal. 680.

29. In this case, the plaintiff's trademark of "Germea" held to have been infringed by defendant's trademark of "Golden Eagle Germ." (*Sperry v. Percival Milling Co.*, 81 Cal. 252.)

30. A slight change in the name, such as cutting off the final letter, or prefixing "Von" or "Van" to it, so long as it is an evident imitation, does not prevent its use from being piracy of the trademark. (*Burke v. Cassin*, 45 Cal. 467.)

31. W. leased a lot of land, on which he erected a building, in San Francisco, and used it as a hotel, to which he gave the name of "What Cheer House." Before the lease expired, he purchased an adjoining lot, upon which he erected a large building, and for a time occupied both buildings as the "What Cheer House," the principal sign being removed to the one last built. He soon after surrendered the leased lot, with the building which was on it, and continued the business, under the same name, entirely in the building which he had erected on the lot he had purchased. Two months afterwards, the defendants, having purchased the first mentioned lot and building, opened there a hotel, under the name of "The Original What Cheer House"—the word "original" being painted on the sign in small letters, and in a manner calculated to deceive the public into the supposition that it was the same name. In an action by W. against defendants, to restrain them from using the name of "What Cheer House" for their hotel, held, that plaintiff was entitled to the relief sought, and that defendants should be enjoined from the use of the name. (*Woodward v. Lazar*, 21 Cal. 448.)

32. In an action to recover damages for an alleged invasion, by imitation, of the plaintiff's trademark for the sale of a certain washing powder, which consisted of a highly colored picture representing a wash-room, with tubs, baskets, clothes-lines, etc., also the following legend interblended with it: "Standard Soap Company, Erasive Washing Powder," followed by directions for the use of the "washing powder," and the place of manufacture, the alleged imitation by defendants consisted of a picture and label which were the same as in plaintiff's alleged trademark only in the use of the words "washing powder," the directions for the use of the powders, and in use of paper of the same color as that used by plaintiff, held, that this did not constitute an infringement of plaintiff's trademark. (*Falkinburg v. Lucy*, 35 Cal. 52.)
Cited 66 Cal. 78.

33. The doctrine of laches, as applied to claimants in the matters of trusts, does not apply with full force to cases of infringement of trademarks or labels; and where the action was commenced about two years after plaintiff discovered the infringement, and the record shows that the plaintiff had, prior to the bringing of this action, brought suit against other infringers, and that the defendants had notice of the prior litigation, and

had changed the color of their label on account of a decision in the court below, the plea of laches is not supported by the facts. (*Schmidt v. Brieg*, 100 Cal. 672, 674.)

84. In an action to recover damages for a violation of plaintiff's trademark, the profit actually realized by defendants from the sales of the spurious article under the simulated trademark is a proper measure of damages, but the recovery of the plaintiff is not limited to the amount of such profits. (*Graham v. Plate*, 40 Cal. 593.)

Piracy of name used as trademark. See ante, V.

One guilty of fraud cannot restrain. See Injunctions, 12.

TRAINING SHIP.

San Francisco, training ship in. See San Francisco, VII.

TRAINS.

Management of. See Railroads, VIII.

TRANSCRIPT.

Appeal, transcript on. See Appeals, VI, 4.

TRANSFER.

Public funds, transfer of. See Supervisors, V, 4; Treasurers.

TRANSFER OF CAUSES.

See Removal of Causes.

Jurisdiction on. See Jurisdiction, III.

Mandamus to compel trial in state court, See Mandamus, 75, 76.

From one department to another, presumption. See Appeals, 2821.

Amendment of complaint on. See Taxation, 639.

TRANSITORY ACTIONS.

See Venue, I, 3, a.

TRANSLATION.

As evidence. See Evidence, 29.

TRANSPORTATION.

Commissioners of. See Railroads, IX.

TRANSPOSITION.

Words, transposition of. See Statutes, VIII, 10.

TRAVELERS.

Rights of. See Constitutional Law, II; Slavery.

Turnpike, rights of travelers over. See Turnpike Companies, VI.

TRAVELING EXPENSES.

See Attorney General, 8.

Officers, traveling expenses of. See Offices and Officers, XII, 2.

TRAVERSE.

See Pleading and Practice, IX.

TREASURERS.

Los Angeles, treasurer of, liability of. See Los Angeles, 4.

Is not officer of executive department. See Controller, 1.

Residence of treasurer at county seat. See Offices and Officers, 78.

Absence from state for sixty days. See Offices and Officers, 200, et seq.

1. The treasurer of state could not, prior to January 1, 1865, transfer to the general fund any money in the fund created by the act of April 4, 1864, providing for the sale of lands for the relief of the volunteers of this state enlisted in the service of the United States. (*People ex rel. Livingston v. Pacheco*, 29 Cal. 210.)

Controller, settlement with county treasurer. See Controllers, IV.

Supervisors, settlements of, with. See Supervisors, 11.

Payment of delinquent tax into treasury. See Taxation, XII, 4, m.

Duty of, in reference to payment of fines. See Home for the Inebriates.

Deposit with, by clerk of court. See Clerk of Court, 7, 8.

Fines by justice to be paid to. See Fines.

2. If a county treasurer receives money as belonging to the county, he is afterward estopped from denying that it is the money of the county. (*McKee v. Monterey County*, 51 Cal. 275.)

Cited 70 Cal. 215.

3. Where a county treasurer, in compliance with the requirements of section 80 of the County Government Act, made entries in his books charging himself, as treasurer, with a certain sum of money as having been received from a license tax-collector on account of license taxes, and delivered a receipt to the auditor showing that he had received the money from the collector, and on the first Monday of each month thereafter during his term made his sworn statement to the auditor that this amount of money was in his hands as county treasurer, he is estopped from questioning his receipt, and will not be permitted to exonerate himself from liability to the county by showing that the sworn statements were false, and that instead of requiring the collector to pay the money into the treasury, he had taken his individual promise to pay it at a subsequent date; and he and his sureties are liable to the county for the loss of the money. (*County of San Luis Obispo v. Pettit*, 100 Cal. 442.)

4. Money in county treasury is presumptively money of county, and money illegally withdrawn by the treasurer will be held to belong to the county until the contrary is shown. (*Sacramento County v. Bird*, 31 Cal. 66.)

5. The treasurer is not an independent officer in respect to his charge and control of the county funds, but, in his disbursements, acts on the warrants of the auditor on claims audited by the board of supervisors. (*People ex rel. Tallant v. Fogg*, 11 Cal. 351.)

6. In such a case the treasurer is not, in respect to interest money, placed in any direct relation with the creditors; and he is not in-

trusted with a mere ministerial duty of holding it or paying it to them on demand. (*People ex rel. Tallant v. Fogg*, 11 Cal. 351.)

7. "Act requiring treasurer to retain certain moneys," approved January 27, 1852, does not affect money in the treasury, prior to its approval. (*McDougal v. Roman*, 2 Cal. 80.)

8. Under the act of 1850, concerning the office of county treasurer, and that of 1857, concerning county warrants, a county treasurer is not required to pay all warrants which the county auditor may draw upon him, but only such as are founded on an order made by the board of supervisors for payment of a demand legally chargeable against the county and allowed by the board. (*Keller v. Hyde*, 20 Cal. 593.)

Cited 22 Cal. 461; 23 Cal. 451.

9. It is the duty of a county treasurer to pay an auditor's warrant upon the school fund, if it is regular and legal in form, unless he has notice that it is not based upon a lawful demand, or has notice of facts sufficient to put an ordinarily prudent treasurer upon inquiry, which, if diligently prosecuted, would lead to a discovery of the illegality of the claim upon which the warrant was founded. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

10. A finding that a payment by a county treasurer was made "upon what purported to be a county auditor's warrant," raises the presumption, in the absence of any finding to the contrary, that the warrant was genuine, and complied with the law in form and substance. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

Warrants under contract for support of convicts, payment of. See Prisons, 26.

Demand on county treasurer, what is not. See Shorthand Reporters, 4.

Claims of volunteer companies. See Military Companies, 4.

Order for payment of minor's expenses. See Criminal Law, 1084.

Trustees of state library, power to draw on treasury. See State Library, 6.

Duty to pay compensation of shorthand reporters. See Shorthand Reporters.

Final judgment on bill to enjoin payment by. See Injunctions, 337.

Unauthorized payment of Dupont street warrant. See Streets, 137, et seq.

Duty in relation to payments for swamp land. See Swamp and Overflowed Lands, XI.

Duty in relation to payment of bonds. See Bonds, 62, et seq.

11. A finding that the warrant upon which the alleged wrongful payment was made cannot be found does not raise any inference against the treasurer that the payment was wrongful, where it is shown that the trial was three years after the payment of the warrant. In such a case it will be presumed that the warrant was in the hands of the auditor, or lost, or destroyed, or otherwise disposed of by him. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

12. A finding that all of the alleged wrongful payments "were made by said treasurer

wrongfully and without right or authority, and in violation of his duty as such treasurer," consists of mere conclusions of law, and even if it could be regarded as a statement of facts is too general and indefinite. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

13. A finding that a warrant, which it is claimed the county treasurer had no right to pay, "was fraudulent and wholly without right," is not a finding that the treasurer was guilty of any fraud or wrong. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

14. A finding that the "treasurer did not, during his said term of office, keep any books as required by subdivision 3 of section 70 of the County Government Act," does not state any particulars in which the treasurer's books were deficient, and does not show that any deficiency or irregularity in his book-keeping contributed to the loss of money paid on an unlawful warrant. (*Los Angeles v. Lankershim*, 100 Cal. 525.)

15. The legislature having by a general law fixed the compensation of county treasurers at a certain percentage on money received by them, boards of supervisors have no power to allow such treasurers a salary out of the county funds, unless specially authorized by law, and the act of March 20, 1855, creating such boards, confers no such authority. (*County of San Joaquin v. Jones*, 18 Cal. 327.)

16. If a county treasurer, upon his settlement with the controller of state, is allowed by the latter officer to retain money for official or other services beyond the compensation to which he is entitled, it is his duty to pay such money into the county treasury and turn it over to his successor in office. He cannot claim the money on the ground that the controller exceeded his authority in making the allowance. (*McKee v. Monterey County*, 51 Cal. 275.)

Commissions allowed to by controller, recovery of. See Controllers, 16, et seq.

Sacramento, compensation of treasurer. See Sacramento, 11.

Withholding salary as fraud. See Bankruptcy and Insolvency, 287.

17. Money paid by the treasurer without authority of law is recoverable by the state. (*People v. Chapman*, 61 Cal. 282.)

Deed of to city slip property. See San Francisco, 292.

Has no immunity from legal process. See Controllers, 15.

Punishing for contempt. See Contempt, 84.

Enjoining. See Injunctions, II, 11.

Mandamus against. See Mandamus, II, 12, e.

County treasurer may purchase swamp land. See Swamp and Overflowed Lands, 77.

County, money with, taxation of. See Taxation, IV, 7.

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Bond of, construction of. See Bonds, 86.

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Bond, complaint in action on. See Bonds, 125.

Plaintiff in suit on bond. See Bonds, 116.

Interest is recoverable in action on bond. See Bonds, 138.

County, attachment in action on bond of. See Attachments, 88.

Sureties of, liability of. See Suretyship, 45, et seq.

Sureties of, county judge could not discharge. See Suretyship, 8.

Action by treasurer of unincorporated associations. See Unincorporated Associations, IX.

Corporation, treasurer of, unauthorized expenditure. See Corporations, VIII, 3.

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TRESPASS.

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Trespasser cannot question existence of corporation. See Corporations, 64.

Trespasser cannot question nonperformance of conditions. See Deeds, 353.

Bare trespass does not justify homicide. See Criminal Law, 2130.

Court of equity should not license trespass. See Watercourses, XII, 6.

Agreement to indemnify against is void. See Indemnity, 1.

I. What Constitutes and for What Acts Lies.

1. To maintain trespass *de bonis asportatis*, evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action. (*Rider v. Edgar*, 54 Cal. 127.) Cited 91 Cal. 122; 19 Or. 455.

2. Where owner of real property, having right to possession, makes forcible entry, the person in the wrongful possession cannot maintain an action of trespass; the remedy provided by statute for a forcible entry is exclusive. (*Canavan v. Gray*, 64 Cal. 5.) Cited 8 Utah, 411.

3. One who enters wrongfully upon the land of another is a trespasser, and he does not cease to be such so that an action will not lie against him for a trespass, because he is allowed for one month after his entry to remain in the undisturbed possession. (*Meyers v. Farquharson*, 46 Cal. 190.)

4. Consent of plaintiff to defendant's entry, if it is merely voluntary, may be withdrawn at any time before the actual entry of the defendants. (*Brownell v. Fisher*, 57 Cal. 150.)

5. A person who has been permitted to occupy land for a particular purpose, whether as a servant or licensee, becomes a trespasser by abusing the privilege, or committing any act hostile to the interests of his employer or licensor. (*Rogers v. Duhart*, 97 Cal. 500.)

Destruction of another's property to save one's own. See post, III, 7.

Seizure by sheriff, when joint trespass. See Executions, 410.

One entering under color of title is not trespasser. See Ejectment, 234.

One destroying property to stop conflagration or save life. See Eminent Domain, 300, 301.

Injury to several parcels from single tort. See Joinder and Severance of Actions, 75.

Mistake, effect of. See Mines and Mining, 307, et seq.

United States marshal, trespass by. See United States Marshals.

Officer refusing to deliver office to successor. See Offices and Officers, 59.

Turnpike company, trespass on property of. See Turnpike Companies, 51, 52.

Animals, trespassing. See Animals, II.
Dam, trespass upon. See Watercourses, XI, 6.

II. Right of Self Protection Against; Trespass on Public Property.

6. One who is in the possession of a tract of land has the right to resist and expel an intruder if the resistance and expulsion take place before the possession of the intruder has become actual and peaceable. (*Hoag v. Pierce*, 28 Cal. 187.)

7. The owner of property in the possession of the same has a right to use so much force as is necessary to prevent a forcible trespass. (*People v. Payne*, 8 Cal. 341.)
Cited 10 Cal. 87; 60 Cal. 4.

8. Where a trespasser goes with the intent and with the means to commit felony, if necessary to accomplish the end intended, the owner of the property may repel force by force. (*People v. Payne*, 8 Cal. 341.)

9. The owner of real estate has a right to remove a trespasser from his premises, using, however, only so much force as may be necessary for that purpose. (*McCarty v. Fremont*, 23 Cal. 196.)

10. Where trespasser enters a workshop for no purpose of business, and unlawfully and violently interferes with the machinery therein, the case is within the rule that a man's house is his castle, and that he has the right to defend it against an intruder with all the force reasonably necessary to the defense, though he would be liable for the result of a brutal use of force beyond what the occasion warranted; but in determining such a question due allowance must be made for the difficulty which a reasonable man would have in measuring, under exciting circumstances, the exact amount of force necessary. (*Townsend v. Briggs*, 99 Cal. 481.)

11. In an action to recover damages for an alleged wrongful and malicious assault, where it appears without conflict of evidence that the plaintiff entered the shop of defendant without having any business there and immediately commenced, in a rude and wrongful manner, unlawfully and violently to manipulate machines therein so as to put them in danger of being destroyed or broken, whereupon the defendant peremptorily ordered him to let the machines alone, and to leave the premises, and threatened to pound his head if he did not go, and upon his refusal to leave the shop, picked up a mallet and struck him upon the head, an instruction to the jury that "before the defendant would have been authorized to use force to remove plaintiff from his place of business he should have requested plaintiff to depart" is erroneous, in assuming that the evidence left some doubt as to whether the defendant told the plaintiff to leave before any force was used, or in giving the jury the impression that there should have been a request couched in some polite and mild-mannered language different from that used by the appellant. (*Townsend v. Briggs*, 99 Cal. 481.)

12. An instruction in such a case that "if the jury finds from the evidence that the plaintiff, at the time of the injury complained of, was not trying to injure the defendant nor his property, then any force used against plaintiff" was wrongful, is erroneous and misleading as tending to convey an impression to the jury that if, when the force was used, the plaintiff was not at that very moment engaged in the act of injuring the defendant's property, the defendant had no right to use force, whereas the defendant, as owner of the shop, had a right to expel plaintiff as a trespasser when he refused to leave after the trespass upon the machinery, and to use sufficient force to do so, though plaintiff was not at the moment when the force was used handling the machines or engaged in the act of injuring the defendant or his property. (*Townsend v. Briggs*, 99 Cal. 481.)

Discharged employee, trespass by, right of removal. See Master and Servant, 174.

Animals trespassing, impounding. See Criminal Law, XXI, 32.

False imprisonment in removal of trespasser. See Criminal Law, 1559.

Railroad, trespassers on and duty towards. See Railroads, VIII, 2.

Trespassers, duty towards. See Negligence, III, 1.

13. If city owns and is seized and possessed of land, and an act is passed by the legislature appointing commissioners to improve it, and authorizing them to take possession of it, the commissioners may, in a careful manner, remove from the premises one who occupies the same as a servant and employee of the city, and may also remove his buildings. (*Swift v. Canavan*, 52 Cal. 417.)

Right of occupant of public land against trespasser. See Public Lands, 126.

Public lands, right of president to remove trespassers on. See Public Lands, VIII, 12.

III. Actions for.

1. What Action is for Trespass.

14. Action for forcibly entering upon land owned and possessed by plaintiff, and tearing down a dwelling-house and outbuildings and carrying away the materials of which they were built, and for digging up and carrying away fruit trees, is *quare clausum fregit*. (*Uttendorfer v. Saegers*, 50 Cal. 496.)
Cited 2 S. Dak. 284.

2. Limitation of.

15. An action for damages for trespass committed on the lands of the plaintiff by the defendant, in entering upon the land with large bands of sheep, and thereby injuring and depasturing the land, is not subject to the limitation of sixty days prescribed by the statute of February 4, 1874, entitled "An act to protect agriculture, and to prevent the trespassing of animals upon private property" in certain counties, the action not being founded upon that statute; but it is governed by section 338 of the Code of Civil Procedure, which provides that an action for trespass to real property may be commenced within three years after the cause of action has accrued. (*Zumwalt v. Dickey*, 92 Cal. 156.)

3. By and Against Whom Lies; Possession, Necessity and Sufficiency of, and Evidence as to.

16. Tenant for years cannot maintain action to recover damages for a trespass upon the leased premises, unless he was in the actual possession thereof at the time of the alleged entry of the defendant; and for the purpose of showing that the plaintiff was not so in the possession, evidence is admissible, without a plea of the statute of limitations, that the defendant then was, and for many years prior thereto had been, in the adverse possession thereof. (*Heilbron v. Heinlen*, 72 Cal. 371.) Cited 78 Cal. 383.

Lessor of personal property cannot maintain trespass. See *Trover*, 6.

Tenant may sue for. See *Landlord and Tenant*, 88.

17. One who is in possession of land as a sole devisee, pending the settlement of the estate of the testator, may maintain an action in her individual name to recover damages for a trespass committed thereon after the death of the testator, and while she is in possession. (*Colton v. Onderdonk*, 69 Cal. 155.)

18. An action cannot be maintained against A to recover damages for a trespass to real estate committed by B. (*Stevenson v. Lick*, 1 Cal. 128.)

Against United States marshal. See *Removal of Causes*, 4.

By sheriff, demand, necessity of. See *Sheriffs*, 60, 61.

Settler on public lands may maintain. See *Public Lands*, 166, et seq.

Trespass does not survive. See *Abatement*, 41.

Trustee may sue for. See *Trusts and Trustees*, 117.

Executor may sue for trespass. See *Executors and Administrators*, 262.

19. In trespass quare clausum fregit it is incumbent on the plaintiff to show that he was in the actual possession of the premises at the time of the alleged trespass, and the defendant may prove, under a general denial, that a tenant of the plaintiff was in the actual possession. (*Uttendorfer v. Saegers*, 50 Cal. 496.) Cited 72 Cal. 374.

20. An action cannot be maintained for a trespass committed on land when the plaintiff is totally disseised, and the defendant is in the adverse possession thereof. (*Raffetto v. Fiori*, 50 Cal. 363.) Cited 51 Cal. 530; 72 Cal. 374; 3 Mont. 222, 223.

21. Possession of personal property is sufficient to maintain an action of trespass against a mere wrongdoer. (*Golden Gate M. & M. Co. v. Joshua Hendy M. W.*, 82 Cal. 184.)

22. Possession in plaintiff is sufficient to enable him to maintain trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. (*McCarron v. O'Connell*, 7 Cal. 152.)

23. Defendant cannot inquire into good faith of plaintiffs' possession in an action for

trespass or nuisance. (*Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.)

24. It is error in the court to instruct the jury that the delivery of the deed and the cutting of firewood on the tract was sufficient evidence of possession, when the question in dispute is whether the premises in dispute were within the lines of the deed. The cutting of timber, by itself, was neither possession nor title as against the owner. (*Stockton v. Garfias*, 12 Cal. 315.)

4. Assignment of Claim for.

25. A claim for damages caused by a trespass on land is assignable, and the assignee may maintain an action to recover the same. (*More v. Massini*, 32 Cal. 590.)

5. Jurisdiction Over; Pleadings in; Joinder or Severance of Actions; Continuous Trespass.

Jurisdiction of district courts over. See *Jurisdiction*, XI, 1, d.

Real estate, trespass to, jurisdiction over. See *Justices of the Peace*, IV, 5, b.

Venue of action to restrain threatened injury to property. See *Venue*, I, 3, f.

26. In an action to recover damages for injuries to real property, where the plaintiff shows facts which would entitle him to relief in a common-law action on the case, the fact that he alleges that he was in possession is immaterial, and the allegation may be treated as surplusage. (*Rogers v. Duhart*, 97 Cal. 500.)

27. A complaint in an action to recover damages for trespass and destruction of property, which alleges that defendant entered upon plaintiff's premises and tore down parts of a building thereon, and caused great damage to plaintiff's goods and business, and rendered the premises unfit for plaintiff's business, and thereby broke up and destroyed said business, and that the same was done in a threatening and terrorizing manner, so that plaintiff suffered great mental and physical distress, and that she was damaged thereby in the sum of five thousand dollars, is demurrable for uncertainty, on the ground that it does not specifically allege the value of the property destroyed, nor the amount of damage done to the premises, nor the amount of damage done to plaintiff's business, each of which should have been alleged. (*Mallory v. Thomas*, 98 Cal. 644.)

28. If the plaintiff, in a complaint for cutting down trees on his land, does not aver that the defendant cut them down knowingly, willfully, or maliciously, he cannot recover the treble damages given in the two hundred and fifty-first section of the old Practice Act. (*Barnes v. Jones*, 51 Cal. 303.)

29. In trespass for cutting down trees, without an averment that the cutting was willful and malicious, the plaintiff may recover simple damages. (*Barnes v. Jones*, 51 Cal. 303.)

Change of cause of action from assumpsit to trespass. See *Pleading and Practice*, 567.

Averment of easement will support trespass. See *Easements*, 64.

30. Where a trespass is continuous, as in the trespass of cattle upon land day after

day, the party injured is not authorized to divide it up into several causes of action, either with respect to the means by which the trespass was committed or the time of its commission, so as to maintain separate actions or proceedings for each cause of action. (*De La Guerra v. Newhall*, 53 Cal. 141.)

31. The eighth section of the act of February 4, 1874, "To protect agriculture, and to prevent the trespassing of animals upon private property in certain counties," does not contemplate a recovery of a part of the damages for the trespass by proceeding under the act, and another part of the damages for a portion of the same trespass by means of an action at law. (*De La Guerra v. Newhall*, 53 Cal. 141.)

32. In a complaint for trespass, the plaintiff claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages; defendant demurred on the ground that two causes of action were improperly joined; and the court below sustained the demurrer. Held, that this was error. (*Tendesen v. Marshall*, 3 Cal. 440.)

33. A complaint in trespass averring that defendant wrongfully entered upon the plaintiff's close and removed earth and gravel therefrom, destroyed ornamental shade-trees growing thereon, tore off and removed the boards from an entire wall of plaintiff's building, darkened plaintiff's windows, and erected another building on the premises, to the damage of plaintiff in a specified sum, is not demurrable for misjoinder of causes of action nor for ambiguity. (*Strohlburg v. Jones*, 78 Cal. 381.)

Distinct trespasses joinder of actions for. See Joinder and Severance of Actions, I, 2, g.

Joint trespass where property wrongfully seized on execution. See Sheriffs, 62.

Repeated trespass, judgment is no bar to subsequent action. See Judgments, 343.

Presumption as to continuance. See Presumptions, 8.

34. The failure of the owner of the land upon which the alleged trespass was committed to comply with certain statutory requirements in connection with his land, conceding it to be a defense to an action for the trespass, cannot be taken advantage of by demurrer to a complaint in which no such fact is alleged. (*Triscony v. Brandenstein*, 66 Cal. 514.)

35. A complaint merely setting forth in detail the circumstances attending an unauthorized and aggravated trespass on the close of plaintiff, which have a material bearing on the question of damages, is not demurrable for ambiguity as to what the damages arose from. (*Razzo v. Varni*, 81 Cal. 289.)

36. In an action of trespass, where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage. (*Rowe v. Bradley*, 12 Cal. 226.)

37. In an action for trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a

sufficient traverse of the allegation of possession for the defendants to aver, in their answer, that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiffs. (*McCormick v. Bailey*, 10 Cal. 230.)

Attaching contract justifying trespass to answer, failure to deny. See Pleading and Practice, 362.

Evidence, what not admissible under general denial. See post, III, 8.

Cross-complaint for. See Cross-complaint, 10, 11.

Cross-complaint alleging that trespasses were committed contrary to provisions of statute. See Cross-complaint, 33.

6. Parties.

38. According to common-law rules, a plaintiff cannot, by mere notice, bring in parties not sued in an action for trespass, when there is no pretense that they were trespassers. (*Pico v. Webster*, 14 Cal. 202.)

Joint action against husband and wife. See Husband and Wife, 511.

Striking out names of parties in action for. See Parties, 94.

Intervention in. See Intervention, 21.

7. Justification of Trespass.

39. In trespass *quare clausum fregit*, where the complaint avers matter of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defense. (*Pico v. Colimas*, 32 Cal. 578.)

40. In trespass *quare clausum fregit* an answer justifying merely because the defendant has an easement on the land contains no defense. (*Pico v. Colimas*, 32 Cal. 578.)

41. An answer justifying trespass on ground of official duty should aver that the defendant is an officer, and what his official duty is. If there are other defendants, and the answer is intended to apply to them, it should state that they entered in aid of the officer. (*Pico v. Colimas*, 32 Cal. 578.)

42. Action of trespass cannot be defended on the ground that it was authorized by the officers of a levee district, where the corporation had no authority to direct the act without the consent of the plaintiff. (*Brownell v. Fisher*, 57 Cal. 150.)

43. The fact that a party is engaged in the construction of a work requiring a large pecuniary expenditure will not justify a trespass on private property. (*Weimer v. Lowery*, 11 Cal. 104, 112.)

44. It has never been held that a trespasser upon lands in the possession of another can justify his acts by setting up an outstanding title in which he has no privity. (*Weimer v. Lowery*, 11 Cal. 104, 112.)

45. A may not, in order to save his own property, destroy property of B, however urgent the necessity. (*Turner v. Tuolumne County Water Co.*, 25 Cal. 397.)

Great value of acts done will not justify trespass. See Watercourses, 61.

Trespasser cannot plead an estoppel. See Estoppel, 101.

8. Evidence in; Variance.

46. If the complaint, in an action to recover damages for an alleged trespass, avers that the defendant unlawfully entered on plaintiff's land and tore down a gate, the gist of the action is the entry, and the removal of the gate is mere matter of aggravation; and if the plaintiff fail to prove the gist, he cannot recover for the matter of aggravation. (*Pico v. Colimas*, 32 Cal. 578.) Cited 19 Nev. 408.

47. In an action of trespass, evidence that the plaintiff had made an application to the defendants' agent to oversee the work constituting the alleged trespass is competent as tending to show his consent. (*Burnett v. Fisher*, 57 Cal. 152.) Cited 89 Cal. 243.

48. In trespass for driving cattle upon land, alleged in the complaint to be "in the quiet and peaceable possession" of plaintiffs "claiming the same as in fee simple," plaintiffs proved their possession and actual occupancy. Defendants then offered deeds from I. to M., and from M. to plaintiffs, and from M. to defendants, of an undivided half interest in the land, to show that plaintiffs and defendants were tenants in common, deriving title from the same source, and hence that the action did not lie. Plaintiffs objected on the ground that they relied solely on possession. Objection sustained, and deeds ruled out. Held, that the ruling was right, there having been no derangement of title from its source, nor any proof to connect the holding of the parties with the deeds, or to show that possession was taken or claimed under them. (*Woodbeck v. Wilders*, 18 Cal. 131.)

49. If circumstances of aggravation be shown, in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions. (*Dorsey v. Manlove*, 14 Cal. 553.) Cited 7 Nev. 78.

50. Evidence is admissible to show that a forcible trespass on the close of plaintiff was accompanied by circumstances of insult and fright to plaintiff's wife which caused her illness for a long period, and to show that she was in condition where fright might have caused her illness. (*Razzo v. Varni*, 81 Cal. 289.)

51. A question put to one of the tenants as to what the leasehold was worth to them, if erroneous is harmless, if the answer plainly indicates that the value of which he testified was the market value. (*Hawthorne v. Siegel*, 88 Cal. 159.)

52. The plaintiff, in an action *quare clausum fregit*, may prove several distinct trespasses committed at various times, if, in his complaint, he alleges the time of one trespass and that others were afterward committed. (*Brady v. Bronson*, 45 Cal. 640.)

53. Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the de-

fendants, and recover against such defendant. Aliter, if a joint trespass has been proved. (*McCarron v. O'Connell*, 7 Cal. 152.)

54. In trespass for driving cattle upon plaintiff's land, and by means thereof trampling on, consuming, and destroying the grass and herbage, and tearing up, subverting, and spoiling the soil, held, that plaintiff could ask a witness: "What would have been the injury to the land by turning in two hundred head of cattle on the 12th, 13th, and 14th of April, and letting them remain in six or seven days?" and "What would it be worth to turn in two hundred or three hundred cattle, and pasture them for six or seven days in the field spoken of?" that the questions as put and answered amounted to little, if any thing, more than an estimate of the value of the pasturage or grass. (*Woodbeck v. Wilders*, 18 Cal. 131.)

55. In an action for the taking of personal property—the plaintiff alleging ownership and possession of the property, and a taking by the defendant, and the answer consisting of a general denial—no evidence is admissible except as to the ownership and taking. (*Pico v. Kalisher*, 55 Cal. 153.)

56. The plaintiff is not entitled to recover damages for a trespass *quare clausum fregit*, alleged in his complaint to have been committed on his own land, when, in fact, the trespass was committed upon another piece of land. (*Doherty v. Thayer*, 31 Cal. 140.)

Possession, evidence as to. See ante, III, 3. Evidence as to profits. See post, 72.

Trespasser cannot set up outstanding title. See Ejectment, 233.

Agreement as to boundaries as evidence in trespass. See Boundaries, 28, 29.

Trespass to mining claim, vendor selling interest after action accrued, competency of. See Witnesses, V, 8, c, E.

9. Instructions.

57. Where, in an action of trespass—plaintiff having attempted to prove malice and a willful effort to injure on the part of defendants, with a view of claiming vindictive damages—the court, on its own opinion of the insufficiency of the evidence, instructed the jury that malice was not proved, and that they could not, therefore, find exemplary damages, held, that the instruction was proper, the character of the proofs warranting it. (*Selden v. Cashman*, 20 Cal. 56.)

Possession, instruction as to. See ante, 24. Instructions as to damages. See post, 80.

10. Verdict, Damages, and Judgment.

58. Where, in an action of trespass, the jury find generally "for the plaintiffs," it is a finding upon all the issues raised by the pleadings material to a recovery by the plaintiffs, and concludes the parties upon a question of title, where it was distinctly put in issue. (*McLaughlin v. Kelly*, 22 Cal. 211.)

59. Where the complaint alleges a trespass on a dam-site and dam in the process of erection, and on the site for a canal and the canal thereon surveyed and commenced, that the defendants, with force and arms, expelled the plaintiff from said property, and has since

kept him thus expelled, and demands a judgment for damages only, a verdict for the plaintiff for damages does not necessarily find all the facts averred in the complaint. Such verdict does not necessarily find a continual withholding of possession or other facts entitling plaintiff to an injunction. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.)

60. In an action of trespass, the question of damages is a question particularly for the determination of a jury. (*Drake v. Palmer*, 4 Cal. 11.)

61. Where a trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the measure and amount of damages are matters for the jury alone. (*Gorman v. Southern Pac. Co.*, 97 Cal. 1.)

62. A party committing a trespass can be made liable for such damages only as are the proximate result of the trespass. (*Story v. Robinson*, 32 Cal. 205.)

63. Damages for a trespass, where there is no malice, must be limited to the direct and natural consequences of the act, and must also be such as are susceptible of computation. (*Selden v. Cashman*, 20 Cal. 56.)

64. The measure of damages in an action for trespass on a mining claim is the amount of money that will fully compensate the plaintiff for all detriment proximately caused by the trespass. (*Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406.) Cited 19 Nev. 414.

65. The trespass being proved, the law presumes nominal damages; and the defendant cannot justify his act, and obtain a verdict, by showing that the value of the ore extracted from the claim was less than the expense of extracting it. (*Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406.)

66. In an action for removal of vault, forming part of the realty, from the plaintiff's premises, the court found and gave judgment for its market value. Held, that the measure of damages was the value of the article as it was in place as a part of the realty, immediately preceding its removal, and not what it would sell for in open market if removed from the building. (*Rhoda v. Alameda County*, 58 Cal. 357.) Cited 9 Mont. 108.

67. Measure of damages recoverable for trespass upon leased premises, and forcibly changing the construction thereof, by which the tenants were compelled to abandon their place of business and to vacate the premises, is the amount which will compensate them for all the detriment proximately caused thereby, whether it could have been anticipated or not. (*Hawthorne v. Siegel*, 88 Cal. 159.)

68. In estimating the damages done to the lessees, it is proper for the jury to consider evidence concerning the expenses of the enforced removal of the lessees from the premises to another place of business, and also evidence regarding any damage which might result from their being deprived of the use of

improvements abandoned by them. (*Hawthorne v. Siegel*, 88 Cal. 159.)

69. The tenants are entitled to be compensated for the amount of any loss occasioned by their being compelled to abandon the leased premises, in respect to the value of their leasehold interest for the unexpired term, and the value of any advantages constituting a part of or directly growing out of the leasehold interest, and such damages are not in their nature remote or speculative. (*Hawthorne v. Siegel*, 88 Cal. 159.)

70. The loss of a water privilege which the tenants had acquired for the purposes of their business, and which the trespass of the defendant caused them to abandon, is an injury proximately caused by the trespass, for which they should be compensated. (*Hawthorne v. Siegel*, 88 Cal. 159.)

71. In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property, with interest. (*Dorsey v. Manlove*, 14 Cal. 553.) Cited 1 Mont. 166, 167.

72. In an action of trespass for wrongfully taking goods, the plaintiff cannot recover the value of the goods and also the profits which might have been made on their sale; hence, the testimony of a witness, who, after examining the sale books of the plaintiff, based his calculation of the loss sustained upon an estimate of the profits (according to the previous rates) which might have been made but for the trespass, is improper, and should not have been allowed. (*Butler v. Collins*, 12 Cal. 457.)

73. In an action to recover damages for a trespass alleged to have been committed by destroying the plaintiff's fences, and by trampling and destroying the grain and herbage growing on his land, the plaintiff cannot recover for injury done to the grain by the cattle of a third person, for any period of time after the original entry and trespass. (*Berry v. San Francisco etc. R. R. Co.*, 50 Cal. 435.)

74. In an action for a trespass, committed by breaking into the plaintiff's rooms and destroying property, the jury, in estimating damages, must not take into consideration the plaintiff's counsel fees and other expenses growing out of the litigation. (*Falk v. Waterman*, 49 Cal. 224.)

75. Exemplary or vindictive damages cannot be recovered for a trespass not malicious in its character. (*Selden v. Cashman*, 20 Cal. 56.)

76. The rule of damages depends on the presence or absence of circumstances of aggravation in the trespass, as fraud, malice, or oppression. (*Dorsey v. Manlove*, 14 Cal. 553.)

77. In the absence of such circumstances, the rule is compensation merely, and this refers solely to the injury done to the property, and not to collateral or consequential damages resulting to the owner. And the measure of relief is matter of law. (*Dorsey v. Manlove*, 14 Cal. 553.)

78. Where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under cir-

cumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages. (*Dorsey v. Manlove*, 14 Cal. 553.) Cited 18 Cal. 325.

79. The rule of compensation merely, as distinguished from the rule of exemplary damages, applies, even though the writ under which the officer committed the trespass were void, there being no circumstances of aggravation. (*Dorsey v. Manlove*, 14 Cal. 553.)

80. In an action to recover for a wanton and malicious trespass, in which special facts in aggravation of damages are alleged in the complaint, it is not error to refuse to instruct the jury that the plaintiff is only entitled to such damages as she may have sustained in the temporary use and occupation of the premises, and not to special damages. (*Waters v. Dumas*, 75 Cal. 563.)

81. If the complaint, in trespass for cutting down trees, contains an averment that the defendant cut them knowingly and maliciously, and it is found that the timber was cut down through a mistake as to where the boundary line was, the plaintiff cannot recover treble damages. (*Barnes v. Jones*, 51 Cal. 303.)

82. Where a trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the measure and amount of damages are matters for the jury alone. Courts will not disturb the verdict on the ground that the damages are excessive, unless the amount of damages is so disproportionate to the injury proved as to make it clear that the jury acted under the influence of passion or prejudice. (*Russell v. Dennison*, 45 Cal. 337.) Cited 97 Cal. 7.

83. Under the circumstances of this case, a verdict for one thousand dollars damages for a forcible trespass, reduced by a conditional order refusing a new trial to five hundred dollars, held not excessive. (*Razzo v. Varni*, 81 Cal. 289.)

84. Where the evidence as to the number of trespassing cattle and as to the damage done by them is conflicting, and the evidence on the part of the plaintiffs tended to show greater damage than was awarded to them, the verdict will not be set aside as excessive on account of the fact that the premises trespassed upon were afterward subleased for one-half more rent than was paid for them by the lessee. (*Brumley v. Flint*, 87 Cal. 471.)

85. Where the plaintiff was entitled to nominal damages only for trespass to land, and the jury gave a verdict for the entire value of the land, held, that the verdict was excessive. (*Stockton etc. Co. v. Stockton etc. R. R. Co.*, 53 Cal. 11.)

Allegations as to damages. See ante, III, 5. Insufficient denial of damages. See ante, III, 5.

Damages recoverable under complaint. See ante, III, 5.

Evidence as to damages in trespass. See ante, III, 8.

Malicious trespass, exemplary damages. See *Sheriffs*, IV, 3, w.

Measure of damages for. See *Turnpike Companies*, 62.

Mining claim, trespass to, damages. See *Mines and Mining*, X, 8.

Profits, recovery of in action for tearing down fence. See *Damages*, 38.

Presumption of damages. See *Mines and Mining*, 302, 303.

Instructions as to damages on court's own motion. See ante, III, 9.

86. A plaintiff who recovers in trespass *quare clausum fregit* does not thereby become invested with the title or succeed to the interest which the defendant in such action may have had in the property. (*Williams v. Sutton*, 43 Cal. 65.)

87. Where, in an action for damages to real property by trespass and for an injunction, the judgment was that the plaintiffs were and had been the owners of the land, and were entitled to the possession thereof, and also for damages, an injunction, and for costs, held, that so much of the judgment as declared the plaintiffs to have been the owners or entitled to the possession of the real estate was erroneous, and the same should be struck out. (*Berry v. Ivanice*, 53 Cal. 653.)

Nature of judgment in. See *Cotenancy*, 173. Judgment not reversed on appeal upon judgment-roll, when. See *Appeals*, 1925.

TRIAL.

See *Pleading and Practice*, XX.

What constitutes a trial. See *New Trial*, I. Definition of. See *Definitions*, 14.

Proceeding to determine degree of crime on plea of guilty is a trial. See *Criminal Law*, 1849.

Hearing and determination of motion for new trial is a trial. See *New Trial*, 535.

Impanneling jury is part of. See *Jury and Jurors*, 71.

Pleading and practice. See *Pleading and Practice*.

Questions relating to. See *Pleading and Practice*, XX.

Trial after ruling on demurrer without issue joined. See *Pleading and Practice*, X, 17.

Action is pending during appeal. See *Abatement*, I, 5.

Criminal. See *Criminal Law*, XVIII.

Jury trial. See *Jury and Jurors*, I, 2.

Notice of. See *Justices of the Peace*, V, 3.

Ordering judgment without. See *Prohibition*, III, 5, d.

Manner of trial before referees. See *Reference*, VIII.

Former, evidence at. See *Evidence*, IX, 10.

Judgment against one brought in after trial. See *Judgments*, XII, 13.

Findings. See *Findings*.

Dismissal at or after. See *Dismissal*, III.

Continuance. See *Continuance*.

Removal of causes. See *Removal of Causes*.

Place of. See *Venue*.

Want of fair or impartial trial. See *Venue*, II, 6, a.

New trial. See *New Trial*.

TRIERS.

Appointment of, on challenge for bias. See Jury and Jurors, VII, 5, e.

TROVER.

I. Distinction Between Trover and Detinue or Replevin.

II. What Constitutes Conversion; for what Acts, for and Against Whom Action Lies.

III. Demand Before Suit.

IV. Parties.

V. Pleadings.

VI. Evidence.

VII. Trover for the Value of Property Recovered in Replevin.

VIII. Verdict, Damages, and Judgment.

IX. Findings.

See Detinue, 2.

Survival of action for. See Abatement, 40.

Limitation of actions for conversion. See Statute of Limitations, VI, 9.

Conversion, action for is not barred by discharge in insolvency. See Bankruptcy and Insolvency, 346.

Conversion of stock, disconnected fraud, arrest for. See Arrest, 7.

By executor, presumptions as to instructions in. See Appeals, 2886.

I. Distinction Between Trover and Detinue or Replevin.

1. In what is called trover, present possession of the property is immaterial, but the relief sought in claim and delivery cannot be had from the defendant unless he is then possessed of the property, which fact constitutes an essential element in the cause of action. (*Ricciotto v. Clement*, 94 Cal. 105.)

2. The distinction between an action to recover possession of personal property, with damages for its detention, and one to recover damages for its wrongful conversion, is as broad as between the common-law actions of detinue and trover. In the latter case the rule of damages is prescribed by section 3336 of the Civil Code, and in the former by section 667 of the Code of Civil Procedure. (*Kelly v. McKibben*, 54 Cal. 192.)

II. What Constitutes Conversion; for What Acts, for and Against Whom Lies.

3. The action of trover being founded on a conjoint right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant, nor is it necessary to be shown that he has applied it to his own use. If he exercises a dominion over the thing, whether for the use of himself or another in exclusion or in defiance of the plaintiff's right, this is in law a conversion. (*Dodge v. Meyer*, 61 Cal. 405.) Cited 79 Cal. 88.

4. Plaintiff must either have possession or immediate right to possession of the property

to entitle him to recover. (*Middlesworth v. Sedgwick*, 10 Cal. 392.)

Instruction as to what constitutes conversion. See Executors and Administrators, 300.

Conversion of stock, action for. See Corporations, IV, 3, IV, 6, c.

5. To enable a plaintiff to recover for the conversion of personal property taken by a wrongdoer, he must have the general ownership or a special ownership in the goods; but one having possession merely is the owner as against a wrongdoer, and a complaint averring possession and a right of possession in the plaintiff, without a direct averment of ownership or title, is sufficient to support a judgment in favor of the possessor against a trespasser. (*Rosenthal v. McMann*, 93 Cal. 505.)

Title, trover depends on the legal title. See Mortgages, 999.

6. Lessor of personal property, such as sheep, cannot maintain trespass or trover for an injury done to the property by a stranger during the term of the lease and while the lessee is in the actual possession of the property. (*Triscony v. Orr*, 49 Cal. 612.)

7. In an action for the conversion of wheat, where the plaintiff claimed title thereto by virtue of his ownership of the land, subject to a lease to a third party, and the defendant claimed the wheat by virtue of a lease executed by him to such third party prior to the acquisition of the land by the plaintiff, it appearing that the plaintiff's grantor had theretofore leased the premises to the defendant by an unrecorded lease, and that he in turn had leased them to such third party for an interest in the crops, but that the plaintiff knew nothing of the lease to the defendant, or that defendant was the lessor of such third party when he purchased the land, having been informed merely that he was not to disturb the possession of such third party, and that he was to receive the rents and issues of the land, and that a clause was inserted in the deed to the plaintiff in the covenant of quiet enjoyment, making it "subject, however, to a lease," to such third party, but naming no lessor and containing no reservation of the rents to be paid by such third party, the plaintiff is entitled to judgment for the conversion of the wheat by the defendant. (*Garber v. Gianella*, 98 Cal. 527.)

8. At common law, trover lay only for tangible property; but in our system the action has been developed into a remedy for the conversion of every species of personal property. (*Payne v. Elliot*, 54 Cal. 339.)

9. Conversion is gist of action of trover, and without conversion neither possession of the property, negligence, or misfortune will enable the action to be maintained. (*Rogers v. Huie*, 2 Cal. 571.)

10. To render the defendant liable to the action of trover, he must have converted the property to his own use; and if not, then any other act, to amount to a conversion, must be done with a wrongful intent, either expressed or implied. (*Rogers v. Huie*, 2 Cal. 571.)

11. Formal demand for the possession of personal property, and a refusal to deliver it,

is not necessarily proof of conversion, but only evidence which may or may not establish the conversion. (*Balch v. Jones*, 61 Cal. 234.)

12. If defendant took plaintiff's property, and refused to return it on demand, there is a conversion, and an allegation of these facts sufficiently shows a conversion. (*Arzaga v. Villalba*, 85 Cal. 191.)

13. An action of trover may be maintained against a trespasser, who is cutting timber, as soon as the timber is cut. (*Sampson v. Hammond*, 4 Cal. 184.)

14. Where defendant contracted with factor who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership, and a conversion of the property. (*Scriber v. Masten*, 11 Cal. 303.)

15. A notice of the ownership of the goods which would put the defendant on inquiry is sufficient. (*Scriber v. Masten*, 11 Cal. 303.)

16. The defendants, who were commission merchants in San Francisco, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over the proceeds to him. The wheat belonged to the plaintiff, and the action was brought to recover its value. The supposition of the defendants as to the ownership of the wheat grew out of the circumstances under which they received it, but the mistake was not caused by any act of the plaintiff. On a review of the facts, held, (1) that the defendants were not justified in supposing that the wheat belonged to Williams; (2) that, even if they were, such a supposition does not exempt them from liability to the plaintiff for selling his wheat and paying the proceeds to another. (*Cerkel v. Waterman*, 63 Cal. 34.) Cited 90 Cal. 131.

17. A complaint alleging that on a day specified the plaintiff was the owner of a saloon and indebted to various persons; that one of the defendants, by representing that he would sell it for a sum largely in excess of the plaintiff's indebtedness, and out of the proceeds pay the indebtedness and turn over the balance to the plaintiff, induced him to execute a bill of sale of the saloon, and caused the name of another defendant and a money consideration to be inserted in the bill of sale without the plaintiff's knowledge or consent; that the plaintiff was then financially embarrassed, sick, and in such a condition mentally as to be unable to attend to business, and relied wholly upon the representations made, without reading the bill of sale or knowing its contents; that he never intended to transfer the property to the defendant named in the bill of sale, who paid no money therefor and never owned or claimed any interest therein except as the tool of the other defendant, who converted it to his own use, and refused, and still refuses, to account or make payment therefor; and that at the time of the transfer the saloon contained merchandise, fixtures, and furniture of a specified value, states a cause of action for a conversion, and not for the enforcement of a trust. (*Hoove v. Kreling*, 93 Cal. 136.)

Cotenant, trover by. See Cotenancy, II, 11.

Executor may maintain. See Executors and Administrators, 263.

Pledgee, action by for conversion. See Pledges, VII, 4.

Action by mortgagee for conversion. See Mortgages, 1001, et seq.

Mortgagor, trover by against mortgagee. See Mortgages, 998, et seq.

Conversion by bailee. See Bailments, 3, et seq.

Conversion of stock by pledgee. See Corporations, 180, et seq.

Conversion of promissory notes by pledgee. See Bills and Notes, 327.

Consignee, when liable for conversion. See Bills of Lading, 14.

Sale of stolen certificates of stock by broker. See Brokers.

Guardian, conversion by. See Guardian and Ward, V, 7.

Warehousemen, conversion by. See Warehousemen.

III. Demand Before Suit.

18. If the taking of personal property is tortious, no demand is necessary before bringing suit. (*Ham v. Henderson*, 50 Cal. 367.)

19. In an action for conversion against one contracting with a factor for goods which he is informed belongs to another no demand is necessary previous to bringing suit. (*Scriber v. Masten*, 11 Cal. 303.) Cited 55 Cal. 560.

Demand and refusal as conversion. See ante, II.

Demand before action for fixtures wrongfully removed is not necessary. See Fixtures, 41.

IV. Parties.

20. All the parties in interest should join in an action of trover. (*Whitney v. Stark*, 8 Cal. 514.)

Apportionment of damages where part owner sues. See post, 58.

V. Pleadings.

21. A complaint in trover for taking personal property must aver a conversion of the same. An averment that the defendant unlawfully, fraudulently, willfully, and maliciously took the property is not an averment of a conversion. (*Triscony v. Orr*, 49 Cal. 612.)

22. Under our practice, in an action for taking and carrying away goods, an allegation in the complaint that the defendant took and carried away the goods is equivalent to an averment that the defendant converted the goods to his own use. (*Hutchings v. Castle*, 48 Cal. 152.)

23. Averment of demand and refusal is not the equivalent of an averment of conversion. (*Balch v. Jones*, 61 Cal. 234.)

24. An averment in a complaint that a defendant unlawfully took personal property is a mere averment of law, and an averment that he fraudulently took it, without stating the facts which constitute the fraud, is not a

statement of an issuable fact. (*Triscony v. Orr*, 49 Cal. 612.)
Cited 81 Cal. 159; 3 Utah, 324.

25. In an action to recover damages for the conversion of certain personal property, an objection to the complaint that it does not describe the property alleged to have been converted with sufficient particularity must be taken by special demurrer. (*Kelly v. Murphy*, 70 Cal. 560.)

26. In an action to recover certain mining stock and the dividends thereon, or their value, the complaint alleged that on a specified time the defendant bought for account of the plaintiff "six hundred dollars' worth" of stock, and that at two subsequent times she bought "fifteen hundred dollars' worth" of other stock. The complaint alleged and the court found other facts showing a conversion of the stock and dividends by the defendant. Held, that the allegations of the value of the stock were sufficient to support a judgment in favor of the plaintiff for the value, and that such a judgment was proper. (*Herrlich v. McDonald*, 80 Cal. 460.)

27. If, in an action of trover, the complaint, in addition to alleging a taking and carrying away of the goods, avers a detention of the same, and it appears on the trial that the defendant had sold the goods before the suit was brought, and the plaintiff recovers judgment only for the value of the goods, the defendant is not injured by the allegation of a detention. (*Hutchings v. Castle*, 48 Cal. 152.)

28. In an action for the conversion of personal property, the complaint alleged attorney's fees as an element of damage. Held, that this allegation may be regarded as surplusage, and the jury will be presumed to have disregarded it. (*McDonald v. McConkey*, 57 Cal. 325.)

29. In an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual averments, went on to detail the manner of the seizure with the incidents occurring on the street at the time, and every thing done by defendants, plaintiff, and the "crowd," relating to or constituting the evidence of the wrongful conversion. Held, that this narration should have been stricken out, on motion, as irrelevant and redundant matter. (*Green v. Palmer*, 15 Cal. 411.)

Special damages must be averred. See post, 45.

VI. Evidence.

30. In determining what was the value of the property at the time of the conversion, evidence is admissible of the cost of the property, not as showing the value conclusively, but as a circumstance to aid in arriving at the value at the time in question. (*Angell v. Hopkins*, 79 Cal. 181.)

31. Certain questions asked a witness on the trial of an action for damages for the conversion of certain wood, held irrelevant. (*Stokes v. Balaam*, 73 Cal. 154.)

32. In an action to recover damages for the conversion of certain cattle, the evidence reviewed, and held to support the findings in favor of the plaintiff. (*Arnaz v. Gassen*, 73 Cal. 618.)

Evidence, when sufficient to support verdict. See post, 51.

Findings as to expenses incurred in pursuit of property, when not sustained by evidence. See post, 48.

Evidence as to value of plaintiff's time in pursuit of property. See post, 47.

Action for conversion, variance, when immaterial. See Variance, 25.

Evidence, sufficiency of to sustain findings. See post, IX.

VII. Trover for the Value of Property Recovered in Replevin.

33. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention; defendants paid the damages, but the property was not restored. Plaintiff then brought an action of trover to recover the value; defendants plead the former recovery as a bar. Held, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not having been satisfied. (*Nickerson v. California Stage Co.*, 10 Cal. 520.)

34. The judgment in the action of replevin was, as between the parties, conclusive evidence of the plaintiff's title to the chattel in question, and it only remained for the court, in this action, to determine its value. (*Nickerson v. California Stage Co.*, 10 Cal. 520.)

35. It is not necessary to the right of the plaintiff in trover, to recover the value of property sued for in replevin suit, but not restored, that the value of the property in the replevin suit should have been found, and an alternative judgment for the return of the property or the payment of its value. (*Nickerson v. California Stage Co.*, 10 Cal. 520.)
Cited 24 Cal. 151; 89 Cal. 504.

VIII. Verdict, Damages, and Judgment.

36. The amendment of section 3336 of the Civil Code, which took effect July 1, 1874, operated upon the trial of an action brought for the conversion of personal property which took place after the amendment took effect, although the conversion had occurred prior to the amendment. (*Tulley v. Tranor*, 53 Cal. 274.)

37. Prior to the amendment of January 22, 1878, to the Civil Code, section 3336, the defendant converted certain stock of the plaintiff. Held, upon appeal from a judgment rendered subsequently to the amendment in an action for the conversion of the stock, commenced prior to the amendment, that the plaintiff was entitled to recover the damages prescribed in the section as amended, to wit, the highest market value of the stock at any time between the conversion and the verdict. (*Dent v. Holbrook*, 54 Cal. 145.)

38. The expression of section 3336, "the detriment caused by the wrongful conversion of personal property is presumed to be," indicates that it was intended to establish a legal presumption to operate, and which could only operate, at the trial of the cause. (*Tulley v. Tranor*, 53 Cal. 274.)

39. The right to resort, at the trial of an action for the conversion of personal property, to an arbitrary presumption of detriment was not, previous to the trial at which the presumption would have arisen, a "right acquired" within the meaning of section 286 of the amendments to the Civil Code, which took effect July 1, 1874. (*Tulley v. Tranor*, 53 Cal. 274.)

40. In an action for the conversion of personal property the plaintiff, if he recovers, may elect to take judgment, either for the value of the property at the time of the conversion, with interest from that time, or, where he has prosecuted the action with reasonable diligence, for the highest market value of the property at any time between the conversion and the verdict, without interest, and, if he fails to elect, the court may award the damages under either rule. (*Barrante v. Garratt*, 50 Cal. 112.) Cited 6 Dak. 288; distinguished 54 Cal. 194, 195.

41. The rule is that when property converted has a fixed value the measure of damages is that value, with legal interest from the time of its conversion; when the value is fluctuating the plaintiff may recover the highest value at the time of its conversion, or at any time afterward. (*Douglass v. Kraft*, 9 Cal. 562, cited 33 Cal. 119, 34 Cal. 132, 39 Cal. 420, 421, 76 Cal. 70; *Hamer v. Hathaway*, 33 Cal. 117, cited 34 Cal. 645, 39 Cal. 420, 421.)

42. In actions for the recovery of personal property of a fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest from the time such value was estimated. (*Page v. Fowler*, 39 Cal. 412.)

Cited 46 Cal. 321, 322; 63 Cal. 374; 8 Nev. 354; 1 N. Dak. 235, 236.

43. Action for the conversion of ten shares of stock in a mining company. The conversion took place on March 26, 1879, and the action was brought on May 23d following. The plaintiff used reasonable diligence in bringing the action, and was entitled, under section 3336 of the Civil Code, to recover as damages for the conversion "the highest market value of the property. at any time between the conversion and the verdict, without interest." (*Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 629.) Cited 6 Dak. 288.

Rule of damages in trover. See ante, I.

44. The market value of property unlawfully taken, as a measure of damages for the conversion, is to be ascertained at the place of conversion. (*Hamer v. Hathaway*, 33 Cal. 117.)

45. If the plaintiff, in an action to recover possession of a mare and damages for her detention, claims damages because the animal had lost flesh in consequence of having been kept upon short pasturage, and because she was detained during the breeding season, these facts must be specially averred as a ground of damages. (*Stevenson v. Smith*, 28 Cal. 102.)

46. Plaintiff is not entitled to recover the

money expended by him in pursuit of the property. (*Kelly v. McKibben*, 54 Cal. 192.) Cited 60 Cal. 639; 85 Cal. 193.

47. Where the plaintiff sought to recover damages for time spent in pursuit of the property, in addition to the value of the property converted, and the trial court, with the consent of the plaintiff, reduced the verdict of the jury to the actual value of the property, the admission of evidence as to the value of the plaintiff's time spent in pursuit of the property, even if error, is not prejudicial. (*Mortimer v. Marder*, 93 Cal. 172.)

48. In an action to recover damages for the taking of personal property the court found as direct and proximate damages that the plaintiff necessarily expended in the pursuit of the property certain sums as fees and necessary traveling expenses of his counsel, and as wages and traveling expenses of an agent necessarily employed. Held, that this finding was not sustained by the evidence. (*Fairbanks v. Williams*, 58 Cal. 241.)

Damages, money expended in recovery of property. See *Replevin*, 102.

Time and money spent in pursuit of property as damages. See *Sheriffs*, 156.

Allegations as to attorneys' fees. See ante, V.

Attorneys' fees in, presumption. See *Appeals*, 2875.

49. In an action for the unlawful taking of personal property interest is to be allowed as a matter of legal right from the time at which the value is estimated. (*Hamer v. Hathaway*, 33 Cal. 117.) Distinguished 76 Cal. 70.

50. If the findings in an action to recover possession of personal property state the value of the property, and the date of the taking, the plaintiff is entitled to interest on such value as damages, without a special finding to that effect. (*Kelly v. McKibben*, 54 Cal. 192.) Cited 63 Cal. 374.

51. In an action to recover damages for the wrongful conversion of personal property, where the evidence showed that the property was second hand and had no market value, and the testimony on behalf of the plaintiff, which was not objected to, showed when the property was purchased by the plaintiff, and what it then cost her, how it had been used, its condition and depreciation, and its value at the date of the wrongful conversion, a verdict for the plaintiff assessing the damages at the valuation given is sufficiently supported by the evidence. (*Mortimer v. Marder*, 93 Cal. 172.)

Interest as damages on conversion. See *Interest*, 89.

52. Exemplary damages may be recovered in an action to recover the property itself as well as in an action for its conversion. (*Arzaga v. Villalba*, 85 Cal. 191.)

53. The fact that the plaintiff has obtained possession of the property under provisional process does not affect the question of exemplary damages. (*Arzaga v. Villalba*, 85 Cal. 191.)

54. In case of malice or oppression the jury

may give damages by way of punishment for the offense, in addition to the actual damages. (*Arzaga v. Villalba*, 85 Cal. 191.)

55. The action was brought to recover the possession of thirteen hundred and fifty-three sacks of wheat, or the value thereof, alleged to be worth seventeen hundred and fifty dollars, and one hundred and fifty dollars damages and costs. The defense was a general denial and justification under a writ of attachment. The action was tried before a jury, and the following verdict was rendered: "We, the jury in this cause, find a verdict for the plaintiff, Mrs. Garlick, and assess her damages at eighteen hundred dollars." On motion of defendant the court set aside the verdict and granted a new trial on the ground that the verdict was against law and the evidence, and on the ground that the damages were excessive, etc. Held (1), the verdict in failing to find the value of the property did not cover the issues submitted to the jury; (2) the verdict for eighteen hundred dollars damages was a verdict for damages in excess by sixteen hundred and fifty dollars of the damage claimed by the plaintiff; (3) for these reasons the verdict was against law and the evidence, and it was properly set aside by the court on the motion of defendant for a new trial. (*Garlick v. Bower*, 62 Cal. 65, cited 62 Cal. 180, 68 Cal. 6; *Vandeford v. Foster*, 62 Cal. 179, cited 68 Cal. 6.)

Exemplary damages in. See Damages, 78.
Double damages in action for conversion. See Executors and Administrators, 301.

56. In an action to recover possession of personal property the plaintiff may recover its value in United States legal tender notes. (*Tarpy v. Shepherd*, 30 Cal. 180.)

57. One unlawfully converting property does not sustain any injury if the jury, in an action to recover possession of the same, find its value in United States legal tender notes. (*Tarpy v. Shepherd*, 30 Cal. 180.)
Cited 31 Cal. 80.

58. Where a part owner sues, *ex delicto*, and the objection of defect of parties is not set up in the answer, the damages should be apportioned at the trial. (*Whitney v. Starke*, 8 Cal. 514.)

Damages, measure of in. See Replevin, 96.
Conversion of gold, damages. See Mines and Mining, 299.

Conversion, action by pledgee for damages, measure of. See Pledges, VII, 4.

59. Where plaintiff, being indebted, was fraudulently induced to execute a bill of sale to the defendant, who represented that he would dispose of the property and pay the debts and return the proceeds, but instead converted the property and refused to account, and where it appears that the defendant was one of the creditors of the plaintiff who were proposed to be secured by the bill of sale, and that judgment was rendered only for the difference between such indebtedness and the value of the property, together with the money received by such defendant from the business after the transfer was made, the judgment is more favorable to the defendant than he is entitled to, and he cannot complain

thereof upon appeal. (*Hoowe v. Kreling*, 93 Cal. 136.)

Judgment in ejectment where damages claimed, no bar to, when. See Ejectment, 454.

Directing judgment on appeal. See Appeals, 3076.

IX. Findings.

60. A finding that hay, alleged to have been converted by defendant to his own use, was worth twenty dollars per ton, without also finding the number of tons converted, does not entitle the plaintiff to a judgment. (*Troy v. Clarke*, 30 Cal. 419.)

61. A judgment for the defendant for costs, upon findings in his favor in an action for conversion of goods, is not rendered erroneous by the absence of an express finding on the issue of value and damage. (*Diefendorff v. Hopkins*, 95 Cal. 343.)

62. In an action for the conversion of stock of a railroad company, held, that the findings are sufficient to support the judgment, and are sustained by the evidence. (*O'Neil v. Donahue*, 57 Cal. 226.)

Sufficiency of evidence to support findings. See ante, VI.

Findings as to expenses incurred in pursuit of property are not sustained by evidence when. See ante, 48.

Conversion, finding as to when a conclusion of law. See Findings, 7.

Special finding as to interest. See ante, 50.

Affirmative defense, failure to find on, when not prejudicial. See Findings, 156.

TRUST DEEDS.

I. What Constitutes; Nature and Construction of; Title Passing by.

II. Execution and Delivery; Validity of; Action to Annul Judgment Setting Aside.

III. Enforcement of; Sale Under; Foreclosure and Redemption.

IV. Termination of Trust and Reconveyance.

Equity follows the law in relation to. See Equity, 7.

Compensation of trustees. See Trusts and Trustees, 197.

Priority between and mechanic's lien. See Mechanics' Liens, 65.

Extension of time as consideration. See Contracts, 23.

For cemetery purposes. See Cemeteries.

Endowment fund, interest on. See Interest, VIII.

Appointment of successor on death or resignation of trustee. See Trusts and Trustees, VII, 10.

I. What Constitutes; Nature and Construction of; Title Passing by.

Assent of trustee is not necessary. See Trusts and Trustees, 33.

1. Instrument by which one conveys realty to another to secure the debt of a third person is not a mortgage, but is, in fact, a deed of trust. (*Bateman v. Burr*, 57 Cal. 480, cited 95 Cal. 438; *Durkin v. Burr*, 60 Cal. 360, cited 71 Cal. 478, 8 Mont. 45.)

2. An instrument which conveys to a grantee named therein the legal title to property described, upon certain trusts which it declares, and which confers upon him the power in execution thereof to sell the property thus conveyed and transmit the legal title to his grantee, is a trust deed. (*More v. Calkins*, 95 Cal. 435.)

3. The fact that such deed was made directly to a creditor of the grantor as trustee, and not to a third party, is immaterial upon the question as to whether the conveyance should be treated as a mortgage or a deed of trust, as such question must depend upon the essential character of the instrument as shown by its terms, and not upon whether the grantee is a creditor whose debt is to be paid out of the proceeds to arise from the execution of the trust which is declared. (*More v. Calkins*, 95 Cal. 435.)

4. Where the owner of a tract of land executes an absolute deed of it to another person to enable the other person to mortgage the same to raise money to pay off liens against it the transaction is not a mortgage, but passes the fee which the grantee holds in trust for the grantor. (*Green v. Butler*, 26 Cal. 595.)

5. G., to secure the payment of his three promissory notes, made severally to C., F., and S., executed an instrument whereby he conveyed to C. certain real estate, upon the condition that if he, G., should pay the notes according to their tenor, the conveyance should be void; but providing that if default should be made in the payment, then it should be lawful for C., after notice, to enter upon and sell the premises and apply the proceeds to the payment, which sale should be a bar both in law and equity against G. and his representatives. Held, that this instrument was a mortgage with an ordinary power of sale, and not a trust deed, and that its character as a mortgage was in no respect changed because the mortgagee was a trustee for himself and other parties. (*Cormerais v. Genella*, 22 Cal. 116.) Cited 57 Cal. 483.

6. A deed of trust in the nature of a mortgage is a conveyance of the property to the trustee merely as collateral security for the payment of a debt, upon an express condition of defeasance, with power to sell the property and pay the debt in case of a default by the trustor. (*Powell v. Patison*, 100 Cal. 234.)

7. An absolute conveyance of property by a debtor to his creditor, in trust, that he may sell the same, and out of the proceeds discharge the debt, is, in effect, only a mortgage with a power of sale, which the grantee may treat as such; and, if he proceeds to foreclosure, his relation to the property is the same as that of a mortgagee in the foreclosure of an ordinary mortgage. (*Felton v. Le Breton*, 92 Cal. 457.)

8. A deed conveying land to a trustee who has no beneficial interest, with power to sell and lease, will be most strongly construed against the trustee, and most favorably to the beneficiary under the trust. (*Sprague v. Edwards*, 48 Cal. 239.)

Construction of law as to. See *Conflict of Laws*, 4, 5.

Lick trust deed, construction of. See *Trusts and Trustees*, III.

Power of sale in. See *post*, III.

9. An absolute deed of trust is a conveyance of the property to a trustee for the purpose of selling it to pay debts, the effect of which is to pass an unconditional and indefeasible title to the trustee for the purposes of the trust. (*Powell v. Patison*, 100 Cal. 234.)

10. A deed of trust of land given as security for the payment of an indebtedness conveys the legal title. (*Partridge v. Shepard*, 71 Cal. 470.)

11. A deed of trust of land, authorizing the trustee, upon default of payment of a debt, to sell and convey the land described, is not a mortgage requiring foreclosure, but a conveyance of the legal title. (*Grant v. Burr*, 54 Cal. 298, cited 57 Cal. 483, 60 Cal. 361, 66 Cal. 286, 71 Cal. 478, 88 Cal. 443, 8 Mont. 45; *Durkin v. Burr*, 60 Cal. 360, cited 71 Cal. 478, 8 Mont. 45.)

12. A deed to a trustee of certain lands described as lands the legal and equitable title to which was then in the trustee does not convey to the trustee lands to which he did not then have either the legal or equitable title, but which he had previously conveyed to one of the grantors; such lands are excluded from the grant by implication, and the clear limitation of the grant will not be controlled by a general description of quantity qualified by the words "more or less," which represent the trustee as holding in trust land equal in quantity to that owned by him before the previous conveyance to such grantor. (*Watson v. Sutro*, 86 Cal. 500.)

13. A trust deed of real estate, taken by a person who loans money to the owner, defeasible on payment of the debt, is something more than a mortgage. It conveys the legal title and an interest in the land. (*Fuquay v. Stickney*, 41 Cal. 583.)

Interest of grantor may be taken in execution. See *Executions*, 84.

Equitable interest of grantor is subject to attachment. See *Attachments*, 131.

Property subject to may be homesteaded. See *Homesteads*, 82.

Dedication by holder of. See *Dedication*, 3.

Estoppel of grantor in. See *Estoppel*, 23.

II. Execution and Delivery; Validity of Action to Annul Judgment Setting Aside.

14. It is not necessary that a deed of trust by which the grantor conveys to the grantee, in trust, to sell the property and pay a debt of the grantor to a third person out of the proceeds, should be delivered to, or assented to, or executed by the cestui que trust, or that there should be a debt due from the grantor to the cestui que trust, in order, as between the grantor and grantee, to pass the legal title to the grantee. (*Barr v. Schroeder*, 32 Cal. 609.)

15. The above rule does not impair the right of a creditor of the grantor to question the

bona fides of the deed. (*Barr v. Schroeder*, 32 Cal. 609.)

16. Complete execution and delivery of trust deed is sufficiently shown where it appears that the grantor was himself nominally one of the grantees; that the deed was intended to be a deed of settlement for the benefit of his children, and was in the nature of a covenant to stand seised for the benefit of the cestui que trust; that it was formally acknowledged and recorded; that the other grantee was present and accepted the trust; and that the grantor recognized it in his subsequent will. (*Huse v. Den*, 85 Cal. 390.)

17. Where it appears that by the act and inducement of the attorney the grantee of the trust deed was induced to permit the attorney's fees to be included in the sum due him, it cannot be claimed that the trustee held the property under a double trust where it does not appear affirmatively that the attorney who acted for the grantee, both in the execution of the instrument and in the foreclosure suit, advised him of the legal effect and consequences of so including it, or that any possible detriment could occur from assuming such relation of double trust in reference to the property. (*Felton v. Le Breton*, 92 Cal. 457.)

18. In an action by a creditor who is assignee of a note secured by a deed of trust, seeking to annul a judgment obtained by assignees of the trustor for the benefit of creditors canceling the deed of trust in a former suit brought by such assignees against the trustor and trustee and original payee of the notes, upon the ground of fraudulent default of the trustee and payee, and further seeking to enforce the canceled deed of trust, a complaint which shows that the judgment was obtained more than three years before the commencement of the action, and merely avers that plaintiff "had no notice or knowledge, either of said suit or the decree therein, until after the rendition of said decree," but does not aver that the fraud was first discovered within three years next before the commencement of the action, does not state a cause of action. (*Watkins v. Bryant*, 91 Cal. 492.)

19. The judgment canceling the deed of trust is not void as against holders of negotiable paper secured thereby who were not named or described in the deed of trust, and were not parties to the action to set it aside, such creditors being represented by the trustee, who was made a party defendant. An action to set aside or annul a deed of trust may be maintained against a trustee, without the presence of the beneficiaries, and especially so when the beneficiaries consist of many creditors who are holders of negotiable paper executed and delivered to a payee named in the deed, and negotiated by him before maturity to persons not described in the deed by name or by any classification. (*Watkins v. Bryant*, 91 Cal. 492.)

20. When a deed of trust has been canceled, and no ground is shown by the complaint for setting aside the judgment of cancellation, a creditor suing to set it aside and to enforce the trust is not entitled to any judg-

ment against defaulting parties to the deed of trust against whom no personal judgment is asked. (*Watkins v. Bryant*, 91 Cal. 492.)

III. Enforcement of; Sale Under; Foreclosure and Redemption.

21. The plaintiff borrowed a sum of money from S. L. S., and to secure payment made a deed conveying real property to B. and S.; S. L. S. was named as party of the third part in the deed, and it recited that it was made to secure said indebtedness, and provided that upon default in payment, and on request of S. L. S., B. and S. should sell the premises. Held, in an action to enjoin B. and S. from selling, that the instrument conferred a power of sale upon B. and S. (*Bateman v. Burr*, 57 Cal. 480.)
Cited 60 Cal. 361; 71 Cal. 478.

22. The death of the grantor does not operate as a revocation of a power of sale contained in a trust deed, or limit the effect of the deed; and the failure to present to the administrator of the deceased grantor the claims secured by it furnishes no ground for a court of equity to cancel the deed. (*More v. Calkins*, 95 Cal. 435.)

23. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage; requiring judicial foreclosure and sale. (*Koch v. Briggs*, 14 Cal. 256.)
Cited 54 Cal. 300; 57 Cal. 482, 483; 66 Cal. 286; 71 Cal. 478; 95 Cal. 437; 8 Mont. 44; distinguished 22 Cal. 124.

24. In a deed of trust there can be no forfeiture of the estate, and hence no equity, as against such forfeiture, to foreclose, as in England. Nor would a suit for decree and sale, as under our system, lie because such suit could be based only on the contract of the parties, and the contract is, that the trustee shall sell upon the happening of a certain event. (*Koch v. Briggs*, 14 Cal. 256.)

25. Relief in equity would be limited to the contract, and a sale could only be made by enforcing the trust. (*Koch v. Briggs*, 14 Cal. 256.)

Foreclosure is not necessary. See ante, 11.

26. A complaint setting out an instrument purporting to be a conveyance upon certain trusts, and empowering the defendant to sell the lands conveyed, and to pay certain indebtedness of plaintiff to defendant and certain advances to be made by him, and an additional sum of ten thousand dollars, and alleging that defendant has advertised the property for sale, and showing that a considerable portion of the demand of defendant is unliquidated and uncertain, and that said sum of ten thousand dollars is disputed as being without consideration, and that the value of the property greatly exceeds the amount of the just and lawful indebtedness of plaintiff to defendant, states a cause of

action for an accounting before a sale of the property, and for a temporary injunction against the sale pending the accounting, regardless of whether the instrument is merely a mortgage with a power of sale, or a deed of trust conveying the legal title. (*More v. Calkins*, 85 Cal. 177.)

27. Where a complaint sets out a deed of trust to pay a certain indebtedness of plaintiff to defendant, and an additional sum of ten thousand dollars, and alleges that defendant has advertised the property, and that a considerable portion of the indebtedness to defendant is unliquidated, and disputes the ten thousand dollars as being without consideration, in such case the court is not only justified in ordering an account of what is due the defendant, but may also control the mode of sale as to the notice to be given, the limitation of the amount, and portions of the property to be sold, and whether or not it should be sold in parcels, and may order the sale to be made by its own commissioner if deemed necessary to secure a fair sale for the highest price. (*More v. Calkins*, 85 Cal. 177.)

28. In an action to vacate a sale made under a deed of trust, held (1) that the notice of the sale conformed to the requirements of the power, and was duly given; (2) that the objection that the trustee was not present at the sale—in the absence of a specification calling in question a finding to that effect—could not be considered; that it was permissible for the trustee to avail herself of the services of an auctioneer in making the sale; (3) that in view of the fact that the trustee was one of the cestuis que trust, who were authorized by the deed to purchase, it was no objection that the sale was made to her attorney for the benefit of the cestuis que trust; (4) that the evidence sustained the finding that the plaintiff was not misled or deceived by the trustee as to the time of sale; (5) that inadequacy of price will not alone vitiate a sale, and that, if it would, the inadequacy in this case was occasioned by the willful and wrongful act of the plaintiff. (*Kennedy v. Dunn*, 58 Cal. 339.)

29. When a sale is made under the direction of a court of equity, by officers appointed by the court, it is not a sale by the trustee, and the rule forbidding a trustee to purchase at his own sale does not apply. (*Felton v. Le Breton*, 92 Cal. 457.)

30. When a deed of trust of real and personal property is given to a debtor as security for advances made and to be made, with power to sell and dispose of the property, and all of the parties to the deed are made parties to a foreclosure suit, in which a full accounting of the trust is had, and a sale is made under the decree therein, at which the trustee purchases the property at public auction by express leave of the court, the trustee becomes thereby vested with absolute title freed and discharged of the lien and trusts created by the original deed. (*Felton v. Le Breton*, 92 Cal. 457.)

31. A beneficiary under a deed of trust may purchase at a sale in pursuance of the trust as effectually as any creditor may purchase the

property of his debtor at a judicial sale, and the trustee may bid for the beneficiary, at his instance, without impairing the validity of the sale. (*Felton v. Le Breton*, 92 Cal. 457.)

32. Where a deed of trust authorizes the trustees, upon default, to sell the trust property at public auction for cash, a sale to a third person who purchased in pursuance of an agreement with the trustees that he should pay nothing for the property, and should hold it subject to the direction of the trustees, is fraudulent, and will be set aside at the instance of a party beneficially interested in the proceeds of the sale. (*Scott v. Sierra Lumber Co.*, 67 Cal. 71.)

33. If a purchaser at a trust sale paid for the property with a check, instead of gold coin, as provided in the deed of trust, and the money was actually paid on the check, defendant's objection to the sale was not well taken. (*Carey v. Brown*, 62 Cal. 373.)

34. One of the trustees became the owner by assignment of the note, the payment of which the deed of trust was given to secure, but the purchaser at the sale had no notice of this, and believed that the sale was regularly made for the benefit of the payee of the note. Held, the purchaser's title to the property was not affected by the fact that one of the trustees had purchased the note. (*Carey v. Brown*, 62 Cal. 373.)

35. When a conveyance is made to a trustee, who has no interest in the trust fund, with power to sell and convey the trust lands, subject to the approval of the cestui que trust, the deed of the trustee to a purchaser will not pass the legal title without the approval of the cestui que trust in writing. (*Sprague v. Edwards*, 48 Cal. 239.)
Cited 49 Cal. 196; 64 Cal. 368.

36. Defendant formerly owned the premises, and to secure an indebtedness executed a deed of trust, in which it was provided that, in default of payment and in the event of a sale, the recitals in any deed executed by the trustees should be conclusive evidence of such default, of the application of the creditor for the sale of the property, and of the publication of the notice of sale. Held, in the absence of fraud, the defendant is concluded by the recitals in a deed which was executed by the trustees. (*Carey v. Brown*, 62 Cal. 373.)

37. Where a deed of trust provides that in case of default the trustees shall, on application of the creditor, sell the premises to them conveyed at public auction to the highest bidder for cash, and authorizes them to establish as a condition of sale that the creditor may bid and purchase thereat, recitals in a deed executed by the trustees to such creditor, who purchased at the sale, to the effect that the sale was at public auction to the highest bidder for cash, and that the trustee did, as a condition of the sale, permit the creditor to bid and purchase, are prima facie evidence of the facts so recited, although the deed of trust is silent as to their effect; and, in an action of ejectment by the purchaser, evidence dehors the deed is not necessary to show title and right of possession in the plaintiff. (*Savings and Loan Soc. v. Deering*, 66 Cal. 281.)

38. Where, under a decree of court, the

trustees of a trust deed sell the land held in trust, and they deliver the deed therefor to the purchaser, reporting these facts to the court, which then makes an order confirming the acts of the trustees, and no appeal is taken from the order, it has the effect to deny the right to redeem. (*Odd Fellows Savings etc. Bank v. Harrigan*, 53 Cal. 229.)

39. From sales under trust deeds there is no equity of redemption, for there is no forfeiture. Performance of the trust carries out the contract of the parties. (*Koch v. Briggs*, 14 Cal. 256.)

Judgment on note secured by trust deed. See Bills and Notes, 451.

Successor may make sale. See Trusts and Trustees, 228.

IV. Termination of Trust and Reconveyance.

40. Where deeds absolute in form were given to a bank as security for indebtedness, and the bank executed a declaration of trust declaring that the lands conveyed were held as security, and the debtor finally, being overwhelmed with debt, and unable to meet his liabilities to the bank, proposed to convey the lands to the bank in fee simple absolute, in discharge and satisfaction of the indebtedness, and a final settlement was thereupon made, and new conveyances absolute in form executed to and accepted by the bank, which surrendered the evidences of indebtedness to the debtor, no oppression or unfairness appearing on the part of the bank, and the settlement being fair and for a full consideration, the express trust was thereby terminated, and any action to enforce an implied trust was barred in four years after the settlement and delivery of the deeds and notes. (*Chapman v. Bank of California*, 97 Cal. 155.)

41. If trust is satisfied before sale and conveyance under a trust deed it is the duty of the trustee to reconvey the title; if he fails or refuses, equity will compel him; or it will, in any case, undertake the supervision of the execution of the trust. (*Bostwick v. McEvoy*, 62 Cal. 496, 500.) Cited 80 Cal. 436.

Trust for benefit of creditors, revocation of. See Trusts and Trustees, 247.

TRUSTS AND TRUSTEES.

I. Creation of and What Constitutes Trust.

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Trusts on which homestead property held, liability for. See Homesteads, X, 2.

Bequests on trust. See Wills, XI, 16.

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State library, trustees of. See State Library.

Trust for cemetery purposes. See Cemeteries.

Setoff by insolvent cestui que trust through trustee. See Setoff, 16.

Orders drawn on trustee, validity under statute of frauds. See Statute of Frauds, I, 5.

Grant of Yosemite valley was a trust. See Yosemite Valley.

I. Creation of and What Constitutes Trust.

1. *Words Necessary; Declaration of Trust; Parol Evidence of.*

1. It is not necessary in the creation of an express trust to use any particular form of words. The relation of trustee and cestui que trust is established, and an express trust created, if the language used in the instrument creating the trust expresses the intention that one party shall hold the legal title,

and the other shall have the beneficial interest. (*Luco v. De Toro*, 91 Cal. 405.)

2. Express trust in real property can only be created or declared by a written instrument subscribed by the trustor or trustee. (*Doran v. Doran*, 99 Cal. 311.)

3. Although a trust in real property, not created by the instrument transferring the title nor by operation of law, must be created by a written instrument subscribed by the trustee, or by his agent thereto authorized by writing, yet the verified answer in an action which contains a declaration of the defendant that the real property in controversy was conveyed to him in trust for certain purposes, is a sufficient declaration in writing to satisfy the requirements of section 852 of the Civil Code. (*Garnsey v. Gothard*, 90 Cal. 603.)

4. The plaintiff sought to establish a declaration of trust, and relied upon the following document: "Received, San Francisco, May 27, 1880, of Wm. H. Sharp, Esq., three hundred and sixty-eight and fifty one-hundredths dollars, being his proportion of his tax and outside land assessment, to be paid by me to Alexander Austin, tax-collector. The land known as the Fleischaker tract." This receipt was signed by the defendant. Held, that the document does not on its face manifest or prove a trust, and that the evidence in the case does not show that it was the intention of the parties in executing it to declare one. (*Hunt v. Friedman*, 63 Cal. 510.)

Declaration of trust. See Assignments for the Benefit of Creditors, V, 1.

Acts and declarations of vendor to prove he held land in trust. See Vendor and Vendee, I, 5.

Written statement of account does not constitute declaration of trust. See post, 179.

Agreement for reconveyance is not declaration of trust, when. See Deeds, 359, et seq.

5. Express trust may be proved by circumstances, and, to ascertain the intention of the parties, the court will consider the then existing circumstances. (*Gunter v. Janes*, 9 Cal. 643.)

6. The facts constituting an implied trust can be proved by parol testimony. (*Millard v. Hathaway*, 27 Cal. 119.) Cited 67 Cal. 256; 74 Cal. 91.

7. An express trust in personal property may be created without a written transfer. (*Hellman v. McWilliams*, 70 Cal. 449.) Cited 80 Cal. 518; 99 Cal. 315.

8. An express or implied trust in relation to personal property may be declared and proved by parol. (*Doran v. Doran*, 99 Cal. 311.)

9. An express trust relating to personal property need not be created by deed or writing, but may be established and continued by oral agreement or by the acts of the parties, and may be proved by parol evidence. (*Roach v. Caraffa*, 85 Cal. 436.)

10. Mortgage being but a personal chattel, a parol trust may attach to the mortgage that the mortgagee shall hold it in trust in part for his own benefit, and in part for the benefit of another; and parol proof of such trust does not vary the terms of the written instru-

ment, or violate the statute of frauds as to the time of performance of the contract. The beneficiary can enforce the mortgage as against subsequent lienholders in all respects as if made to him. (*Tapia v. Demartini*, 77 Cal. 383.)

11. Parol evidence is admissible to prove that a written assignment of personal property, absolute upon its face, was in fact made in trust for the benefit of others than the assignees, and to prove the character of the trust. (*Lockwood v. Canfield*, 20 Cal. 126.) Cited 22 Cal. 579.

12. The principle involved is the same as that which permits the introduction of similar evidence to prove that a deed, absolute on its face, was intended as a mortgage, and the admissibility of such evidence is not an open question in this court. (*Lockwood v. Canfield*, 20 Cal. 126.)

13. Trust by which one is to hold policy of life insurance for the benefit of the children of another should be clearly and distinctly proved, but may be proved by parol evidence. (*Silvey v. Hodgdon*, 52 Cal. 363.)

14. If a person who desires to procure an insurance on his life for the benefit of his children makes a parol contract with another, by which the former is to pay the premiums and the policy is to be made payable to the latter, who is to hold it in trust for the children, and collect and hold the proceeds in trust for them, a court of equity will enforce the trust. (*Silvey v. Hodgdon*, 52 Cal. 363.) Cited 85 Cal. 445.

15. Where son conveys to his father, in consideration of verbal agreement by which the father is to make a will in favor of his son, if, in such case, the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. (*Russ v. Mebius*, 16 Cal. 350.) Cited 22 Cal. 579; 23 Cal. 637; 75 Cal. 532; 79 Cal. 530.

Parol agreement to take subject to trust. See post, 141.

Parol evidence of constructive trust. See post, V.

Parol evidence of resulting trust. See post, VI, 2.

Demurrer will not lie to bill alleging parol trust. See post, 211.

Effect of statute of frauds in case of trust. See Statute of Frauds, IV.

Parol evidence to establish trust on purchase by agent. See Agency, 204.

Parol agreement to hold in trust. See Deeds, 367.

Verbal agreement by fraudulent grantee to reconvey does not create trust. See Fraudulent Conveyances, 136.

Express trust cannot be created by parol. See Cotenancy, 43.

2. Repudiation by Trustee; Trust not Permitted to Lapse for Want of Trustee; Incompetency of Trustee.

Repudiation of trust. See post, 151.

16. After a contract creating the trust rela-

tion has been assigned by the beneficiary, to the knowledge of the trustee, no repudiation of the trust by the trustee can affect the rights of the assignee, unless the latter has notice thereof. (*Luco v. De Toro*, 91 Cal. 405.)

17. Trust will not be permitted to fail for want of a trustee. (*Hill v. Den*, 54 Cal. 6, 20.)

18. Fact that trustee named in deed is not competent to act does not render the trust void as between the parties thereto, but a court of competent jurisdiction may substitute a new trustee to enforce and perfect the objects of the trust. (*Smith v. Davis*, 90 Cal. 25.)

3. Contract to Create Trust.

19. A court of equity will lend no assistance towards perfecting a voluntary contract for the creation of a trust, nor regard it as binding, so long as it remains executory. (*Estate of Webb*, 49 Cal. 541.)
Cited 80 Cal. 435.

20. If such contract is executed by a conveyance of the property in trust, so that nothing remains to be done by the grantor or donor to complete the transfer of title, the relation of trustee and cestui que trust is deemed to be established, even if there was no consideration, and a court of equity will enforce the trust. (*Estate of Webb*, 49 Cal. 541.)

4. What Agreements or Relations Create.

21. If several parties are interested in purchase of land made by one by mutual agreement, neither can exclude the other from what was intended for the common benefit; and any private benefit touching the common right which is secured by either party will turn him into a trustee for the benefit of all. (*Jenkins v. Frink*, 30 Cal. 586.)

22. If several parties contract, in writing, that one shall purchase land about to be offered at sheriff's sale, for the benefit of all, each to furnish his proportion of the money, and the buyer to convey to each, if no redemption is made, his proportion of the land, and one of the contracting parties, after the purchase is effected, on his own account, purchases another judgment which makes him a redemptioner, and redeems and obtains a sheriff's deed, an implied trust arises and he becomes a trustee in invitum holding the legal title in trust for all the parties to the contract. (*Jenkins v. Frink*, 30 Cal. 586.)

23. If one party agrees to unite with two others in the purchase of land each to furnish one-third the purchase money and such party to conduct the negotiations, and buy the land for the least possible price, he assumes a position of trust towards his associates, and is bound to exercise the utmost good faith towards them, and share with them all the profits of the bargain. (*King v. Wise*, 43 Cal. 623.)

24. T. agreed with M. that if they could obtain a road franchise from the legislature in T's name, and M. would draw a bill to that effect, and would construct half the road, he constructing the other half, they should be equal owners and divide the tolls. M. drew the bill, which became a law, and constructed his half of the road; then, by express agree-

ment, T. took possession of the road and collected the tolls on mutual account. Held, to be an express trust. (*Miles v. Thorne*, 38 Cal. 335.)

25. Where land is absolutely conveyed to another, and, by a contemporaneous agreement, the grantee covenants to sell the land and pay the debts of the grantor and to pay to the grantor a certain proportion of the balance, he assumes trust relations towards the grantor. (*Janes v. Throckmorton*, 57 Cal. 368, 381.)

26. If two partners are embarrassed, and one executes deed to other, absolute on its face, with a consideration expressed of both his individual property and interest in the partnership property, for the purpose of enabling the grantee to raise money by mortgaging the same to pay the firm debts, there is no express trust, nor does a trust arise by implication of law. (*Burt v. Wilson*, 23 Cal. 632.)

27. Where a person during his last sickness, and in contemplation of death, executed a conveyance of his real property to his brother, of his own motion and without any solicitation, undue influence, or fraud on the part of the grantee, the mere statement by the grantor to the grantee at the time of the conveyance that he knew the latter would do what was right, does not show either an express trust or a trust arising by operation of law, and a finding that such conveyance is absolute will not be disturbed upon appeal. (*Doran v. Doran*, 99 Cal. 311.)

28. A was indebted upon a note and mortgage to B, in the sum of forty thousand dollars. B assigned the note and mortgage to C, and received from him his notes in lieu thereof. Afterwards A mortgaged to C, together with other property, the property previously mortgaged to B, subject to the first mortgage, for which C was to advance to A, from time to time, sums of money, not to exceed twelve thousand dollars, to enable A to pay his debts. By this mortgage, C was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the twelve thousand dollars and interest, and in case the rents should not be sufficient for that purpose, and A should not pay within two months after request, then C was to sell, and, out of proceeds, pay the amount and interest so advanced. C, at various times, advanced to A nearly twelve thousand dollars, and collected rents to the amount of twenty-eight thousand dollars. Subsequently, C died, and then his executor collected the rents. Held, in an action by A against C's administrator, that C acted in the purchase of the note and mortgage of B as an agent of A, and that A was entitled to the trust fund. (*Gunter v. Janes*, 9 Cal. 643.)
Cited 19 Nev. 244.

29. R. was the owner of promissory notes overdue, and desired to have the same collected. Having no means to pay attorney's fees and costs he arranged with C., an attorney, to take the notes for collection. By the arrangement C. was to furnish money to pay costs and disbursements, and have the notes indorsed to him, and bring suit in his own

name, and be reimbursed, both for his fees as attorney and for advances by him made, out of the proceeds when collected. R. then indorsed the notes to C., who gave him a receipt as attorney, stating that he received the notes for collection. C. brought suit in his own name, obtained judgment, and had an execution issued, but the same was returned unsatisfied. C. then made an arrangement with a brother of one of the defendants in the judgment, by which the brother conveyed to C. a tract of land, and C. assigned him the judgment, and paid him a sum of money besides. C. was solvent and willing to pay R. whatever was due him on the settlement. Held, that there was no resulting trust in favor of R., and that C. did not hold the land conveyed to him in trust for R., and that R. was only entitled to recover the money due him on a fair settlement. (*Robles v. Clarke*, 25 Cal. 317.)

Resulting trusts. See post, VI.

Constructive trusts. See post, V.

Precatory trusts. See Wills, XI, 16.

Trusts for charitable uses. See Charitable Uses.

Habendum does not create trust, when. See Deeds, 255.

Bond conditioned to convey in trust for corporation. See Vendor and Vendee, 72.

Tax sale, purchaser at, when a trustee. See Taxation, XII, 5, f, E.

Tax sale, one acquiring title from purchaser at, when a trustee. See Taxation, XII, 5, f, E.

Purchaser at execution, when a trustee. See Executions, IX, 6, i, D.

Cotenant, conveyance to, trust arising from. See Cotenancy, II, 4.

Confirmer of Spanish grant as trustee. See Mexican Lands, I, 23, j.

Attorney, when trustee for client. See Attorney and Client, V, 4.

Trust created where attorney prosecutes case on contingency. See Attorney and Client, 107.

Patentee, when a trustee. See Public Lands, XX, 14.

Agreement to procure patent for undivided interest. See Statute of Limitations, 172.

Implied trust on conveyance by minor to aunt. See Parent and Child, III.

Husband is trustee for wife, when. See Husband and Wife, 311.

Mortgagee, when a trustee. See Mortgages, 189.

Conveyance as security creates trust. See Mortgages, 65.

Agent assuming to act after principal's death is liable as trustee. See Agency, 378.

Partner of agent is not trustee for principal, when. See Agency, 38.

Judgment debtor receiving rents is trustee for purchaser at execution. See Executions, 257.

Assignee, when a trustee for assignor. See Assignments of Contracts, VII, 4, e.

One purchasing true title is not trustee for one purchasing distinct tract. See Estoppel, 30.

Custodian of will is charged with a trust. See Wills, 50.

Pledge of note, trust when arises in relation to pledge of note. See Bills and Notes, XVII, 8.

II. Validity of Trust; Assent and Signature of Trustee; Trustee as Beneficiary.

Secret trusts, conveyance on. See Fraudulent Conveyances, II, 7.

Distinct trusts in same person. See Merger, 4.

Agreements to create monopolies. See Contracts, III, 3, c.

30. A verbal transfer of money in trust for the use and benefit of the children of the trustor, reserving to the latter the right to draw from the trust fund such sums as he might deem proper for his own use, is valid. (*Hellman v. McWilliams*, 70 Cal. 449.) Cited 99 Cal. 315.

31. Where the owner of a note, upon which a suit is brought against the makers, assigns it in trust, together with all the avails of the action, and certain other claims to secure certain specified obligations, "first deducting and paying out of any money that may be realized out of said claims all charges for costs and attorney's fees and charges, to provide for the payment of which this assignment is also made," the fact that the assignee is one of the beneficiaries named does not prevent the assignment from creating a trust, which may be enforced in favor of the attorney of the assignor, for his fees and disbursements for costs in the suit on which the note was made. (*Tyler v. Mayre*, 95 Cal. 160.)

32. Deed of trust made by owner to himself and his brother as trustees is valid. (*Hill v. Den*, 54 Cal. 6, 19.)

33. Assent of trustee is not necessary to validity of trust deed. (*Smith v. Davis*, 90 Cal. 25.)

Assent of beneficiary. See Trust Deeds, 14.

34. The fact that the trust deed was not signed by the trustee, although it was intended to be signed by him, does not render it defective, if it was signed by the other parties thereto, under an express agreement that it should be binding as between them. (*Smith v. Davis*, 90 Cal. 25.)

35. Under our system it is the necessary province of a probate court to inquire and determine whether a valid trust has been created. The mode of administering, the power to regulate and direct its subsequent administration, is quite separate and distinct from a question of whether a legal trust has been expressed. (*Estate of Hinckley*, 58 Cal. 457.) Cited 73 Cal. 564.

Renunciation of trustee. See post, 224, 225.

Want of consideration does not affect trust. See post, 249.

Validity of trust, trustee is estopped to deny. See post, 175.

III. Construction of Trusts.

36. The meaning of a clause of the trust being ambiguous and uncertain, in ascertaining the intention of the donor, reference may be

had to other parts of the deed providing for the acquisition and improvement of lands, and particularly to other trusts of like character, indicating the general intent of the donor as to the acquisition of title and the expenditure of the trust funds. (Floyd v. Rankin, 86 Cal. 159.)

37. In a deed to trustees, the declaration of trust provided as follows: Said trustees shall sell to M. T., and such other nine persons as he may in writing designate, within six months after the said trustees shall have notified him, said M. T., that they have fixed the prices at which they will commence selling the lots and subdivisions of such lands, or certain portions thereof, such of said lots and subdivisions as he or either of them desire to purchase, not exceeding to each one respectively the value of three thousand dollars, etc. In an action of ejectment against M. T. and the parties designated by him to purchase, the defendants claimed the right to purchase portions of a large tract, valued at one hundred thousand dollars, which was one of the subdivisions into which the land had been divided by the trustees. Held, that the defendants could only purchase according to the prices and subdivisions fixed by the trustees. (Steinback v. Norwood, 57 Cal. 647.)

38. Under the deed of trust executed by James Lick to certain trustees therein named, by the terms of which large sums of money were to be realized by the trustees from the property conveyed, and applied to various charitable and other beneficial purposes, and by the fourteenth clause of which the trustees were required, at a cost of five hundred and forty thousand dollars, to found and endow "The California School of Mechanical Arts," under the direction of seven persons named, who were directed to acquire the site thereof, and to form a corporation of themselves and successors appointed by the survivors of them, never exceeding seven in number, to own, control, and manage the said institution. The trustees have no other power or duty than to furnish the money up to the amount named, to be expended as directed by the seven persons named, and the latter are required to select and acquire the title to the site, and take the same in their own names or in the name of the corporation, if formed before the title is acquired. (Floyd v. Rankin, 86 Cal. 159.)

39. The parties who are required to acquire the site and direct the founding and endowment of "The California School of Mechanical Arts" cannot call for the whole of the money and expend it themselves, but the trustees are required to expend the money donated under the direction of the parties mentioned, who are, however, the sole judges as to how, for what purpose, and when the money is to be expended, subject only to the purposes mentioned in the trust deed, and it is the duty of the trustees to furnish the money needed so long as the expenditure is within and for the purpose named in the deed, and to pay any surplus remaining to the corporation which is to control and manage the institution. (Floyd v. Rankin, 86 Cal. 159.)

40. The corporation formed as provided for in the deed of trust is a valid body. (Floyd v. Rankin, 86 Cal. 159.)

41. The action was brought to obtain the construction of a deed of trust. The question presented by the appeal was whether interest should be allowed on the sum of seven hundred thousand dollars which the trustees were directed to expend in the erection of a telescope and observatory. The portion of the judgment of the court below affecting the question reads as follows: "That the proceeds of the trust property constitute one fund, out of which the trustees are to execute the several trusts specified in said deed, and that the profits arising from investments of money in their hands are to be treated as a part of such fund, and not as accruing for the benefit of any of the said trusts, in the execution of which a definite sum is required to be paid or expended, so as to increase the amount of such payment or expenditure." Held, that the judgment was correct. (Floyd v. Forbes, 71 Cal. 588.)

42. Under a provision in the Lick trust deed authorizing the trustees, after discharging the previous trusts and making the payments provided for, to make over and transfer the residue of the proceeds of the property in equal proportions to the California Academy of Sciences and the Society of California Pioneers, the court has no authority, before the previous trusts are discharged and the payments therein provided for all made, to order the trustees to pay to such societies the sum of three hundred thousand dollars each as a portion of the "residue" continually coming to them. (Floyd v. Davis, 98 Cal. 591.)

Interest on endowments under Lick trust. See Interest, 48.

IV. Meeting of Minds; Mistake in Trust; Reformation of.

43. Where it is shown that the minds of the parties had met and agreed upon what was to be done when the time came to act in executing the declaration of trust, in the absence of proof to the contrary, the law presumes that they remained in the same condition of agreement until the act was done; and it is not requisite that the mind of the attorney in fact of one of the parties who was authorized merely to sign the name of his principal to the agreement, but was charged with no discretion as to its terms, and who intended only to declare such a trust as he supposed the parties had agreed upon, should meet in agreement with the other party at the time of signing the declaration. (Ward v. Waterman, 85 Cal. 486.)

44. Where the interests under a declaration of trust are several, and not joint, and there is a mistake common to the parties beneficially interested in that particular interest, the instrument may be reformed in that particular, and the mistake need not be common to all the parties who executed the instrument; and it is immaterial whether they had knowledge of it or not; nor does it lie in the mouth either of a beneficiary debtor, or of his attaching creditor, to object to the re-

formation of the declaration of trust on the ground that the trustee did not share in the mistake, he being a party to the suit and not making such objection, which, if tenable at all, is purely personal to himself. (*Ward v. Waterman*, 85 Cal. 488.)

45. It is a matter of entire indifference to the trustee of a mere naked trust, not coupled with any interest, who will be entirely unaffected by the reformation asked for, and is wholly immaterial whether he shared in the intention of the parties beneficially interested or knew of the mistake or not, on account of which the reformation is sought. (*Ward v. Waterman*, 85 Cal. 488.)

46. Complaint in intervention, and to reform a declaration of trust as to one of the beneficiaries, is not demurrable on the ground that the declaration of trust could not be reformed in the absence of other beneficiaries, who were not parties to nor interested in the particular agreement sought to be reformed. As to each of the separate interests provided for in such declaration of trust, the contract or declaration is several, and not joint, and to reform it as to one of the separate interests, it is only necessary to make those persons parties who are interested in the particular interest in respect to which the reformation is sought. (*Ward v. Waterman*, 85 Cal. 488.)

Trust agreement, right to reform. See *Reformation of Contracts*, 40.

Limitation of action to reform trust. See *Statute of Limitations*, 299.

V. Constructive Trusts.

47. Where the circumstances of a transaction are such that the person who takes the title to property cannot be permitted to hold and enjoy it, in whole or in part, without necessarily violating some principle of equity, a constructive trust will be raised for the benefit of the party entitled in equity to its beneficial enjoyment. (*Mandeville v. Solomon*, 33 Cal. 38, 44.)

48. It is because the trustee holds the property or some interest therein which it is inequitable for him to enjoy, that the court declares the trust and fastens it upon his conscience, and wrests the property or interest from him and causes it to be transferred to the person equitably entitled to it. (*Mandeville v. Solomon*, 33 Cal. 38, 44.)

49. It is as necessary in establishing such a trust that there should be trust property as that there should be a trustee and *cestui que trust*; and indeed the relation of trustee and *cestui que trust* cannot exist or be declared in cases of implied trust in the absence of a subject matter to which the trust relates. (*Mandeville v. Solomon*, 33 Cal. 38, 44.)

50. Implied trust cannot exist in respect to a claim of title to land which claim is without foundation. (*Mandeville v. Solomon*, 33 Cal. 38.)

51. Where general fiduciary relation exists, and actual confidence is also reposed in the trustee, it is not necessary to allege or prove that the trustee took the conveyance with the fraudulent intention of claiming the same as his own in order to establish a constructive

trust and compel a reconveyance. (*Alanis v. Casenave*, 91 Cal. 41.)

52. If a confidential agent, trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent will be held as trustee for the owner of the money. (*Wells v. Robinson*, 13 Cal. 133.)

Cited 14 Cal. 660; 22 Cal. 578, 593; 58 Cal. 122.

53. If one is employed by another to assist him in obtaining a conveyance of property, and trust and confidence are reposed in him to enable him to aid his employer in the business, and he violates the confidence and obtains a conveyance of the property to himself, he will be held to be the trustee of his employer, and will be compelled to convey to him. (*Webster v. King*, 33 Cal. 348.)

54. If one who is in possession of land, claiming to own it, finds that the conveyance of his grantor is defective, and, to cure the defect, hands a quitclaim of his grantor, with an abstract of title, to an attorney and searcher of titles, and requests them to procure his grantor to execute the deed, and they undertake to do so, but instead thereof induce the former grantor to deed to one of them, who then deeds an undivided half to the other, they will become the trustees of their employer, and will be compelled to execute a conveyance to him. (*Webster v. King*, 33 Cal. 348.)

55. Where a husband caused a tract of land, of which he was the owner, to be conveyed to his wife, and also certain moneys and other personal property to be paid to her, with the verbal understanding that the wife was to hold it in trust for the husband while he lived, and after his death to divide it in equal parts between herself and daughter, a constructive trust was thereby created which will be enforced in favor of the daughter. (*Hayne v. Hermann*, 97 Cal. 259.)

56. A constructive trust arises, and will be enforced in equity, where a minor procures land to be conveyed to himself by his mother under an express promise that he will reconvey it to his brother when arriving at age, with the intention not to perform the promise, and to claim and hold the property absolutely in his own right after arriving at age. (*Nordholt v. Nordholt*, 87 Cal. 552.)

57. Where pretermitted children make an absolute deed of their interest to their mother (the defendant), and it was procured by false and fraudulent representations as to its contents, by which they were led to believe that it was a conveyance for the life of the defendant only, and also by promises of the defendant as to certain future advances, which the defendant failed to keep, a suit to charge the defendant as trustee is proper and the plaintiff's remedy is not by a bill in equity to reform the deed so as to make it conform to the intent of the parties. (*Olivas v. Olivas*, 61 Cal. 382, 386.)

Cited 71 Cal. 110.

58. The fact that the fraud complained of

was discovered in time for plaintiffs to have availed themselves of it in the probate court does not affect their right to relief in a court of equity. It may be admitted that they could have successfully opposed the order of distribution in the probate court, but it does not follow that they did not have a right to go into equity for the purpose of setting the deed aside on the ground of fraud. (*Olivas v. Olivas*, 61 Cal. 382.)

Constructive trust on purchase by agent. See Agency, 203.

Resulting trust in favor of client where attorney purchases at assignee's sale. See Attorney and Client, 56, et seq.

Purchase by attorney at assignee's sale. See Statute of Limitations, 171.

Mining partner purchasing holds in trust for copartners. See Partnership, 79, et seq.

Executor purchasing property of estate is trustee. See Executors and Administrators, 239, et seq.

59. Whenever one person acquires from another title to real estate by fraud, actual or constructive, practiced upon that other, a constructive trust is created, which a court of equity will fasten upon the title in his hands; and fraud is presumed when an unfair advantage is gained through any undue influence exercised over the party from whom the advantage is derived. (*Hayne v. Hermann*, 97 Cal. 259.)

60. A trust in real and personal property may be declared and enforced, where it appears that the property was transferred to the defendant at his solicitation, while the plaintiff's mental condition was such that he was incompetent to transact business, and that he was induced to transfer the property to the defendant by the fraudulent acts and representations of the defendant that he would manage the property and reconvey it to the plaintiff, after paying off the plaintiff's debts; that there was no further consideration, and that all the statements and representations made by the defendant were false and fraudulent, and were knowingly made with the intent to deceive and defraud the plaintiff. (*Hays v. Gloster*, 88 Cal. 560.)

61. A constructive trust, arising from fraud, is not within the statute of frauds, and may be proved by parol evidence. (*Nordholt v. Nordholt*, 87 Cal. 552.)

62. Trusts in real property arising from fraud, actual or constructive, are not within that part of the statute of frauds which requires the trust to be declared by a written instrument; but such trusts arise by operation of law, and may be proved by parol evidence. (*Hays v. Gloster*, 88 Cal. 560.)

63. Parol evidence of the facts constituting actual or constructive fraud is admissible to raise a constructive trust. (*Brison v. Brison*, 75 Cal. 525.)

64. Constructive trusts, such as arise by operation of law, and are excepted from the requirement that a trust can only be created by an instrument in writing. (*Hayne v. Hermann*, 97 Cal. 259.)

65. In an action to enforce a constructive trust, where the testimony on behalf of the

plaintiff tended to show the existence of a parol trust, the testimony of other witnesses concerning declarations by the defendant as to the character in which she held the property, although not competent for the purpose of proving the trust, is admissible in corroboration of the testimony of the plaintiff's witnesses as to the existence of the trust. (*Hayne v. Hermann*, 97 Cal. 259.)

Trust cannot be proven by party to fraud. See Fraud, 85.

66. If one bargains with another for the purchase of a tract of land with the knowledge of a third person who stands by and becomes a party to it by advancing a portion of the money to enable the purchaser to complete the bargain, and if such third person then, without the knowledge of the purchaser, buys from the seller a portion of the same land, for which he obtains a conveyance, which is placed on record before the conveyance to the first purchaser, such third person will become the trustee of the first purchaser, and, if he sells the land to a bona fide purchaser without notice, becomes liable for the damage sustained. (*Mercier v. Hemme*, 50 Cal. 606.)
Cited 1 N. Dak. 82.

67. If a party, who is in possession of land, without right, legal or equitable, is fraudulently deprived of the possession by one who does not deprive him of any right at law resulting from his prior possession, and the one who thus obtains possession then purchases the title from the true owner, he does not hold this title in trust for the prior possessor, and cannot be compelled to convey it to him. (*Scott v. Umbarger*, 41 Cal. 410.)

68. Where the lender of money has assigned to him, as collateral security, a note and mortgage for a much larger sum on a third person, and afterwards agrees with the borrowers that at the foreclosure sale of the mortgaged premises he would purchase the property in the name of the borrowers, and would hold the same for their benefit, subject only to a lien for the money loaned, upon faith in which promise the borrowers take no further interest in the sale, but the lender, in his own name, purchases, and for a sum much less than the amount called for in the note, and makes the payment of the purchase by crediting the amount of his bid, less the costs, on the judgment, a trust is thereby created in favor of the borrowers, and equity will decree them a conveyance if it is in the power of the lender to make a title unencumbered by any acts of his own. (*Price v. Reeves*, 38 Cal. 457.)
Cited 2 Mont. 592.

69. The land in controversy belonged to the Central Pacific Railroad Company, and the defendant applied to purchase the same. The company recognized the right of the defendant, and agreed that, upon the payment by him of a specified sum, it would execute to him a contract for the sale. By the contract the defendant would have five years in which to pay. The plaintiff paid the first installment of the price for the benefit of the defendant, in pursuance of a verbal agreement between them that the contract should

be taken in the name of the plaintiff, to be held by him as security for repayment within one year. The contract was accordingly made to the plaintiff, but before the expiration of the year, the plaintiff extended the time of repayment six months. Before the expiration of the six months the plaintiff voluntarily, and without the knowledge of the defendant, paid the company the balance, and took a conveyance in his own name. The plaintiff never demanded payment by the defendant of the amount so advanced, and has refused to make any statement of the amount due him. The defendant has at all times been ready and willing to repay the amount of the advance, but the plaintiff has refused to accept the same. Held, that the plaintiff held the land in trust for the defendant, and should be compelled to convey the same to him upon the payment of the amount advanced. (*Ward v. Matthews*, 73 Cal. 13.)

Legatee, when a constructive trustee. See *Wills*, 248.

Constructive trust, party to fraud cannot enforce. See *Contracts*, 194.

Constructive trusts, statute of frauds does not apply to. See *Statute of Frauds*, 125, 126.

VI. Resulting Trusts.

1. What Constitutes.

70. Where land is purchased in name of one, and consideration paid by another, a trust arises, and the person in whose name the conveyance is taken is deemed, in law, to hold as trustee for the one furnishing the money. (*Osborne v. Endicott*, 6 Cal. 149, cited 22 Cal. 578, 99 Cal. 591; *Hidden v. Jordan*, 21 Cal. 92, cited 22 Cal. 578, 593, 38 Cal. 193, 67 Cal. 257, 74 Cal. 91, 75 Cal. 170, 77 Cal. 93, 97 Cal. 580, 99 Cal. 590, 19 Col. 522; *Bayles v. Baxter*, 22 Cal. 575, cited 74 Cal. 91, 77 Cal. 338, 97 Cal. 580, 99 Cal. 590; *Simson v. Eckstein*, 22 Cal. 580, cited 22 Cal. 578; *Millard v. Hathaway*, 27 Cal. 119, cited 35 Cal. 487, 75 Cal. 170, 77 Cal. 93, 338, 97 Cal. 580, 19 Col. 522, distinguished 40 Cal. 637; *Currey v. Allen*, 34 Cal. 254, cited 38 Cal. 193, 97 Cal. 580; *Case v. Codding*, 38 Cal. 191, cited 40 Cal. 637, 67 Cal. 237, 21 Or. 380; *Somers v. Overhulser*, 67 Cal. 237, cited 77 Cal. 93; *Breeze v. Brooks*, 71 Cal. 169; *Thomas v. Jameson*, 77 Cal. 91, cited 80 Cal. 435.)

71. If one pays only part of consideration a trust is thereby created in his favor, pro tanto. (*Case v. Codding*, 38 Cal. 191, cited 6 Cal. 293; *Hidden v. Jordan*, 21 Cal. 92; *Somers v. Overhulser*, 67 Cal. 237, cited 77 Cal. 93; *Thomas v. Jameson*, 77 Cal. 91, cited 80 Cal. 435.)

72. It seems that when the portion of the purchase money furnished by the party claiming the benefit of a resulting trust, is not an aliquot portion of the whole, there is no resulting trust corresponding with the portion of the purchase money so furnished. (*Robles v. Clarke*, 25 Cal. 317.)

73. Where a purchaser of a part of a tract of land under an oral agreement has paid part of the purchase price therefor to the vendor, and subsequently other persons purchase and take a conveyance of the whole tract from the vendor, and agree with him to

convey to the first purchaser the portion of the land which he had agreed to purchase, and the sum paid by him as part payment thereon is deducted from the price paid by the subsequent purchasers to the vendor, the first purchaser virtually occupies the position of one who has advanced money to the subsequent purchasers for the purchase of the land, and a resulting trust pro tanto is created in his favor against them, though he cannot enforce the contract against them in an action for specific performance, but must plead the facts showing the resulting trust. (*Fulton v. Jansen*, 99 Cal. 587.)

74. When real estate is purchased, and one party pays the purchase price and another takes the title, the money paid for the purchase price being advanced by the latter to the former as a loan, a resulting trust arises in favor of the former, and the latter holds the title as his trustee. (*Hellman v. Messmer*, 75 Cal. 166.)

Cited 77 Cal. 93.

75. The same rule applies when the party taking the title advances the purchase money as a loan to the other party, and the title is taken to secure its repayment. When part of the purchase money is so advanced, and the remainder is secured by note and mortgage of the party taking the title, which it is understood that the other party is to assume, and to secure or indemnify the mortgagee from all liability thereon as a condition of receiving a conveyance, a resulting trust arises, and may be enforced as to the whole of the property. (*Thomas v. Jameson*, 77 Cal. 91.)

Cited 80 Cal. 435.

76. Where one pays the purchase money, and the deed is executed to another, the law implies a trust, to be executed by a conveyance to the cestui que, on demand; and this implied trust is not destroyed because the beneficiary stipulates, in writing, to repay the money, with interest until paid; and the trust is not to be executed until the money is paid. (*Millard v. Hathaway*, 27 Cal. 119.)

77. No implied trust is created in favor of a person advancing the consideration for the purchase of land, the deed of which is taken in the name of another, when the person making the advance takes from the grantee a deed creating an express trust in the land as security for the advancement. (*Tripp v. Duane*, 74 Cal. 85.)

78. Where A purchases land with his own funds, but before the execution of the deed enters into a verbal contract with B by which the deed from the grantor is executed directly to B, and B is at some future time to pay A the purchase money, held, that a resulting trust is not created in favor of A. (*McCue v. Gallagher*, 23 Cal. 51.)

79. Where A agrees with B that he will purchase a sheriff's certificate of sale of a mining claim, and take an assignment in his own name for the joint benefit of both, and A makes the purchase, B furnishing his proportion of the money, and takes a sheriff's deed in his own name, a resulting trust arises, and A holds a part of the property in trust for B. (*Dikeman v. Norrie*, 38 Cal. 94.)

Cited 21 Or. 380.

80. Such resulting trust cannot be defeated by the fraud of A in making this agreement and taking B's money, when, in fact, he had already, unknown to B, made the purchase. (*Dikeman v. Norrie*, 38 Cal. 94.)

81. No implication of trust arises upon a purchase of property by a parent in the name of his child; as is the case when the purchase money is paid by one person, and the conveyance taken in the name of a stranger. *Prima facie*, such purchase is regarded as an advancement. (*Russ v. Mebius*, 18 Cal. 350.)

82. Resulting trust must grow out of facts existing at time of conveyance, and cannot arise from a mere parol agreement that the purchase shall be for the benefit of another. (*Hunt v. Friedman*, 63 Cal. 510.)

83. The party claiming the benefit of the trust must show that the money was paid before or at the time of the execution of the conveyance. (*Case v. Coddington*, 38 Cal. 191.) Cited 74 Cal. 440; 75 Cal. 170; 4 Mont. 111.

84. Where A agrees with B that he will purchase from C, at a given price, a sheriff's certificate of sale, which C holds, of a tract of land, and that B shall furnish one-half of the money, and that the assignment of the certificate shall be taken in A's name, for the joint benefit of A and B, and B furnishes A his proportion of the money, when in truth A has already bought the certificate unknown to B, held, that A is estopped from alleging that he had made the purchase before his agreement with B, and that on this ground said agreement is within the statute of frauds, and does not create a resulting trust. (*Dikeman v. Norrie*, 38 Cal. 94.)

Resulting trust, agreement by creditor to purchase at execution for benefit of debtor. See Statute of Frauds, I, 5.

Resulting trusts, statute of frauds does not apply to. See Statute of Frauds, IV.

Resulting trust, purchase with wife's funds in husband's name. See Husband and Wife, 324.

Resulting trust, advancing money to purchase title does not create, when. See Quietting Title, 77.

Conveyance on consideration of agreement to make will. See Wills, III.

2. Pleading and Evidence of; Recitals in Deed, Conclusiveness of.

85. In an action to enforce a resulting trust in an undivided interest in a mining claim, where it is alleged and found that the title was taken in the name of the defendant, and that the plaintiff furnished the whole of the purchase money, the defendant cannot contend on appeal that the evidence shows that he paid a larger sum than that alleged, and has a right to retain the title until he receives the balance of the purchase price advanced by him, if such defense was not set up in the answer. (*Hanson v. Fricker*, 79 Cal. 283.)

86. When a transfer of real property is made to one person, and the consideration is paid by or for another, the presumption of a trust in favor of the person by or for whom the payment is made may be rebutted by evidence showing a different intention between

him and the grantee. (*Tryon v. Huntoon*, 67 Cal. 325.)

87. Facts need not appear affirmatively on the face of deed in order to create a resulting trust, but may be proved by any note or memorandum in writing of the nominal purchaser, even though he plead the statute of frauds. (*Osborne v. Endicott*, 6 Cal. 149.) Cited 22 Cal. 579, 593; 79 Cal. 534.

88. Resulting trust cannot be established upon mere allegation of verbal agreement, to the effect that plaintiff was to be jointly interested with defendant in the purchase of the property, and in the absence of any averment that he paid a portion of the purchase money at the time of the purchase. (*Roberts v. Ware*, 40 Cal. 634.) Cited 63 Cal. 513; 74 Cal. 91.

89. In an action brought to establish an implied trust, on the ground that the deed was executed to one party and the purchase money furnished by another, the party alleging the implied trust must prove clearly that the money belonged to him; and, if the testimony is merely parol, it will be received with great caution. (*Millard v. Hathaway*, 27 Cal. 119.) Cited 38 Cal. 193; 14 Nev. 428.

90. Resulting trust arises by operation of law, and the facts creating it may be shown by parol. (*Thomas v. Jameson*, 77 Cal. 91.)

91. The fact that the party receiving a conveyance of land verbally agreed at the time with the person paying the consideration that the former should, upon demand, execute a conveyance to the latter of the premises, does not make the trust express as distinguished from one implied by law from the act of the parties, so as to exclude proof of it by parol under the operation of the statute of frauds. (*Bayles v. Baxter*, 22 Cal. 575.)

92. Evidence of payment of the purchase money of land by a party claiming to be the real purchaser, though the deed was to a third person, admitted in this case. (*Eldridge v. See Yup Co.*, 17 Cal. 44.)

93. Although a verbal agreement by A to purchase land for B may not be given in evidence to establish a resulting trust where the entire purchase money has been paid by A and the conveyance taken in his name, yet, if any part of the purchase money is shown to have been paid by B, a verbal agreement may then be proved which shall have the effect to deprive A of all beneficial interest in the purchase, and to clothe the entire estate in his hands with a trust in favor of B. (*Hidden v. Jordan*, 21 Cal. 92.)

94. H., being desirous of purchasing a certain farm, agreed verbally with J. that the purchase should be made by and in the name of J., and the conveyance taken to him; that H. should furnish a portion of the purchase money, and that the balance should be advanced by J. and within a certain time repaid to him with interest by H., upon which J. should convey the title to H. H. having furnished the portion of the purchase money as agreed, J. made the purchase, paid the whole price and took a deed in his own name. In an action by H. to compel J. to execute a con-

veyance to him, held, that the verbal agreement might be proved for the purpose of showing a resulting trust in favor of H., and that the effect of the transaction was to make J. a mere trustee of H. as to the entire property, holding the legal title as security for the repayment of his advances. (*Hidden v. Jordan*, 21 Cal. 92.)

95. A resulting trust may be defeated as well as established by parol evidence. (*Bayles v. Baxter*, 22 Cal. 575.)

96. The recital in a deed that the purchase money of the property thereby conveyed was paid by the grantee is not conclusive that such was the fact, in an action brought by an alleged cestui que trust against the grantee as trustee to establish the trust. The recital may be explained or contradicted by parol testimony. (*Millard v. Hathaway*, 27 Cal. 119.)

97. The doctrine of resulting uses and trusts is founded upon mere implication of law, and, generally, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there is evidence of fraud or mistake the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. (*Russ v. Mebius*, 16 Cal. 350.)

Resulting, consideration of deed cannot be contradicted to show. See Deeds, 47.

3. Conveyance by Trustee to Beneficiary.

98. If in case of a resulting trust the trustee executes a deed to the other without any new consideration it is valid, and the cestui que trust is not estopped to claim the premises by allowing the trustee to claim the land as his own. (*Breeze v. Brooks*, 71 Cal. 169.)

99. In an action by the creditors of one who held the legal title to land as a resulting trust in favor of his brother, who paid the consideration for the land, to set aside a deed made to such brother in execution of the trust, on the ground that the conveyance was in fraud of the creditors of the trustee, it is necessary, in order to entitle the creditors to recover upon the ground of estoppel of the beneficiary, to show that the beneficiary was in some way privy to the trustee's obtaining credit from them, or that in giving such credit they relied upon some affirmative statement or act of the beneficiary other than the mere fact of his permitting the title to stand of record in the name of the trustee, if the creditors did not examine the record, or rely thereon as an inducement to give credit to the holder of the legal title. (*Breeze v. Brooks*, 97 Cal. 72.)

100. The creditors of the trustee cannot rely upon the fact that while he was the holder of the legal title he was generally reputed or believed to be the owner, or that his ownership was recognized by the beneficiary in a litigation between the trustee and other parties, where it does not appear that the creditors had knowledge of such general reputation, or of what was done during the litigation, or that they in any way relied thereon in giving credit to the trustee. (*Breeze v. Brooks*, 97 Cal. 72.)

101. Although it appears that credit was given by the plaintiffs on account of the apparent ownership of the trustee, and his exclusive possession of the property, and relying upon his declarations that he was the owner thereof, the beneficiary is not bound thereby, if it does not appear that he had any knowledge that the trustee was obtaining credit with the plaintiffs upon the faith of his apparent ownership of the land. (*Breeze v. Brooks*, 97 Cal. 72.)

102. Resulting trust is extinguished by conveyance by trustee to the beneficiary of other lands upon purchase of his equitable estate; and the statute of frauds does not in such case require a conveyance by the beneficiary of his equitable interest to the holder of legal title. (*Oarter v. Hopkins*, 79 Cal. 82.) Cited 82 Cal. 282.

Vendor procuring release from vendee does not take subject to trust in favor of one furnishing vendee with money. See Vendor and Vendee, XI, 3.

VII. Powers, Duties, and Liabilities of Trustees.

1. Powers are Controlled by Declaration of Trust.

103. When a conveyance is made to a person as a trustee, and he, at the same time, executes and delivers to the grantor a declaration in writing in which there is no ambiguity, stating the objects and purposes of the trust, the powers and duties of the trustee with reference to the trust estate are to be ascertained from the deed and the declaration; and, when so ascertained, the rights and duties of the parties must be controlled thereby. (*Tyler v. Granger*, 48 Cal. 259.)

2. Delegation of Powers.

104. Discretionary power in the execution of a trust cannot be delegated to a stranger by assignment. (*Saunders v. Webber*, 39 Cal. 287.)

3. Joint Trustees.

105. Whenever, by the terms of a conveyance to trustees with power to sell, it is doubtful whether the trustees take as joint tenants, or tenants in common, courts will hold, if possible, that they take as joint tenants. (*Saunders v. Schmaelzle*, 49 Cal. 59.)

106. In a conveyance to trustees with power to sell, and use the proceeds to pay expenses and the debts of the grantor, if the conveyance is silent as to whether the trustees take as joint tenants, or tenants in common, courts will hold that they take as joint tenants. (*Saunders v. Schmaelzle*, 49 Cal. 59.)

107. Where the deed creating the trust conveys the trust estate to trustees and empowers them, or the survivor of them, to sell and dispose of the trust estate, or any part of it, a conveyance by one of the trustees, while the other is acting as such, does not convey the legal title. (*Learned v. Welton*, 40 Cal. 349.) Cited 84 Cal. 468; 92 Cal. 14.

108. When trustees with power to sell hold as joint tenants, and one of the trustees dies as the whole estate descends to the survivors, so the power annexed to the trust devolves

on them, and they may sell and convey the legal title. (*Saunders v. Schmaelsle*, 49 Cal. 59.)

109. A trustee must personally see to the application of any trust funds received, and he cannot pass them over to his cotrustee for investment or distribution, without rendering himself personally responsible for the acts and defaults of the cotrustee. (*Fox v. Tay*, 89 Cal. 339.)

4. Title and Right of Possession of Trustees; Actions by; Actions Relating to Property.

110. A conveyance upon an express trust for the management and sale of real property and disposition of its proceeds among certain beneficiaries named, pursuant to subdivision 1 of section 857 of the Civil Code, vests the whole title in the trustee, both legal and equitable, by virtue of section 863 of the same code; and the only right that any beneficiary has is to share in the proceeds of the rents and profits when realized, and of the sale of the land when sold, and his only remedy is to enforce the execution of the trust. He has no attachable interest in the land. (*Ward v. Waterman*, 85 Cal. 488.)

111. If the owner of land who is indebted to another person conveys the same to a third person in trust, and the trustee makes a declaration of the trust in writing, in which it is stated that he holds the land in trust to sell the same at the end of sixty days and apply the proceeds to the payment of the debt of the cestui que trust, unless within said time the cestui que trust finds a purchaser who will pay the debt to the trustee, and then to convey the land to such purchaser upon such terms and conditions as the cestui que trust may dictate, the trustee has not the right to the possession of the land during the sixty days, nor afterwards. (*Tyler v. Granger*, 48 Cal. 259.)

112. In such case the cestui que trust, or his assigns, may continue in the use and possession of the property until a sale and conveyance of the same, in pursuance of the terms of the trust. (*Tyler v. Granger*, 48 Cal. 259.)

113. A trustee to whom land is conveyed by a debtor, with power to sell and use the proceeds in payment of the debt and the expenses of the trust, and whose powers and duties are prescribed by a declaration of trust in writing, and who merely holds the title in trust as security for the debt, cannot maintain ejectment against the cestui que trust, or his assigns, to recover the land. (*Tyler v. Granger*, 48 Cal. 259.)
Cited 62 Cal. 501.

114. Where a married woman, to whom purchase money was due under an executory contract for the sale of her real estate, conveyed her interest in the land to her father on the day before her death, by a deed absolute on its face, for the purpose of putting the legal title in him, to collect the purchase money, and hold the same, in trust, for certain purposes, he is entitled to receive and hold the money as against the surviving husband, who was her sole heir at law, notwith-

standing the subsequent execution of an invalid will declaring the terms of the trust, and regardless of whether the trust is or is not valid. (*Garnsey v. Gothard*, 90 Cal. 603.)

Title of trustee, when testator bequeaths property on trust. See Wills, XI, 16.

Trustee cannot vote stock of corporation. See Corporations, 510.

Delivery of bill or note without authority. See Bills and Notes, II, 3.

115. The trustee of an express trust is entitled to bring an action in his own name for the benefit of his cestui que trust. (*Winters v. Rush*, 34 Cal. 136.)
Cited 80 Cal. 31.

116. The holder of the legal title to land, although a trustee for a third person, is the real party and interest, and may maintain an action in his own name to recover the possession. (*Anson v. Townsend*, 73 Cal. 415.)

117. Trustee of an express trust may maintain an action to prevent waste or trespass upon the land held in trust, or to recover possession thereof, without joining with him his cestui que trust. (*Tyler v. Houghton*, 25 Cal. 29.)

118. A trustee of an express trust is a person having such beneficial interest in the trust estate, within the meaning of the four hundred and sixty-eighth section of the Practice Act, as to enable him to apply for a mandamus to compel the surveyor general to allow him to contest before him the application of a third person for the purchase of the land held in trust. (*Tyler v. Houghton*, 25 Cal. 29.)
Cited 73 Cal. 343; 10 Mont. 483.

119. Should a trustee refuse to bring an action to prevent waste or trespass, or to recover possession of the property, he may be compelled to do so. (*Tyler v. Houghton*, 25 Cal. 29.)

Delay by trustee in bringing suit. See post, 147.

Trustee may sue without joining beneficiaries. See Mortgages, 563.

Trustee of express trust may sue without joining beneficiary. See Executions, 303.

Holder of equitable title cannot quiet title. See Quieting Title, 17, 18.

Trustee of legal title may maintain ejectment. See Ejectment, 58.

Judgment against trustee, effect of, against purchaser. See Judgments, 445.

Dedication by trustee. See Dedication, 3, 4.

Judgments, trustee and beneficiaries, whether privies. See Judgments, X, 10, j.

Bar of trustee, how affects beneficiary. See Statute of Limitations, V, 4.

Who may sue to quiet title, where property held by trustees. See Quieting Title, 84.

Trustee of naked legal title is proper party. See Quieting Title, 90.

Parties, bringing in trustee by amendment. See Mortgages, 562.

Limitation of actions in cases of trust. See Statute of Limitations, VI, 5.

Trustee as plaintiff in foreclosure suit. See Mortgages, 562, 563.

5. Sale or Mortgage by Trustee; Purchaser, Whether Chargeable With Trust.

120. A conveyance to one in trust, to rent or sell the property, and apply the proceeds toward the payment of a debt of the grantor, conveys the fee, and the trustee has power to convey the legal title. (*Thompson v. McKay*, 41 Cal. 221.)

121. The trustee of a naked trust has no power to mortgage the trust estate. (*Griffin v. Blanchar*, 17 Cal. 70.)

122. Where the deed creating the trust empowers the trustees, or the survivor of them, "with the approbation or at the request of" the cestui que trust "expressed in writing, to sell and dispose of the trust estate, or any part of it," such approbation is manifested by joining in the execution and acknowledgment of a deed by which the trustee effects the sale and conveyance of the estate. (*Welton v. Palmer*, 39 Cal. 456.)
Cited 40 Cal. 350.

123. A deed so executed and acknowledged vests in the grantee the entire estate in the lands therein described as fully as it was held by the grantors under the trust deed. (*Welton v. Palmer*, 39 Cal. 456.)

124. Where the cestui que trust assented to the deed in compliance with the terms of the trust, she could not thereafter complain that there was no consideration, and her heirs have, in this respect, no greater rights than she possessed. (*Welton v. Palmer*, 39 Cal. 456.)

125. If one who holds the legal title in trust for devisees under a will, makes advances to pay encumbrances on the trust estate, and then sells portions of the property, a court of equity in taking an account will confirm the sales and charge the trustee with the proceeds. (*Morrison v. Bowman*, 29 Cal. 337.)

126. If trustees, who have a discretionary authority to sell and convey the trust property, sell the same, and receive the consideration, it is their absolute duty to convey the legal title. (*Saunders v. Schmaelzle*, 49 Cal. 59.)

127. If trustees have authority, in their discretion, to execute a deed of the trust property a court of equity may compel them to execute a conveyance in a proper case. (*Saunders v. Schmaelzle*, 49 Cal. 59.)

Death of grantor, effect on power of sale. See *Trust Deeds*, 22.

Sale of trust property, bond of trustee. See *Charitable Uses*, 21.

Deed by trustee, recitals in as evidence. See *Deeds*, 373.

Deed of trustee, admissibility of in evidence. See *Evidence*, 175.

Power of equity to decree sale of trust property. See *Charitable Uses*, 20, 21.

Action to set aside conveyance by trustees. See *Unincorporated Associations*, III.

128. The action was brought to recover the possession of certain land originally owned by one Soto. The plaintiffs claim to have derived title to the demanded premises after the death of Soto, by a conveyance from the trustee and cestui que trust under a deed of trust alleged to have been executed by Soto, and

empowering the trustee and beneficiary to convey in case of his death pending the trust. The answer alleged that the trust deed was never delivered by Soto to the trustee, but merely deposited with him for safekeeping, with the understanding that it should be returned for cancellation on demand, and that with the consent of the beneficiary the deed was surrendered to Soto, and canceled by the destruction thereof. Held, that the answer was sufficient to constitute an equitable defense. (*Burroughs v. De Couts*, 70 Cal. 361.)

129. Transfer by trustee in violation of trust transfers no other or greater interest than the trustee had where the transferee had notice of the trust. (*Eversdon v. Mayhew*, 65 Cal. 163, 166.)

130. It is a violation of trust where one holding the legal title in trust for another transfer's her title to another. (*Eversdon v. Mayhew*, 65 Cal. 163, 166.)

131. When property held by a trustee is conveyed to an innocent purchaser for value in fraud of the trust, the trustee is personally liable for all moneys derived from the trust property. (*Adams v. Lambard*, 80 Cal. 426.)
Cited 80 Cal. 645.

132. Where the trustee of a naked trust is in actual possession of the trust estate, and conveys it, for a valuable consideration, to a purchaser without notice of the trust, the title of the purchaser will prevail. (*Griffin v. Blanchar*, 17 Cal. 70.)

133. A bona fide purchaser from the holder of the legal title, without notice of a secret or resulting trust arising from the payment of the purchase money by another person, when conveyance was originally made to his grantor, is protected against the enforcement of such trust, and is not affected with constructive notice of an unrecorded decree of distribution made while his grantor was administrator of the estate of the deceased owner of the equity, distributing such equity to the heirs of the decedent, under an inventory made by such administrator declaring that decedent was the owner of the equitable estate; nor is such purchaser put on inquiry by the fact that his conveyance from the holder of the legal title was, in effect, a quitclaim deed, granting only his right, title, and interest in the premises. (*Nidever v. Ayers*, 83 Cal. 39.)

134. When property is conveyed to a trustee to rent and sell, and apply the proceeds to the payment of a debt of the grantor, a bona fide purchaser at the trust sale acquires a good title, even if the trustee, before the sale, had received sufficient money from the rents to pay the trust debt. (*Thompson v. McKay*, 41 Cal. 221.)

135. A party who purchases trust property with a knowledge of the trust occupies the same position with the original trustee. (*Price v. Reeves*, 38 Cal. 457.)
Cited 84 Cal. 297.

136. A trustee cannot acquire an adverse right to the trust property for his own benefit, and a purchaser from him with notice of the trust stands in the same position. (*Cavagnaro v. Don*, 63 Cal. 227.)

137. If a debtor makes an assignment of his

property to a trustee in trust to pay the proceeds pro rata to his creditors, one to whom the trustee assigns the property with notice of the trust must execute it. (*Sharp v. Goodwin*, 51 Cal. 219.)

138. If a trustee to whom a debtor has assigned his property in trust to pay the proceeds pro rata to his creditors sells and assigns the property to a third person for value, with notice of the trust, and such person converts the property into money and pays the creditors, they have no cause of action against the trustee. (*Sharp v. Goodwin*, 51 Cal. 219.)

139. K. in his lifetime purchased of one B. the land in controversy, paying therefor money received from his mother, the defendant, with the understanding that he should purchase the land for her benefit, taking the deed in his own name. Plaintiff, then the wife of K., with full knowledge of the facts, procured V. to make a deed of gift of the premises to her. Held, that the plaintiff took the legal title in trust for the defendant. (*Wormouth v. Johnson*, 58 Cal. 621.)

140. In such case it was not error to admit declarations of K., made after the deed of gift from V. to the plaintiff, that the purchase money of the premises belonged to the defendant, and that the purchase was made with her money and for her benefit, and that the title was held for her use. (*Wormouth v. Johnson*, 58 Cal. 621.)

141. When an express trust in land has been created by deed, for the purpose of paying the debts of the grantor, an oral agreement with a purchaser from the trustee, that he should take the title subject to the same trust, is not subject to the objection that such a trust cannot be created by parol, but the purchaser will be charged in equity with the terms of the trust created by the deed, as being a purchaser with notice of its terms. (*Scrivner v. Dietz*, 84 Cal. 295.)

142. In an action to declare a trust and compel a conveyance of the trust property to the beneficiaries the complaint alleged that the defendants held the legal title by conveyance from the original trustee, and that they took with knowledge of the plaintiffs' equities. At the time of the purchase by the defendants there was nothing of record to put them on inquiry as to the rights of the plaintiffs. Held, that the burden of proving notice to the defendants was upon the plaintiffs. (*Wyrick v. Weck*, 68 Cal. 8.)

143. In an action by the tenant of the grantee of the trustee, to compel such grantee and the grantee of the title obtained by the beneficiary in the action, to enforce the trust to interplead respecting the rent due, the burden is not upon the grantee of the trustee to allege and prove that he was a bona fide purchaser for value without notice of the trust, but is upon the other grantee, to aver and prove that he was not such bona fide purchaser. (*Warnock v. Harlow*, 96 Cal. 298.)

Purchaser of stock from trustee, rights of. See Corporations, IV, 5, b.

Sale by trustee to innocent purchaser. See Husband and Wife, 324; Partnership, 85.

Purchaser from one who holds in trust. See Bone Fide Purchaser, 10.

One cannot enforce deed from trustee if he is not entitled to relief against beneficiary. See Vendor and Vendee, 400.

Trust, where one purchases with notice of another's right. See Assignment of Contracts, 62.

Assignee, when chargeable with trust. See Assignment of Contracts, 82, et seq.

6. Management of Property; Mingling Funds.

144. A trustee of moneys, placed in his hands for the sole purpose of paying a note, which he cannot pay until it matures, is in duty bound merely to hold the money until those for whose benefit it is held give him definite directions, and he has no power or right to lend the money. (*Allin v. Williams*, 97 Cal. 403.)

145. When trustees act with good faith in management of trust property, and without selfish motives, they are entitled to be treated by a court of equity with liberality and indulgence, and especially when they act under the advice of counsel. (*Ellig v. Naglee*, 9 Cal. 683.)

146. Very supine negligence, or willful default, will render trustees liable; but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking the trust. (*Ellig v. Naglee*, 9 Cal. 683.)

147. Delay on the part of trustees in bringing suit to recover the rents of the trust estate, if subsequently approved by the cestui que trust, will excuse them. (*Ellig v. Naglee*, 9 Cal. 683.)

148. A trustee cannot, by mingling trust moneys with other funds, change his character from that of trustee to that of mere debtor. Per *Burnett, J.*, on rehearing. (*Gunter v. Janes*, 9 Cal. 643.)
Cited 63 Cal. 16.

149. If the testator during his lifetime mingled the money of the cestui que trust with his own, and after his death neither the trust money nor property into which it was converted can be identified in the hands of the executor, the cestui que trust has only a claim against the estate, which must be presented to the executor for allowance, as required by the Probate Act. (*Lathrop v. Bampton*, 31 Cal. 17.)
Cited 63 Cal. 16.

150. If trustee does wrongful act, then he by the act consents to be treated as a trespasser, or debtor, at the option of the cestui que trust. (*Gunter v. Janes*, 9 Cal. 643.)

Investments by trustees, what authorized. See Unincorporated Associations, 17.

7. Dealing With Property; Purchases by Trustee; Contracting With Beneficiary, Protection of.

151. A trustee cannot be permitted to retain possession as such after repudiating the trust and claiming adversely. (*Schlessinger v. Mallard*, 70 Cal. 326.)

152. The law does not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity, and express contracts thus made are contrary to public policy. (*Wilbur v. Lynde*, 49 Cal. 290.)

153. One acting in a fiduciary capacity will not be permitted to deal with himself in his individual capacity. (*Davis v. Rock Creek etc. Co.*, 55 Cal. 359.)

154. The rule is unyielding that a trustee shall not, under any circumstances, be allowed to have any dealings in the trust property with himself, or acquire any interest therein. (*Wickersham v. Crittenden*, 93 Cal. 17.)

155. Courts will not permit any investigation into the fairness or unfairness of the transaction, or allow the trustee to show that the dealing with himself was for the best interest of the beneficiary, but will set the transaction aside, at the mere option of the beneficiary. (*Wickersham v. Crittenden*, 93 Cal. 17.)

156. Where a trustee, holding moneys as a depository thereof, to pay a note which had not matured, loaned them to one from whom he took land as security, which he had previously contracted to sell to a third party, who had, in turn, contracted to sell the same to the party to whom the loan was made, and it appeared that the land was declining in value, such third party being willing to deduct a large sum from the amount due him from the party to whom the loan was made, in order to have the latter substituted for him as the debtor to the lender, a finding by the court that the trustee dealt with the trust property for his own profit, and did not act in good faith in making the loan, is sustained by the evidence. (*Allin v. Williams*, 97 Cal. 403.)

157. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and, if defendant used the money himself, he would be like a guardian using his ward's money, and be regarded as a borrower upon the same terms upon which he could have loaned to others. (*Baker v. Joseph*, 16 Cal. 173.)

158. As to whether proof of the conventional rate of interest in San Francisco during the time defendant held plaintiff's money was admissible, stated. (*Baker v. Joseph*, 16 Cal. 173.)

159. In all trust relations confidence is presumed; and, if advantage has come to the trustee in dealing with the beneficiary, the burden is on the trustee to show that confidence has not been abused, but this presumption may be overcome by proof that no confidence was placed in the trustee, and that the beneficiary acted exclusively upon the advice of disinterested and competent professional advisers; and, in such case, the transaction is not voidable at the election of the beneficiary, but it will devolve upon the latter, if he would set it aside, to show either actual or constructive fraud. Such fraud may be shown in some instances by presumptions. (*Colton v. Stanford*, 82 Cal. 351.)

160. Conceding, without deciding, that the trust relation between business associates continues after the death of one of them, so as to impose an active obligation upon the survivors as trustees of his estate to disclose

fully and correctly the condition of the business, upon a settlement thereof with his personal representatives, yet, if it appears that absolutely no confidence was reposed in them by the personal representative, but that the latter acted exclusively upon the advice of several disinterested experts and professional friends specially selected to investigate and advise in the premises, and who had full access to all sources of information, there is a complete waiver of the trust relation, and of the obligation of the trustees, as such, to make an absolutely correct disclosure of all the facts, provided they acted in good faith, without intentional fraud. If it further appears that the trustees in good faith disclosed to the representative of their deceased associate every fact within their knowledge, a compromise effected by mutual concession of claims between the parties will not be rescinded upon the ground that the trustees did not disclose all facts of which they might have acquired knowledge by a more diligent and skillful search; nor upon the ground of inaccuracies and misrepresentations in the accounts rendered by them, if the existence of inaccuracies in their statement was known to plaintiff before the compromise, and the representations were discarded as unworthy of belief, and an independent investigation made into the sources of information, which were fully open, and it appears that every fact which has since been discovered could have been discovered before the execution of the agreement. (*Colton v. Stanford*, 82 Cal. 351.)

161. The presumption follows from an independent investigation by the professional advisers of the beneficiary into the sources of information, that every thing material was discovered, and this presumption is fortified by proof of memoranda kept by such advisers, showing unmistakable care, and a painstaking and minute consideration of the subject. (*Colton v. Stanford*, 82 Cal. 351.)

162. A trustee cannot purchase nor deal with the subject of the trust, nor purchase debts to be paid out of the trust fund, nor place himself in a position antagonistic to the trust. (*Page v. Naglee*, 6 Cal. 241.)

163. A trustee cannot purchase from himself, either directly or indirectly. If he attempts to do so the transaction is voidable at the election of the cestui que trust. (*Golson v. Dunlap*, 73 Cal. 157.)

164. A trustee may purchase from his cestui que trust if the transaction is fair in all respects. (*Golson v. Dunlap*, 73 Cal. 157.)

165. As a general rule (subject to some exceptions) it is essential to the fairness of a purchase by a trustee from his cestui que trust that the consideration should be adequate. While the inadequacy of consideration is not itself the ground for setting the sale aside, yet, taken by itself, it raises a presumption of unfairness which, unless rebutted, renders the transaction constructively fraudulent. Section 2235 of the Civil Code does not change this rule. (*Golson v. Dunlap*, 73 Cal. 157.)

Cited 88 Cal. 187.

166. It is not necessary, on a purchase by a

trustee from his cestui que trust, that the highest possible price should be obtained; nor is a subsequent increase in value material. The fair value at the time is what is required. (*Golson v. Dunlap*, 73 Cal. 157.)

167. Inadequacy of consideration is one of the facts constituting the fraud on a purchase by a trustee from the cestui que trust, and when put in issue must be found. (*Golson v. Dunlap*, 73 Cal. 157.)

168. If it be assumed that the question of the right of trustee under a will to purchase from his cestui que trust may be litigated on the application for distribution, yet, if not so litigated, the decree of distribution does not conclude the question. (*Golson v. Dunlap*, 73 Cal. 157.)

169. Where several tenants in common conveyed land to a trustee by a deed absolute on its face, which was duly recorded, and the trustee executed a declaration of trust, reciting the conveyance to him by the parties to facilitate the settlement of the title, and binding himself, his heirs and assigns, to reconvey the proportions conveyed by them after the title is settled, and one of the tenants in common was afterward substituted as trustee in place of the first trustee, upon receiving a conveyance from him, and thereafter executed a declaration of trust to the same effect as the first declaration, except that he omitted the name of one of the cotenants, and agreed to convey the share owned by such cotenant to another cotenant, from whom he had obtained it by deed duly recorded, a purchase of such share by the substituted trustee from the one to whom he had agreed to convey it cannot make him an innocent purchaser, as he was bound to know, as a matter of law, that he was trustee for the same parties as the first trustee, and that he could not displace one beneficiary and substitute another in his place by ignoring the right of the former, and recognizing another as holding his interest. (*Watson v. Sutro*, 86 Cal. 500.)

170. Title obtained by trustee to property inures to the benefit of his cestui que trust. (*Janes v. Throckmorton*, 57 Cal. 388, 386.)

171. Interest acquired in trust property by a trustee with funds obtained from the trust property inures to the benefit of the cestui que trust. (*Janes v. Throckmorton*, 57 Cal. 388, 386.)

172. Trustees are guilty of fraud on their cestui que trust, when they enter into a conspiracy with his creditor whereby the creditor procures a judgment against the cestui que trust, under which the latter's interest in the trust estate is sold under execution and conveyed to the trustees; and the trustees will be compelled, on repayment of the purchase price, to reconvey the property so acquired to the cestui que trust. (*Raynor v. Mintzer*, 67 Cal. 159.)

173. The purchase, by a trustee, of a debt, to be paid out of the trust fund, and causing an action to be brought, and judgment obtained thereon in the name of another, if not a fraud in fact, was a violation of his duties as a trustee, and it makes no difference in this respect whether his trust is created by

deed or mortgage, or whether the same was void or not. (*Page v. Naglee*, 6 Cal. 241.)

174. A judgment so obtained by a trustee, is void in law and a nullity, and may be enjoined at the instance of the party executing the deed of trust to secure the payment of his debts out of the fund. (*Page v. Naglee*, 6 Cal. 241.)

175. Having accepted the trust and received the rents of the property the trustee cannot dispute its validity, particularly for his own benefit. (*Page v. Naglee*, 6 Cal. 241.)

Right of trustee to purchase. See *Trust Deeds*, 29, et seq.

Purchase by trustee, cestui que trust need not disaffirm. See *Executors and Administrators*, 250.

Trustee obtaining patent in his own name. See *Mines and Mining*, 183.

176. It is one of the peculiar functions of a court of equity to protect a cestui que trust against any violation by his trustee of his obligation, and to prevent any impairment of the trust fund, and, in case of diversion or misappropriation thereof by the trustee, to direct a restitution, and enforce it by appropriate process. (*Wickersham v. Crittenden*, 93 Cal. 17.)

177. A trustee should never be permitted to defeat the rights of the cestui que trust, so long as it is in the power of a court of equity to enforce them. (*Gunter v. Janes*, 9 Cal. 843.)

8. Accounting; Allowance for Expenses; Advances by or to; Compensation of.

178. The right of the beneficiary of a trust to enforce an accounting from the trustee does not rest upon fraud, and no such allegation is necessary in the complaint; nor is it necessary to allege that such an amount has been realized by the trustee as to entitle the beneficiary to a share of the profits, as he has a right to know how much has been realized and expended, so as to determine whether he is entitled to any payment. The fact that no amount is due cannot affect the right to an accounting, when the trustee has denied the trust. (*Green v. Brooks*, 81 Cal. 328.)

179. A written statement of account given by the grantee to the widow of the grantor, showing the amounts received by the grantee as rent, and expenditures out of rent, and some payments to the grantor, does not constitute a written declaration of a trust. (*Haas-hagen v. Haas-hagen*, 80 Cal. 514.)

180. Under a contract to account for and pay moneys held in trust no account should be taken of sums received after the filing of the complaint. (*Butler v. Austin*, 64 Cal. 3.)

Accounting by, see *Appeals*, 225, 226.

Accounting, where executor is also appointed trustee. See *Executors and Administrators*, VIII, 2.

Incomplete adjudication in action for accounting. See *Judgments*, 7.

181. When the trustee is frequently requested to give an accounting of his trust, and continually evades it, without repudiating the trust, and finally, in violation of the trust, sells the trust property to an innocent purchaser, he is not entitled to any interest on

his account, but may be charged with compound interest from the date of the sale. Where the omission of a trustee is due to mere negligence, without fraudulent intent, simple interest alone is allowed to the cestui que trust on trust funds; but, if the omission is willful, compound interest is allowed. (*Adams v. Lambard*, 80 Cal. 428.) Cited 80 Cal. 645.

Interest, liability for, where trustee uses funds. See ante, 158.

Interest, liability for, demand, when necessary. See Interest, 78.

182. Payments made to a beneficiary by a trustee who has received the income of the land held in trust, in the absence of an express agreement or understanding to the contrary, will be presumed to have been made on account of the rents, issues, and profits received, and not as advances or loans. (*Woodard v. Wright*, 82 Cal. 202.)

183. Where one supposed he had acquired the legal title to land in trust for certain devisees under a will, and under that belief, in discharge of his supposed trust, paid off encumbrances existing on the land, and expended money necessary for its preservation, held, that he was entitled to be reimbursed what he had so paid, with interest, notwithstanding he had not in fact acquired the legal title to the land. (*Morrison v. Bowman*, 29 Cal. 337.)

184. Money advanced by the trustees to the cestui que trust with the understanding that the same should be repaid out of the rents of the trust property, is a lien only upon the net incoming rents, and not a lien upon the trust property. (*Ellig v. Naglee*, 9 Cal. 683.)

185. The same is true respecting the charges for legal services of one of the trustees in the management of the trust property. The rents must be applied to the payment of such allowances until they are liquidated. (*Ellig v. Naglee*, 9 Cal. 683.)

186. Trustees are entitled to reimbursement out of the trust property for all moneys paid out and expended under the trust for the benefit of all the beneficiaries, for the purpose of relieving the trust property of an encumbrance, and have a lien upon the whole of the trust property for such reimbursement, which cannot be so limited in law or in equity as to be a lien upon a moiety only of the property. (*Glide v. Dwyer*, 83 Cal. 477.)

187. One who purchases land at the request of another, and takes the deed in his own name to secure a part of the purchase money advanced by him to the person requesting the purchase, holds the property as trustee for such person; and, if allowed, by consent, to retain the entire management of the property, should be reimbursed, as a condition of enforcing the trust, for the expenses of erecting a fence, constructing a windmill, laying water-pipes, digging a new well, and construction of a new bridge, where it appears that such improvements were absolutely necessary. Money paid for insurance should also be allowed. Trustees with invested general powers of control and management are not bound to the strict limitations placed on mortgagees in possession, but are justified in making ordinary

repairs and improvements, and in insuring the property, and are allowed to hold the estate until reimbursed; nor does the right of reimbursement depend upon the knowledge or consent of the cestui que trust. (*Woodard v. Wright*, 82 Cal. 202.)

188. In an action by the trustees of the Lick trust for a settlement of their accounts, and for permission to pay over to the residuary donees a part of what would, in the end, be coming to them, where the various beneficiaries named in the trust deed appeared by answer and cross-complaint, and the action was virtually transformed into a contest between the various trusts as against the residuary donees, the attorneys' fees allowed by the court to the attorneys for the various beneficiaries under the trust deed should not be charged to the main trust fund, but each particular trust shall be charged with its own attorney's fee. (*Floyd v. Davis*, 98 Cal. 591.)

189. Under the provisions of such trust deed authorizing the trustees "to expend the sum of seven hundred thousand dollars for the purpose of purchasing land and constructing and putting up on such land a powerful telescope (superior to and more powerful than any telescope ever made)," expenditures incurred by the trustees for legal services rendered for the express benefit of the telescope trust, and traveling expenses of the president of the board of trustees on telescope business, should be charged to the telescope trust fund, as part of the cost of construction, and not to the general fund. (*Floyd v. Davis*, 98 Cal. 591.)

190. The provision in the James Lick trust deed that the trustees erect a "group of bronze statuary, well worth one hundred thousand dollars," at the city hall in the city and county of San Francisco, means that one hundred thousand dollars should be honestly and intelligently expended in the erection of the statuary, and expenses incurred by the trustees for models, diagrams, etc., furnished under an advertisement by the trustees, to be used in the erection of the statuary, but which proved unsatisfactory, and were rejected, should be charged to the general trust fund, and not to the statuary fund. (*Floyd v. Davis*, 98 Cal. 591.)

191. A trustee acting under a declaration of trust, expending money not expressly authorized by the declaration, is not entitled to reimbursement out of the trust property, unless the expenditure was necessary for the preservation of the property, or to prevent the failure of the designated trusts; and a third person advancing money to the trustee stands in no better position with reference to the trust property. If the third person advance the money with the approbation of the grantors in the trust deed he can only enforce the equitable lien thus obtained against the residuary interest coming to them after all the claims mentioned in the declaration are satisfied. (*Beatty v. Clark*, 20 Cal. 11.)

192. Where a declaration of trust, accompanying a conveyance of real property, provided that parties making advances to the trustee to a specified amount for certain designated purposes, with the consent of persons

previously named in the declaration as beneficiaries of the second class, should stand, as to the advances so made, in the same position, and receive payment in the same manner and proportion as such previously named beneficiaries, held, that the trust estate was not liable for advances made to the trustee for any other than the purposes designated in the declaration, nor for advances made for those purposes by third persons without the consent of the beneficiaries. (*Beatty v. Clark*, 20 Cal. 11.)

193. Where the purposes designated in the declaration of trust were to secure advances to pay off a debt, to purchase and locate school warrants, and to raise a crop, and the trustee in one instance borrowed money to harvest and put in the crops, and gave his note as trustee for the amount, including also an amount for storage on grain, and stated in the note that for its payment all the property was pledged, and also borrowed money to meet future farming operations, and gave his note, in which he also stated that all the property was pledged for its payment, held, that the statement in the notes did not create any lien; that even if raising a crop, as mentioned in the declaration, implied also the harvesting of the crops, no allowance could be made, inasmuch as it did not appear how much was borrowed for that purpose; that the other objects for which the money was borrowed were not embraced in the declaration of trust; and for the payment the trustee had no authority to pledge the property; and, further, that he had no authority to accept the moneys, and place the claims thereupon arising in the second class of claims secured, without the consent of the persons holding the claims of that class. (*Beatty v. Clark*, 20 Cal. 11.)

194. Under the provision in the Lick trust deed authorizing the trustees "to expend the sum of one hundred and fifty thousand dollars in the erection and maintaining, in the city of San Francisco of free baths," under the direction of the trustees, compensation allowed to such trustees for services rendered in the matter of the erection and maintaining of the free baths should be charged to the bath trust fund, and not to the general trust fund. (*Floyd v. Davis*, 98 Cal. 591.)

195. In an action by a divorced wife, against trustees appointed by the will of the divorced husband, to recover money which they had received as the proceeds of her one-third interest in certain hotel property, awarded to her by the decree of divorce, which it was agreed and decreed that the husband should be entitled to manage, but which was not subject to his testamentary disposition, nor disposed of by his will, it is no defense to such action that the trustees are entitled to keep the money as compensation for their services, as trustees under the will, in caring for the divorced wife's interest in the property. (*Berghauser v. Blanckenburg*, 86 Cal. 316.)

196. In such action, where it appears, from the evidence, that the trustees thought they had a claim upon the wife's interest in the property, for compensation as trustees under the will, for managing the entire property, but that they never pretended or acted under

the belief that they had any agreement with her to be her agents for the management of her interest, and to receive any compensation directly from her therefor, or that they had any claim against her for services rendered at her request upon a quantum meruit, outside of their claim as trustees under the will, findings that there was no agreement of the wife to pay them, and that they had rendered no services for her, at her request or otherwise, will be sustained, and there can be no recovery against her for such services. (*Berghauser v. Blanckenburg*, 86 Cal. 316.)

197. A trustee, upon the close of his trust, is entitled to a reasonable compensation for his services in performing his duties under the trust deed, to be fixed by the court, unless the parties can agree in relation thereto, and is entitled to be reimbursed for all expenses incurred by him. (*More v. Calkins*, 95 Cal. 435.)

One holding stock in trust, liability of for debts. See Corporations, 246.

Trustee's failure to turn over property on order. See Contempt, 27, 28.

9. Action to Establish, Enforce, or for Breach of Trust.

198. Before one can maintain a suit to charge another as trustee of the legal, he must show that he has the equitable title to the property. (*Hoemer v. Duggan*, 56 Cal. 257.) Cited 70 Cal. 546.

199. The question not decided whether the probate court has jurisdiction to enforce a trust created by an intestate. (*Estate of Webb*, 49 Cal. 541.)

200. An assignee of a cause of action to establish and enforce a trust is the real party in interest, and may maintain the action in his own name. (*O'Connor v. Irvine*, 74 Cal. 435.)

201. An action is properly brought in the names of the beneficiaries of the trust. (*Bettis v. Townsend*, 61 Cal. 333.) Cited 70 Cal. 97.

202. Heirs at law are the proper parties to bring suit to enforce a trust and compel a conveyance of the legal title. (*Janes v. Throckmorton*, 57 Cal. 368, 387.)

203. Where an attorney purchases the property of an insolvent at the assignee's sale, for the benefit of the creditors, in an action to enforce the trust, the insolvent, his creditors and their successors in interest, are proper parties plaintiff; and the trustee, and subsequent purchasers and encumbrancers under him are proper parties defendant. (*Broder v. Conklin*, 77 Cal. 330.)

204. In an action by one of several cestui que trust to declare and enforce an implied trust in relation to land all the persons who are entitled to, or claim to be entitled to, a portion of the trust estate are proper parties defendant. (*Jenkins v. Frink*, 30 Cal. 586.) Cited 71 Cal. 187.

205. Where the complaint charged that A was indebted to plaintiff, and had conveyed his property to B, to be disposed of for his benefit, and had drawn an order in favor of plaintiff, on B, who had accepted it, and further charged that B had subsequently re-

conveyed a portion of the property to A, without consideration, praying that B be compelled to execute the trust in favor of plaintiff, held, that A was a proper and necessary party to the action. (*Lucas v. Payne*, 7 Cal. 92.)

206. By the acceptance of the order they became liable to the plaintiffs as trustees, which liability they could not escape by a subsequent fraudulent transfer of the trust property. (*Lucas v. Payne*, 7 Cal. 92.)

207. Where one of the parties to the trust deed, who was made a party defendant in an action to appoint a new trustee and to enforce the trust, transferred all his interest in the land to a third person after the execution of the deed, and after the complaint was filed, he cannot complain that the third person was not made a party to the action, if he did not ask to have him joined as a party. (*Smith v. Davis*, 90 Cal. 25.)

208. In an action to establish and enforce a trust in certain shares of corporate stock, when the evidence shows that a third person has an interest with the plaintiff as a cestui que trust in the subject matter of the action, the court should order him to be made a party, although the defendant has omitted to raise any objection of defect of parties, either by demurrer or answer; and the failure of the court so to do is fatal to the judgment. (*O'Connor v. Irvine*, 74 Cal. 435.)
Cited 87 Cal. 265.

Parties in action to compel reconveyance. See post, 250.

209. A trust agreement cannot be enforced in an action to rescind a conveyance, where the pleading does not justify such relief. (*Schultz v. McLean*, 93 Cal. 329.)

210. The action was brought to establish a trust, and compel a conveyance of the trust property. The court below sustained a demurrer to the complaint. Held, that no trust was shown by the complaint, and that the demurrer was properly sustained. (*Mound City etc. Assn. v. Slauson*, 65 Cal. 425.)

211. Where a bill alleges a parol trust, it seems that it must be denied; and a general demurrer will not lie. (*Peralta v. Castro*, 6 Cal. 354.)

212. In an action to have a party declared a trustee, and to compel him, as such, to convey land alleged to have been acquired by him from a third party as trustee of the party complaining, testimony on behalf of the latter party as to whether he knew that the other was about to make the purchase is irrelevant. (*Branson v. Caruthers*, 49 Cal. 374.)

213. If plaintiff alleges an express trust, it is incumbent upon him to prove it as alleged. (*Gunter v. Janes*, 9 Cal. 643.)

214. When, in an action to enforce a trust, there is an entire absence of any evidence to show an express or resulting trust, and only evidence of circumstances tending to show a verbal agreement to hold the property in trust, a nonsuit should be granted, and although the evidence of the defendant to explain those circumstances is not satisfactory, a finding of a trust from such evidence cannot be sustained. (*Hasshagen v. Hasshagen*, 80 Cal. 514.)

215. In case the execution of a valid conveyance cannot be decreed, the beneficiaries of the trust are entitled to recover its value from those by whose wrongful acts it was lost. (*Price v. Reeves*, 38 Cal. 457.)

216. In such case the value of the property at the time of the commencement of the suit is the measure of damages. (*Price v. Reeves*, 38 Cal. 457.)

217. A decree establishing a trust in favor of the cestui que, and making allowances to the trustee for moneys by him advanced in and about the trust estate, and directing the trustee to execute a conveyance of the trust estate to the cestui que before payment of the moneys advanced by the trustee, is erroneous. The payment of the money should be made a condition precedent to the conveyance. (*Robles v. Clarke*, 25 Cal. 817.)

218. An action of ejectment by a cestui que trust against the trustee to recover possession of the trust estate is not a bar to a subsequent action against him to establish the trust. (*O'Connor v. Irvine*, 74 Cal. 435.)

Action against trustees for moneys received under trust, defense that trustees entitled to money as compensation. See ante, 195, 196.

Action against executor to enforce trust. See post, VIII.

Enforcement of trust against third person. See post, VIII.

Action to declare trust. See post, 250.

Action to charge grantees as trustees. See Fraud, 82.

Complaint by administrator to establish trust, when insufficient. See Executors and Administrators, 292.

Consolidating action for partition and action to enforce trust. See Consolidation, 2.

Action by beneficiary to enforce trust, parol evidence to contradict deed. See Evidence, 366.

Right of administrator to sue to enforce. See Executors and Administrators, 272.

Bill to enforce, when not multifarious. See Equity, 80.

Actions to enforce trust and lien, joinder of. See Joinder and Severance of Actions, I, 2, c.

Jurisdiction over action to enforce trust. See Executors and Administrators, 315.

Jurisdiction over property held in trust for debt. See Equity, 88.

Venue of action for settlement of trust. See Venue, I, 3, h.

Judgment reforming trust agreement, relation of. See Reformation of Contracts, 42.

Breach of trust by guardian. See Guardian and Ward, V, 7.

Action to enforce resulting trust against executor, beneficiary may testify. See Witnesses, 50.

Action is for conversion and not for enforcement of trust, when. See Trover, 17.

Equity controls, legal title for benefit of beneficiary, when. See Mines and Mining, 183.

Gold coin judgment in action by beneficiaries. See Judgments, 60.

Findings of disavowal of trust interest. See Statute of Limitations, 173.

Trustee's right of appeal. See Appeals, 392.

Appealability of orders relating to trustees. See Appeals, II, 9.

Judgment enforcing a trust, effect of pending appeal. See Appeals, 1669.

Certiorari to review orders relating to trustees. See Certiorari, III, 2, f.

10. Removal and Substitution of Trustees; Appointment of New Trustees.

219. A superior court has jurisdiction of an action to remove a trustee, although the trust property consists of real estate in another county. (*More v. Superior Court*, 64 Cal. 345.)

220. If a trustee is an improper person to receive money and execute a trust, equity will remove him and appoint another. (*Silvey v. Hodgdon*, 52 Cal. 363.)

221. If the trustee has been unfaithful, the court may compel restitution, and restrain him by injunction, and remove him from his trust, if necessary, and also enjoin his confederates from further participation in acts infringing the plaintiff's right. (*Wickersham v. Crittenden*, 93 Cal. 17.)

222. A court of equity will substitute new trustees to manage the trust property when its safety or proper administration so requires, but will not do so if no good result is to be accomplished thereby. (*Schlessinger v. Mallard*, 70 Cal. 326.)

223. The complaint, after setting up the trust, and all the facts connected with it, alleged that the defendant had violated and repudiated it, had used the trust property for his own benefit, and that he was an unfit person to be trustee. The court found these allegations to be true, but, instead of substituting a new trustee, it decreed that the defendant should convey the land to the plaintiffs, and provided that they should hold the lot in which the bodies were buried, subject to the public easement as a place of burial, until the bodies were removed by proper authority. Held, that the decree was proper. (*Schlessinger v. Mallard*, 70 Cal. 326.)

Appointment of new trustee where trustee incompetent. See ante, 18.

Action to appoint new trustee, parties in. See ante, 207.

224. Where a testator provided in his will that his wife should manage his estate as trustee, and that in case of her death before certain grandchildren, named as trustees, should become of age, the management of the property should devolve upon his son, named in the will, and the widow voluntarily renounces her trust, and consented to the substitution of the son as trustee, the order of substitution is not void for want of notice to the minor trustees, who were not beneficiaries under the will, or interested in the management of the property during the life of the widow. (*Moore v. Superior Court*, 86 Cal. 495.)

225. Where a trust deed respecting land in another state, made and executed in this state, provides that if the trustee named therein should fail or refuse to accept the trust a new trustee may be appointed by a court of competent jurisdiction, a court of this state which acquires jurisdiction of the parties may appoint a new trustee to carry out the trust, where the trustee named in the deed refuses to act. (*Smith v. Davis*, 90 Cal. 25.)

226. An order substituting a trustee of an estate is a final order as between the old and new trustees, and the court has no jurisdiction after the expiration of six months to vacate the order made, on a mere motion for that purpose, the order not being void on its face, and an order vacating such final order after the expiration of such period is void and will be annulled on certiorari. (*Moore v. Superior Court*, 86 Cal. 495.)

227. A complaint in an action to quiet title, brought by trustees holding under a will, is not subject to general demurrer, on the ground that the complaint shows that one of the plaintiffs was appointed as a trustee by four of the remaining trustees, without an order of court, after one of six trustees named in the will had died, and another had been removed by the superior court as incompetent, it appearing that the will expressly provided that when the number of trustees was reduced to four, the remaining four should appoint a fifth trustee. (*Irvine v. Davy*, 88 Cal. 495.)

228. Where a deed of trust, given to secure the indebtedness of the trustor to a beneficiary named therein, provides that the trustee shall sell the land in a specified manner, upon non-payment of the money secured by the deed, and also provides for a successor in case of the death, resignation, or removal of the trustee, though not specifying the manner in which he should be appointed, a trustee appointed by the superior court upon petition of the beneficiary, without notice to the trustor or his grantees, as successor of the deceased trustee named in the deed, may make a valid sale and conveyance of the land in accordance with the terms of the deed of trust. (*Dyer v. Leach*, 91 Cal. 191.)

229. The order of court appointing the trustee, unless absolutely void, cannot be collaterally attacked, and such order is not rendered void by the absence of notice to the trustor, it being discretionary with the court what, if any, notice should be given. (*Dyer v. Leach*, 91 Cal. 191.)

230. The theory of the law is, that upon the death of the trustee the trust vests in the court, and, in the absence of statutory provision, notice is not necessary to confer jurisdiction. (*Dyer v. Leach*, 91 Cal. 191.)

231. The jurisdiction of the superior court to appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practicable method for the appointment of a successor is a quasi jurisdiction in rem, a power over the trust, and is not acquired by the service of process upon any person interested in the trust fund or its preservation. (*Dyer v. Leach*, 91 Cal. 191.)

Order vacating substitution of trustee not appealable. See Appeals, 154.

Substitution of new trustee, where original incompetent to act. See ante, I, 2.

VIII. Following Trust Fund; Enforcement of Trust Against Executor or Third Person.

232. If a trust fund in the mutations of business has become so mingled with and absorbed into the property belonging to the

trustee as to be no longer capable of being traced or identified, the only remedy of the cestui que trust upon the death of the trustee is that of a creditor, and if he fails to present his claim as required by probate law, he must fail in his action; but if the trust property can still be earmarked, traced, and identified, the cestui que trust may maintain an action against the administrator to enforce the trust, without presenting any claim against the estate of the trustee, since the cestui que trust in such case seeks his own property only, and not to enforce a claim against the estate and property of the decedent. (*Roach v. Caraffa*, 85 Cal. 436.)

233. Before a cestui que trust can claim specific real or personal property in the enforcement of the trust, he must show that it is the identical trust property, or that it is the fruit or product thereof in a new form. (*Lathrop v. Bampton*, 31 Cal. 17.)

234. When a cestui que trust can identify the trust fund, either in its original or in a substituted form, he may elect to hold the original or substituted property, or may hold the trustee personally liable; but, if he cannot identify the property, he must rely on the personal liability of the trustee. (*Lathrop v. Bampton*, 31 Cal. 17.)

Cited 2 Wash. 637.

Purchaser of wife's property from husband takes subject to trust. See *Husband and Wife*, II, 4, e.

Notice of implied trust what is not. See *Vendor and Vendee*, XI, 3.

Action to subject trust property to administration. See *Estates of Deceased Persons*, 15.

Estoppel to pursue trust fund from election of remedy at law. See *Election*.

235. If an action to enforce a trust could not have been maintained against a testator, it cannot be maintained against his executor. (*Lathrop v. Bampton*, 31 Cal. 17.)

Cited 57 Cal. 461; 72 Cal. 18, 20; 85 Cal. 444; 1 N. Dak. 82.

236. A trust assumed by a testator will not be enforced against his executor when the identity of the trust fund is entirely lost, and it is neither shown to be in the hands of the executor in its primary condition, nor that it was converted by his testator into the property or any part of it in the executor's possession. (*Lathrop v. Bampton*, 31 Cal. 17.)

237. Where the owner of a note assigns it in trust such trust devolves upon the administrator of the trustee, and may be enforced directly against him by the assignor's attorney as an equitable cause of action. (*Tyler v. Mayre*, 95 Cal. 160.)

238. If the executor has come into the possession of the trust fund or its substitute, so that the same can be identified, he can be held to account and charged as a trustee upon the same terms as his testator held the trust, and the relationship of trustee and cestui que trust will be added to that of executor. (*Lathrop v. Bampton*, 31 Cal. 17.)

Cited 65 Cal. 230.

239. The defendant had possession of a promissory note to which the plaintiff was

entitled under an agreement between him and one Isaac Friedlander, deceased, and the action was brought to compel an assignment and delivery of the note to the plaintiff. The note was payable to Isaac Friedlander, who held it at the time of his death, and the defendant obtained possession of it as executrix of the estate. After the commencement of the action the defendant collected the note by offsetting in part a claim which the maker had against the estate, and receiving the balance in money, and thereupon surrendered the note to the maker. A supplemental complaint was filed stating the fact of the collection, and demanding a judgment against the defendant for the amount of the note. Held, that the plaintiff was entitled to recover, that the defendant was a trustee for his benefit, and that her duty was to deliver the note to him; that its collection and surrender constituted a breach of trust, and that she was personally liable for the amount. (*Sharpstein v. Friedlander*, 63 Cal. 79.)

240. A party seeking to enforce a trust against the administrator of a trustee is compelled, from the complex nature of the cause, to ask relief in a court of equity. (*Gunter v. Janes*, 9 Cal. 643.)

241. A court of equity will enforce a trust against all persons who with notice of the trust come into the possession of the trust property, in the same manner and with like effect as against the original trustee. (*Lathrop v. Bampton*, 31 Cal. 17.)

Cited 84 Cal. 297.

242. A judgment creditor of the husband, who purchases property standing in the husband's name at a sale under execution upon his judgment, although he pays no money therefor, but credits the amount of his bid on his judgment, stands in the same position as a third party making a purchase under the execution and paying a money consideration therefor, and is protected against a latent equity arising from a resulting trust in favor of the wife, of which the judgment creditor had no notice. (*Riley v. Martinelli*, 97 Cal. 575.)

243. In an action by the wife to enforce the resulting trust in her favor, and obtain a decree against the judgment creditor that she is the owner of the property sold, and to have the sale declared void, evidence of declarations made by the wife to a third party, in reference to her ownership of the property, is inadmissible, unless it is proposed to bring the knowledge of such declarations home to the defendant. (*Riley v. Martinelli*, 97 Cal. 575.)

244. K. acquired the legal title to land under such a state of facts as made his purchase fraudulent, and made him the trustee of S. U. bought from K. S. commenced an action against U. to have him declared his trustee and to compel him to convey the land. In his complaint he averred the facts showing K's fraud, and which, in law, made him the plaintiff's trustee. S., in his answer, admitted these facts and his knowledge of them, but denied that he became the trustee of S., or that there was anything unfair or fraudulent in the facts alleged. Held, that the answer ad-

mitted the trust. (*Scott v. Umbarger*, 41 Cal. 410.)

Purchaser from trustee, whether takes subject to trust. See ante, VII, 5.

Suit in equity to enforce parol trust against decedent. See *Estates of Deceased Persons*, 223, 224.

Administrator of tax-collector may be treated as trustee. See *Executors and Administrators*, 329.

IX. Revocation and Termination of Trust; Conveyance to Beneficiary; Reconveyance to Trustor.

245. A declaration of trust in a will as to property conveyed to a trustee by an absolute conveyance in trust, which is no part of the will, is not revoked by the revocation of the will, where the property conveyed is expressly excepted from the estate disposed of by the will, and the declaration of trust contained in the will is referred to in the deed of trust for the purpose of showing the nature of the trust. (*Kopp v. Gunther*, 95 Cal. 63.)

246. Act of either trustee or cestui que trust, without consent of the other, should not be permitted to change the relation or capacity of the parties. (*Gunter v. Janes*, 9 Cal. 643.)

247. Express trust in land created for the purpose of paying the debts of the grantor could not be revoked without the consent of all the creditors for whose benefit it was created; nor could it be extinguished without the consent of the beneficiaries, except by the entire fulfillment of its object, or by such object becoming impossible or unlawful. (*Scrivner v. Dietz*, 84 Cal. 295.)

248. After a trust has been created and accepted, the trustor has no power to revoke it without the consent of the beneficiaries, unless such power was reserved in the declaration of the trust. (*Hellman v. McWilliams*, 70 Cal. 449.)

249. A voluntary deed of trust passing a present interest in fee to the trustee, with full power to control, encumber, and sell the property, without reserving a power of revocation, is irrevocable, and a want of consideration therefor is immaterial. (*Kopp v. Gunther*, 95 Cal. 63.)

250. A complaint in an action brought to have it decreed that a conveyance of lands by the plaintiff to the defendant created a mere naked legal trust, and to compel the defendant to convey the lands to the plaintiff, alleging that the property was conveyed in trust, and that at the same time the defendant executed a written instrument, which, after reciting that the property was conveyed in trust, contains an acceptance of the trust and an agreement to carry out the same according to a declaration of trust set forth in plaintiff's will, executed contemporaneously therewith, and which further alleges that the deed was executed solely for the purpose of securing the defendant for small amounts of money to be loaned to the plaintiff by the defendant, and as a part of his last will, and further avers that the plaintiff has revoked his will and the naked trust, if any, created by the conveyance, and has offered to repay the sums

advanced by defendant, but which avers neither undue influence, fraud, or any other of the ordinary grounds for avoiding conveyances, states no cause of action. (*Kopp v. Gunther*, 95 Cal. 63.)

251. A mere mistake of law on the part of the grantor of a deed of trust as to the nature and effect of the instrument, supposing it to be a mere testamentary disposition of his property remaining within his control, is not ground for relief in equity, especially where it appears that he intended to put the property beyond the reach of an unfavorable judgment. (*Kopp v. Gunther*, 95 Cal. 63.)

252. The author of an express trust, which does not provide to whom the trust property shall belong upon a failure or termination thereof, may convey the property subject to the trust; and the grantee will acquire all the rights in and to the property that the trustor had. (*Schlessinger v. Mallard*, 70 Cal. 326.)

Conveyance by trustee to beneficiary in case of resulting trust. See ante, VI, 3.

253. Where one has received property or money in trust, to hold for the security of sureties on a recognizance, a release by the sureties of all claim on the property and a demand on the bailee terminates the trust, and it then becomes his duty to return the property to the bailor. (*Skidmore v. Taylor*, 29 Cal. 619.)

254. When it was provided, in a conveyance of real estate to certain parties in trust for a specified purpose, that, if the trustees should declare by resolution that the objects of the trust were found to be impracticable, the estate thereby conveyed should be determined and the land revert to the grantor, it was held that on the happening of that event the trust deed became void, and the right of the grantor became absolute. (*Hawes v. Lathrop*, 38 Cal. 493.)

Trustee cannot change his character as trustee by mingling funds. See ante, VII, 6.

255. When an express trust has been created by a conveyance of land to the defendant to be held in trust for the plaintiff for five years, and to be reconveyed to the plaintiff at the end of said term, the mere possession of the plaintiff at the expiration of the five years, without a reconveyance, will not justify a finding that the legal title is in her. (*Harrigan v. Mowry*, 84 Cal. 456.)

Termination of trusts. See *Trust Deeds*, IV. Power to revoke trust. See *Bailments*, 14. For cemetery purposes, termination of. See *Cemeteries*.

Conveyance to trustee to secure debt, effect of barring of debt by statute. See *Statute of Limitations*, 375.

256. Trustees of an undivided interest in land cannot convey the property in severalty to the beneficiary, before partition made. (*Hill v. Den*, 54 Cal. 6, 23.)

257. If owner who is indebted to another make a conveyance to a third person to secure the debt, in such case, if the debt is satisfied before a sale and conveyance made by the trustee in pursuance of the terms of the trust, equity will compel the trustee to make a conveyance to the cestui que trust or his assigns,

upon the payment of the amount due the trustee for his services and expenses. (*Tyler v. Granger*, 48 Cal. 259.)

Commissioner's deed to beneficiary has no priority over prior unrecorded deed. See *Registration*, 79.

258. The court found that the trust deed was surrendered with the intention and agreement that the trust therein provided for should cease, and the property be owned by Soto as if the deed had never been made; that the beneficiary, with full knowledge of the facts, acquiesced therein; and that it was intended that a proper deed should be executed reconveying the property to Soto and terminating the trust, but on account of neglect the deed was never executed. The evidence showed that upon the redelivery of the trust deed, it was for some time in the possession of the beneficiary, who was the wife of Soto; that during his lifetime he managed and possessed the property as his own; that at his death he devised only a portion of it to her, and the residue to his children; that she was appointed and acted as the executrix of his will, described the property as belonging to his separate estate, submitted to a division of it as in the will provided, sold her interest in it as devised to her, and never asserted any claim under the trust deed until after twenty-four years. Held, that the finding was within the issues and sustained by the evidence. (*Burroughs v. De Couts*, 70 Cal. 381.)

259. The action was brought to compel a reconveyance of trust property, and to obtain possession thereof, and for an account of the rents and profits, and an injunction restraining the defendants from asserting any claim to the property. The defendant Lynch was the trustee, and the complaint alleged that the defendants Lincoln, Sherburn, and Caselman were in possession of portions of the trust property without title, and merely as tenants at will of the trustee, the property being real estate. The complaint further alleged that Sherburn joined in the execution of the trust deed, and that Lincoln and Caselman had acquired the interest of others who also joined in its execution, but there was no allegation that they asserted any claim to the property by reason of such joinder. Held, that a demurrer to the complaint for want of such an allegation was properly sustained. (*Reynolds v. Lynch*, 64 Cal. 442.) Distinguished 71 Cal. 187.

Resulting trust, extinguishment of by conveyance to beneficiary. See ante. VI, 3.

Reconveyance of property. See *Trust Deeds*, IV.

TUGS.

See *Towage*.

TULARE COUNTY.

Fees of sheriff of. See *Sheriffs*, 193.

Trespass by animals in. See *Animals*, 13.
Powers of water commissioners of. See *Watercourses*, 52.

TUNNELING.

See *Mines and Mining*, XI, 7.

Enjoining. See *Injunctions*, 141, 142, 199.

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TUOLUMNE COUNTY.

Sheriff is ex officio tax-collector. See *Taxation*, 873.

TURNOUTS.

See *Railroads*, X, 4, b.

TURNPIKE COMPANIES.

- I. Right to Construct; Grant of; Acceptance, Nature and Exclusiveness of.
- II. Validity of Grant; Use of Public Highway as Toll-road.
- III. Assumption of Right and Validity of Organization; Presumptions as to; Inquiry into; Quo Warranto.
- IV. Whether Corporations; Directors, Powers and Liabilities of; Contracts of Members or Stockholders.
- V. Title to Road; Right to Hold Realty.
- VI. Rights of Traveler Over Road.
- VII. Fixing Rates or Number of Gates; Exemptions; Excessive Charges.
- VIII. Actions by.
- IX. Expiration of Franchise; Toll-road as Public Road After.

Sale of under execution. See *Executions*, 96; *Franchises*, 20.

Franchise, assignability of. See *Franchises*, 20.

Sale of under execution, rights of purchasers. See *Executions*, IX, 6, d.

Franchise of turnpike company, passing of by assignment in bankruptcy. See *Bankruptcy and Insolvency*, 215.

Purchase of unexpired lease of Yosemite and Wawona road. See *Constitutional Law*, 410.

Agreement in relation to obtaining franchise constitutes trust, when. See *Trusts and Trustees*, 24.

Dedication of as a public highway. See *Dedication*, 43.

I. Right to Construct; Grant of; Acceptance, Nature and Exclusiveness of.

1. The state does not possess the exclusive authority to construct a road over the public domain, or over any land within the state; but any person who can procure from the landholder a right of way may construct and maintain a road. (*Bartram v. Central Turnpike Co.*, *Bartram v. Ogilby*, 25 Cal. 283.)

2. Right to collect tolls is franchise, and cannot be exercised except it be granted by the legislature, or some branch of the government vested by the legislature with the power to grant the franchise. (*Bartram v. Central Turnpike Co.*, *Bartram v. Ogilby*, 25 Cal. 283.)

3. Under a legislative act authorizing the construction, by private parties, of a wagon road between two counties, to constitute an acceptance of the franchise granted, it is necessary that the parties should indicate such acceptance by the building of the road; and

the taking possession of a public road already constructed by the county authorities between the two counties is not an acceptance of the grant. (*Welsh v. Plumas County*, 94 Cal. 368.)

4. Right to collect tolls is franchise. (*Truckee etc. Road Co. v. Campbell*, 44 Cal. 89.)

Cited 100 Cal. 90.

5. Such a franchise is a certain privilege of a public nature, conferred by grant from the government and vested in individuals. It is a sovereign prerogative and vests in an individual only by virtue of a legislative grant. (*Truckee etc. Road Co. v. Campbell*, 44 Cal. 89.)

Cited 51 Cal. 385; 100 Cal. 90.

6. Whether granted directly by the legislature or by a subordinate body to whom the power of granting it is delegated by legislative act the franchise is still a grant emanating from the sovereign authority of the state. (*Truckee etc. Road Co. v. Campbell*, 44 Cal. 89.)

7. The grant of a franchise to collect tolls on a particular road does not, by implication, prohibit the construction of roads parallel to the one vested with the franchise. (*Bartram v. Central Turnpike Co.*, *Bartram v. Ogilby*, 25 Cal. 283.)

8. Neither the General Incorporation Act, nor the act of May 12, 1853, concerning plank roads and turnpikes, gives any exclusive privileges to the corporation first established. Others may build a road on or near the same line of travel. (*Indian etc. Road Co. v. Robinson*, 13 Cal. 519.)

Cited 21 Cal. 252; 23 Cal. 423; 25 Cal. 228; 8 Or. 108, 267.

9. There is nothing contained in the act of 1857, submitting to the people of Sacramento and El Dorado counties a proposition to appropriate money for the construction of a wagon road from Sacramento county, through El Dorado county, to Carson Valley, or in the acts amendatory thereof, which gives to the two counties, or either of them, the exclusive right to construct or maintain a road along the intended route; nor does the act of 1862, authorizing the board of supervisors of El Dorado county to lease said road, grant to El Dorado county or the lessee such exclusive right. (*Bartram v. Central Turnpike Co.*, *Bartram v. Ogilby*, 25 Cal. 283.)

Validity of grant. See post, II.

Use of public highway as toll-road. See post, II.

Franchise, exclusiveness of. See Franchises, 12, 13.

Special privileges to turnpike corporation. See Constitutional Law, 401.

II. Validity of Grant; Use of Public Highway as Toll-road.

10. The granting of a franchise for a toll-road by the board of supervisors of a county is a legislative act, and the board, in granting it, cannot exceed the authority vested in them, or transcend the limits of the procedure required of them. (*Blood v. Woods*, 95 Cal. 78.) Cited 99 Cal. 213; 100 Cal. 90.

11. A grant of a turnpike franchise by a board of supervisors, made under authority granted by the legislature, has the same standing in respect to its validity, the presumptions in its favor, and the mode in which it may be attacked, as a grant of any other right, privilege, or thing, made by any department of the government under the authority of law. (*Truckee etc. Co. v. Campbell*, 44 Cal. 89.)

Cited 62 Cal. 110; 100 Cal. 90.

12. A grant of a turnpike franchise is not liable to be attacked by a private person, or in a collateral proceeding, for mere error in the exercise of the authority to make the grant. (*Truckee etc. Co. v. Campbell*, 44 Cal. 89.)

13. The granting by the board of supervisors of a county of a franchise to collect tolls does not preclude inquiry by the courts as to whether the road was a toll-road or a free public highway, and their conclusion upon that fact may be questioned collaterally. (*Blood v. Woods*, 95 Cal. 78.)

Cited 99 Cal. 213; 100 Cal. 90.

14. The board of supervisors of a county has no authority to grant a franchise to collect tolls upon a free public road. (*Blood v. Woods*, 95 Cal. 78.)

15. A board of supervisors of a county have no authority to convert a public highway into a toll-road, and to grant to an individual the right to collect tolls of persons traveling on the same. (*El Dorado County v. Davidson*, 30 Cal. 520.)

Cited 95 Cal. 86.

16. The grant by a board of supervisors to an individual of a right to collect tolls on a public road is a grant to do an illegal act. (*El Dorado County v. Davidson*, 30 Cal. 520.)

17. The act of March 24, 1863, entitled "An act to allow James E. Nuttman, Marcus Harlow, and their associates or assigns, to construct a toll-road in the county of San Mateo," does not confer upon said Nuttman and Harlow and their associates or assigns the right to appropriate the county road then in use in San Mateo county to their use and purposes for such toll-road. (*Mahoney v. Nuttman*, 27 Cal. 343.)

18. A toll-gate erected on a public highway which belongs to the state or people is a nuisance, and may be abated as such. (*El Dorado County v. Davidson*, 30 Cal. 520.)

Cited 95 Cal. 86.

19. The grant by the board of supervisors to an individual of a franchise to collect tolls on a public road as a consideration for his promise to pay rent therefor, is an unlawful consideration, and therefore void. (*El Dorado County v. Davidson*, 30 Cal. 520.)

20. An action cannot be maintained on a lease to collect the rent which an individual promises to pay in consideration of a grant to him by the board of supervisors of a franchise to collect tolls on a public highway. (*El Dorado County v. Davidson*, 30 Cal. 520.)

Franchise to erect, power to grant. See Franchises, 7.

III. Assumption of Right and Validity of Organization; Presumptions as to; Inquiry into; Quo Warranto.

21. An individual cannot become a corporation de facto by assuming the name of a toll-road company, where there are no directors or officers, and no acts in corporate forms. (*People v. Volcano Cañon etc. Co.*, 100 Cal. 87.)

22. A person in the possession of a road claimed by him to be a toll-road, authorized by the legislature to be continued for twenty years, who has collected tolls thereon for over twenty years since the passage of the act, and who shows no other franchise therefor, will be presumed to have claimed the right to tolls under the original grant, and to have collected them lawfully during the existence of the franchise, although there is no direct evidence that the persons named in the act, or their assigns, constructed the road, or that he was an assignee of such persons, or collected tolls under that franchise. (*Blood v. Woods*, 95 Cal. 78.)

23. The question as to whether the toll-road company was ever legally incorporated, and as to whether it had ever been or was the owner and entitled to the possession of the toll-road, of which it had possession for more than fifteen years, cannot be inquired into by the board of supervisors on an application to fix its rates of toll, or in a proceeding by mandamus to compel the board to fix rates. (*Volcano Cañon etc. Co. v. Supervisors of Placer County*, 88 Cal. 634.)

24. The right of a corporation to exercise its franchise cannot be determined on an application to the supervisors to fix the rates of toll. (*Weaverville etc. R. Co. v. Supervisors*, 64 Cal. 89.)
Cited 100 Cal. 89.

25. In an action in the nature of a quo warranto against a toll-road company for the usurpation of a franchise, and to have the road upon which it has collected toll declared a public highway, and to enjoin the company for collecting tolls thereon, where the answer admits that the defendant claims and is exercising the disputed franchise, the burden of proof is upon it to show by what warrant or authority it claims and exercises the franchise, and where there is no attempt to show any warrant or authority whatever, a judgment in favor of the plaintiff is proper. (*People v. Volcano Cañon etc. Co.*, 100 Cal. 87.)

26. A complaint in quo warranto against a toll-road company alleging "that for more than six months last past defendant has had no franchise or right to demand to take toll," etc., does not admit that the defendant ever had a toll-road franchise. (*People v. Volcano Cañon etc. Co.*, 100 Cal. 87.)

27. Where the corporate character of a toll-road company alleged to be the usurper of a toll-road franchise in an action of quo warranto is admitted in the pleadings, but the evidence shows that there is no such corporation, and does not disclose any authority to collect tolls, a judgment declaring the road a public highway, and enjoining the defendant

from collecting tolls must be affirmed. (*People v. Volcano Cañon etc. Co.*, 100 Cal. 87.)

Ineffective attempt to incorporate. See Corporations, 63.

IV. Whether Corporations; Directors, Powers and Liabilities of; Contracts of Members or Stockholders.

28. Although the act for the formation of plank and turnpike road companies denominates companies which may be formed under its provisions "joint stock companies," still the powers, rights, and liabilities of these companies, as provided for in the act, show that they are corporations. (*Blanchard v. Kaull*, 44 Cal. 440.)

Cited 51 Cal. 410.

29. The directors of a corporation formed for the construction of plank or turnpike roads are not vested with any power by the statute until the stockholders have adopted by-laws defining their powers, and the same have been filed in the recorder's office. (*Hall v. Crandall*, 29 Cal. 567.)

30. The directors of a corporation formed for the construction of plank or turnpike roads are not liable personally, under the nineteenth section of the act creating such corporations, on a contract made by them, which by its terms binds the corporation, unless the stockholders have adopted by-laws, and the same have been filed in the recorder's office, and the contract is made in violation of the by-laws. (*Hall v. Crandall*, 29 Cal. 567.)

31. To make the directors of a plank or turnpike road company personally liable for debts contracted in violation of its by-laws, and after the same have been filed, the complaint must contain allegations that they were thus contracted. (*Blanchard v. Kaull*, 44 Cal. 440.)

32. In an action to recover from the members of a plank or turnpike road company debts contracted before its final organization, the complaint must allege that the defendants commenced the formation of such company, and that before the final organization thereof debts were contracted which still remain unpaid, etc. (*Blanchard v. Kaull*, 44 Cal. 440.)

33. In such action no recovery can be had on promissory notes, signed by trustees of the company, as the contracts of members of the company, for the act does not make members liable for debts contracted by the agents of the company, but for debts contracted before the organization of the company. (*Blanchard v. Kaull*, 44 Cal. 440.)

34. Under the act of May 12, 1853, for the incorporation of turnpike road companies, it is competent for a majority of the stockholders, assembled in stockholders' meeting, to authorize the board of directors to execute a promissory note of the company; but, if a note is executed by the board of directors without such authority, a subsequent resolution adopted by a majority of the stockholders, levying an assessment to pay the note, is a ratification, and makes the note the note of the company. (*Forbes v. San Rafael etc. Co.*, 50 Cal. 340.)
Cited 59 Cal. 25.

35. It requires the vote of two-thirds of the stockholders of a turnpike company to enable the board of directors to mortgage the property of the company, and if without such vote a mortgage is given it requires a two-thirds vote to ratify it. The facts, that, by a majority vote of the stockholders, an assessment is levied to pay the mortgage, and that two-thirds of the stockholders pay the assessment, do not prove a ratification. (*Forbes v. San Rafael etc. Co.*, 50 Cal. 340.)

36. A promissory note of a turnpike company is not void because made before it has filed a copy of its by-laws with the county recorder. (*Forbes v. San Rafael etc. Co.*, 50 Cal. 340.)

V. Title to Road; Right to Hold Realty.

37. The road of a turnpike company is not the private property of the company, but belongs to the public, and all the interest the company has in it is the right and power to collect tolls on the line of the road as a compensation for building it. (*Wood v. Truckee etc. Co.*, 24 Cal. 474.)
Cited 32 Cal. 581; 83 Cal. 240; 99 Cal. 212.

Title of company in road. See post, 54.

Title to road cannot be inquired into on mandamus to fix rates. See ante, 23, 24.

38. Corporations for the construction of turnpike roads can hold only such real estate as the purposes of the corporation may require. (*Coleman v. San Rafael etc. Co.*, 49 Cal. 517.)

39. Corporations organized for the construction of plank or turnpike roads cannot acquire or hold lands, or the possessory right thereto, or any interest therein, beyond the easement or right of way over the same. (*Wood v. Truckee etc. Co.*, 24 Cal. 474.)
Cited 99 Cal. 212.

VI. Rights of Traveler Over Road.

Public highway, turnpike is. See Dedication, 43.

40. Every traveler has same right to use the road of a turnpike company, upon paying the toll established by law, that he has to use any other public highway. (*Wood v. Truckee etc. Co.*, 24 Cal. 474.)
Cited 18 Nev. 273.

VII. Fixing Rates or Number of Gates; Exemptions; Excessive Charges.

41. The board of supervisors of a county wherein a toll-road is situated has no right arbitrarily to refuse, but is in duty bound, to fix toll rates, after a demand by the toll-road corporation that the board fix the rates of toll, and they may be compelled to fix the rates by writ of mandate. (*Volcano Cañon etc. Co. v. Supervisors of Placer County*, 88 Cal. 634.)
Cited 100 Cal. 89.

Compelling fixing of tolls. See Mandamus, II, 13, g.

Mandamus to fix rates, title to road cannot be inquired into on. See ante, 23; Corporations, 347.

42. The failure of the board of supervisors of

the county through which a toll-road passes to fix the rates of toll to be collected thereon during a particular year, as required by the act of April 28, 1857, amending the act of May 12, 1853, does not render a person who demands and receives tolls thereon during such year liable for the penalty prescribed by section 31 of the latter act for demanding and receiving excessive tolls. (*Culbertson v. Kinevan*, 73 Cal. 68.)

43. A corporation organized for the purpose of building a turnpike road and collecting tolls thereon must have the number and location of its toll-gates fixed by an order of the board of supervisors of the county; and, in the absence of such order, it has no power to collect tolls, even if the board of supervisors fixes the rates of toll. (*Waterloo etc. Road Co. v. Cole*, 51 Cal. 381.)

44. An order of the board of supervisors, authorizing the directors of a turnpike corporation to establish toll-gates at such places as the directors may designate, does not confer on the corporation the franchise to collect tolls. (*Waterloo etc. Road Co. v. Cole*, 51 Cal. 381.)

45. In such case, a person traveling on the road may defend successfully in an action brought against him to collect the tolls. (*Waterloo etc. Road Co. v. Cole*, 51 Cal. 381.)
Cited 3 Mont. 172.

46. The right to exemption from paying toll, under an agreement that the owner of a ranch, which has conferred a right of way upon a toll-road company, and his grantees shall be exempt from toll, is not an easement appurtenant to the land or imposed upon the road as a servient estate, and an injunction will not lie upon that ground to restrain the company from collecting toll from a subsequent grantee of the ranch. (*Kellett v. Ida Clayton etc. Road Co.*, 99 Cal. 210.)

47. Such grantee is not entitled to maintain an injunction on the ground that the remedy at law for breach of the contract by way of damages is inadequate, and will entail a multiplicity of suits. The damage, being merely the amount of toll required, is easily estimated, and the presumption is that an action at law would be final and prevent further dispute. (*Kellett v. Ida Clayton etc. Road Co.*, 99 Cal. 210.)

48. Under section 31 of the act of May 12, 1853, providing for the formation of corporations for the construction of plank and turnpike roads, a toll-gatherer who receives from any person more than he is authorized to collect as toll is not liable for the penalty imposed by that section, unless he also demanded the excessive amount of the person paying the same. (*Culbertson v. Kinevan*, 73 Cal. 68.)

49. If the toll-gatherer on a turnpike road exacts and demands and receives from a traveler a sum greater than he is permitted by law to collect, it is not a collection of toll, but extortion; and an action to recover a penalty for it does not involve the legality of a toll within the meaning of article VI, section 6, of the constitution, and cannot be brought in the district court unless the amount

claimed is three hundred dollars. (*Brown v. Rice*, 52 Cal. 489.)
Cited 71 Cal. 88.

50. If a corporation has constructed a turnpike road for the purpose of collecting tolls from travelers, and the board of supervisors has once fixed the rates of toll, a person who, as the agent of the company, demands and receives toll, is a "toll-gatherer" within the purview of section 518 of the Civil Code, which fixes a penalty for demanding or receiving too much toll, even if more than one year has elapsed since the rates of toll were fixed. (*Brown v. Rice*, 51 Cal. 489.)

Tolls, enjoining collection of. See Injunctions, II, 16.

Excessive tolls, actions for, jurisdiction over. See Justices of the Peace, IV, 5, d.

Fine imposed for wrongfully collecting toll, right of appeal. See Appeals, I, 3, i.

VIII. Actions by.

51. If a corporation de facto is in the actual possession of a public highway, under a grant of a franchise to improve and collect tolls on the same, a mere trespasser cannot justify his entry thereon on the ground that it was only a corporation de facto, and was not de jure entitled to the franchise. (*Stockton etc. Co. v. Stockton etc. R. R. Co.*, 45 Cal. 680.)

52. In trespass for disturbing the bed of a turnpike road, by building a railroad thereon, the measure of damages is the damage actually sustained by reason of the acts of the defendant, not the entire value of the land composing the bed of the road. (*Stockton etc. Co. v. Stockton etc. R. R. Co.*, 53 Cal. 11.)

53. In an action by the owner of a toll-road against another for damages caused by obstructing the public highway leading to his road the plaintiff must allege that his right to collect tolls has been disturbed, or it will be presumed that he has received no injury by reason of the obstruction. (*Lewiston Turnpike Co. v. Shasta etc. Co.*, 41 Cal. 562.)

54. Grantees of a toll-road constructed pursuant to an act of the legislature have a sufficient estate or interest in the land upon which the wagon-road rests to enable it to sue the county, under section 738 of the Code of Civil Procedure, to determine an adverse claim by it to the ownership of the road as a free public highway. The right of way for the road is private property, though held for a public use, and is incident and necessary to the privilege of collecting tolls thereon, and constitutes an interest in the land on which the wagon-road rests. (*Welsh v. County of Plumas*, 80 Cal. 338.)
Cited 86 Cal. 284.

55. If plaintiff's toll franchise has expired, or has been determined by forfeiture, condemnation, or purchase by the county, or otherwise, so that it may declare the road a free public highway, it should set up such fact in its answer to plaintiff's complaint for adjudication; but the county cannot by general demurrer assail the right of the plaintiff to have the adverse claim of the county determined, in an action to quiet plaintiff's title under

section 738 of the Code of Civil Procedure. (*Welsh v. County of Plumas*, 80 Cal. 338.)

56. The owner of an incorporeal hereditament, though he may have no estate in the land, shows a sufficient case in equity to sustain an injunction, if his complaint avers possession, and a right to the possession of a toll-road for the purpose of collecting tolls thereon, and that the county through its board of supervisors interferes with and obstructs the free use and enjoyment of his property by depriving him of his tolls. (*Welsh v. County of Plumas*, 80 Cal. 338.)

Ejectment lies to recover toll-road. See Ejectment, 5.

What amounts to disseisin of road. See Ejectment, 87.

IX. Expiration of Franchise; Toll-road as Public Road After.

57. A franchise for a toll-road granted by the legislature for the period of twenty years expires by limitation at the end of the twenty years, and the road then becomes a public highway. (*Blood v. Woods*, 95 Cal. 78.)

58. The act of constructing and opening a toll-road for use, followed by public user thereof, constitutes a dedication of it as a public road. The fact that tolls are demanded, and that the public uses the road only upon condition of paying tolls, does not affect the question of dedication. (*Blood v. Woods*, 95 Cal. 78.)

59. A toll-road constructed in 1867, by a corporation formed under the act of 1853, became a public highway by dedication, subject to the right to collect tolls for a limited period; and, when such period expires, the dedication to the public remains, and the road may be declared a public highway by the supervisors, and neither the corporation nor its stockholders have any interest thereafter for which compensation can be demanded. (*McMullin v. Leitch*, 83 Cal. 239.)

60. Under section 2619 of the Political Code, upon the expiration of a toll-road franchise, the toll-road becomes a free public highway, and no compensation is required to be paid to the toll-road owner. The owner, by construction of the road, with knowledge of the law, turned it over to the use of the public, and can claim no compensation other than such as was given by tolls during the existence of the franchise. (*People ex rel. El Dorado County v. Davidson*, 79 Cal. 166, cited 83 Cal. 240, 95 Cal. 83, et seq., 99 Cal. 213, distinguished 88 Cal. 633, 95 Cal. 86; *People ex rel. El Dorado County v. O'Keefe*, 79 Cal. 171, cited 83 Cal. 240.)

61. Tolls cannot be collected on a wagon-road after the expiration of the time for which the franchise to collect tolls was granted. (*People ex rel. Redemeyer v. Anderson etc. Road Co.*, 76 Cal. 190.)

62. When a toll-road franchise, granted by the El Dorado county board of auditors in 1878, is subsequently repealed by the board of supervisors of the county in 1886, the franchise expires by limitation; and the county may commence an action as complainant in

the name of the people of the state, upon relation of the attorney general, to have the road adjudged a public highway, and to enjoin the one claiming to be the owner of the road from demanding or taking toll from travelers thereon, or from interfering with or obstructing travel over the same by the public. (*People ex rel. El Dorado County v. Davidson*, 79 Cal. 168.)

Cited 79 Cal. 171, 172.

Expiration or forfeiture of franchise, how pleaded. See ante, 55.

Extension of existence of under the code. See Corporations, 49.

Toll-roads to Yosemite valley do not become public on expiration of franchise. See Yosemite Valley.

TURNTABLE.

Leaving unguarded or unlatched. See Negligence, III, 2.

ULTIMATE FACTS.

See Findings, VIII, 3.

Ultimate and not probative facts should be stated in pleading. See Pleading and Practice, VII, 4.

ULTRA VIRES.

Contracts of corporations. See Corporations, VI, 8, c.

Contract for supply of water. See Water Companies, 47.

Contract by board of education to erect building on public square is. See Schools, 14.

UMPIRE.

Selection of. See Arbitration and Award, IV.

UNCERTAINTY.

See cross-references under Certainty.

Bequest, uncertainty in. See Wills, XI, 15.

Bequest, uncertainty of, effect on probate. See Wills, X, 6.

Certainty in pleadings. See Pleading and Practice, VIII, 3.

Demurrer for. See Pleading and Practice, X, 6, h.

UNDERTAKINGS.

Appeal, undertakings on. See Appeals, V, 6.

Appeal from inferior court, undertaking on. See Appeals, XIII, 3, c.

Appearance, undertaking for. See Witnesses, III.

UNDUE INFLUENCE.

See Fraud, I, 4; Spiritualism.

Rescission for. See Rescission of Contracts, III, 4.

Effect of on wills. See Wills, VII, 4.

UNFINISHED BUSINESS.

See District Attorneys, III; also cross-references under Outgoing Officers.

UNIFORM PROCEDURE.

Presumption arising from. See Pleading and Practice, XV.

UNINCORPORATED ASSOCIATIONS.

I. Nature of.

II. Articles of Association; By-laws and Amendments or Alterations of.

III. Contracts of; Liability of Directors; Investments; Actions to Set Aside Conveyance by Trustees.

IV. Assessments; Forfeiture for Non-payment and Reinstatement.

V. Beneficiary, Nomination and Change of.

VI. Payments on Death; Sick Benefits; Conclusiveness of Decision of Association.

VII. Expulsion and Secession of Members; Interference of Court.

VIII. Forfeiture for Violation of By-laws.

IX. Action by Treasurer of.

X. Actions Against; Action by Members to Enforce Trust.

XI. Dissolution of and Distribution of Assets.

See Stock and Exchange Board.

Colleges. See Colleges.

Joint stock companies. See Joint Stock Companies.

Mining companies. See Mines and Mining, XIII.

Religious societies. See Religious Societies.

Superintendent of unincorporated ditch company, powers of. See Watercourses, XIII.

Action by on note, effect of change of name. See Bills and Notes, 379.

Indictment of treasurer for embezzlement. See Criminal Law, 1523.

Pledge of stock, presentation against estate. See Estates of Deceased Persons, 151.

Seat in stock and exchange board is liable to execution. See Executions, 90.

I. Nature of.

1. Voluntary associations for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, etc., are partnerships, and may be dissolved by a court of equity if they improperly exclude a member. (*Gorman v. Russell*, 14 Cal. 531.)

Cited 18 Cal. 688.

Unincorporated ditch companies and partnerships, distinction between. See Watercourses, XIII.

II. Articles of Association; By-laws and Amendment or Alteration of.

2. The written articles of association of an unincorporated endowment league constitute a contract by which the duties of its officers and members and the scope of its business are to be regulated, and bear to it the same relation that a charter bears to an incorporated society, and constitutes its fundamental law, in accordance with which all subsequent by-laws, regulations, and amendments must be made, and no change or amendment can be

made to impair the obligation of the original contract without the consent of all the members to be affected thereby. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

3. The fact that the articles of association constituting the contract do not operate equally upon the individual members confers no authority upon the directors to change or amend the articles for the purpose of "equalization of payments," or other burdens imposed by the original compact, otherwise than authorized by the original articles. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

Certified copies of articles of association or consolidation. See Evidence, II, 7, h.

Copy of articles of association as evidence. See Evidence, 115.

4. An article conferring upon the board of directors the power "to enact laws for the government of the league must be understood as limiting the power by the laws of the land with reference to which the article must be construed, and does not imply consent of all the members for the enactment of laws impairing the obligation of the contract embodied in the original articles. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

5. A member of a benevolent corporation who has assented to the provisions of its constitution and by-laws is bound by them. (*Robinson v. Irish-American Benevolent Society*, 67 Cal. 135.)

6. A member of a benevolent association, who is acquainted with its by-laws, is chargeable with notice of the restrictions thereby imposed upon the power of the trustees to invest the funds of the association. (*Red Jacket Tribe No. 28 v. Gibson*, 70 Cal. 128.)

7. Action to foreclose mortgage. The defendants, S. and wife, owners of stock in the plaintiff corporation, borrowed money from the plaintiff, and executed their notes, and, to secure payment, mortgaged certain real estate, and hypothecated their stock. The ninth by-law of the plaintiff is as follows: "Every stockholder for every share of stock shall pay to the secretary, on the second Wednesday in every month, the sum of one dollar in gold." The eleventh by-law of the plaintiff is in the following words: "Any stockholder failing to pay his or her monthly installments or interests shall pay a fine of ten per cent per month upon the amount of the indebtedness. This fine shall be charged by the secretary, and collected with the delinquent's monthly dues; and in case any stockholder shall neglect or refuse to pay the monthly dues or fines for the space of six months, the secretary shall tender to the delinquent the amount actually paid in, deducting all fines and forfeitures that may be charged against him or her, and from that time he or she shall cease to be a member of the association." Held, (1) by-law XI in no way affects or changes the terms of any contract of loan between the association and a stockholder; (2) the word "interest" in by-law XI does not refer to interest due upon any loan from the corporation to a stockholder; (3) penalties and forfeitures are not to be favored, but must be created by unam-

biguous language. (*Occidental etc. Assn. v. Sullivan*, 62 Cal. 394.)

8. A by-law of a mutual benefit corporation which provides for the payment of a weekly sum to members in case of sickness (without specifying how long such payments shall continue) may be changed after sickness has commenced so as to limit the period such payments shall continue after such change, but not so as to affect payments which have become due before the change. (*Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557.) Cited 82 Cal. 646.

9. The foregoing does not depend upon an express power to change reserved by the by-laws. The contract resulting from the by-laws will be construed with reference to existing statutes authorizing a change, which statutes will be held to enter into and form a part of the contract. (*Stohr v. San Francisco Musical Fund Soc.*, 82 Cal. 557.)

10. Where the original articles of association provide that coupons issued by the Endowment League should be paid on the day they matured by warrant on the treasurer, upon surrender of the coupons, the directors were not authorized to modify or annul this provision by changes in the by-laws providing that the dues for the quarter and all assessments levied for the month in which the coupons are payable must first be paid before the coupons are payable, and providing for an impairment of the endowment fund from which coupons are payable by creating reserve and emergency funds to be taken out of the endowment fund. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

11. Where a benefit certificate in a mutual benefit association, with coupons attached, provided that the member should be "entitled to participate in the special benefit fund of the order in an amount to be computed according to the laws of the order, not exceeding the amount named in said coupons respectively," and the constitution of the order contained a provision that the constitution and laws relating to and governing the beneficiary fund might be amended by a three-fourths vote of the grand lodge, a change of the laws regularly made by the grand lodge limiting the amount to be paid upon a maturing coupon to a proportionate share of one assessment for the payment of all coupons then maturing does not impair the obligation of the contract, though a different rule of computing the amount to be paid existed at the date of the certificate. (*Bowie v. Grand Lodge of the Legion of the West*, 99 Cal. 392.)

12. The constitution and laws of the mutual benefit association entered into and became part of its contract with its members, including the provision therein for future change of the laws regulating the beneficiary fund, and such change is not an amendment of the certificate of incorporation or articles of association, within the meaning of section 362 of the Civil Code. (*Bowie v. Grand Lodge of the Legion of the West*, 99 Cal. 392.)

Resolution increasing assessment, validity of. See post, VI.

Judgment as to validity of by-law, conclusiveness of. See post, X.

Forfeiture for violation of by-laws. See post, VIII.

Board of brokers, rules of, judicial notice of. See Judicial Notice, 61.

III. Contracts of; Liability of Directors; Investments; Actions to Set Aside Conveyance by Trustees.

13. An unincorporated endowment association is the creature of contract, and must be governed by the law of contracts, and the obligations of its contracts for the payment of money or for the security of any other right of property are as sacred as those of any other contract, and a breach thereof will be remedied by the courts. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

14. A contract entered into by a number of individuals, describing themselves in the contract as "Directors of the Placer Hotel Company," and signed by them individually, is their individual contract, and not that of the company. (*Whiting v. Heslep*, 4 Cal. 327.)

15. Evidence that a trustee of a benevolent society acted without the concurrence of a co-trustee, or that the latter was induced to concur by reason of misrepresentations made as to the concurrence of another trustee, is admissible in an action to set aside a conveyance. (*Red Jacket Tribe v. Gibson*, 70 Cal. 128, 130.)

16. In an action to set aside a conveyance by trustees, evidence that one of the trustees had understood the propriety of the purchase was to be submitted to the lodge is admissible. (*Red Jacket Tribe v. Gibson*, 70 Cal. 128.)

17. Order instructing trustees "to try and invest the money in the bank not exceeding two thousand dollars" does not purport to authorize an investment of money otherwise than in "stocks, bonds, mortgages, or other securities approved by two-thirds of the members." (*Red Jacket Tribe v. Gibson*, 70 Cal. 128, 131.)

Foreclosure of mortgage, deficiency judgment. See post, X.

Contracts of members of turnpike company. See Turnpike Companies, IV.

Powers of members of incorporated ditch companies. See Watercourses, XIII.

Members, when not liable on contract. See Watercourses, 170.

IV. Assessments; Forfeiture for Nonpayment and Reinstatement.

18. The levy of numerous unnecessary assessments in the month in which a coupon is payable under the original articles, where there was sufficient money in the endowment fund provided for by these articles to pay all coupons then maturing, is not authorized by a provision of the original articles allowing assessments, when the demands on the endowment fund require additional assessments; nor can such assessments be made to provide for future anticipated losses, where there was no provision therefor in the articles of association, and such unauthorized assessments are invalid; nor can the refusal of the owner of a maturing coupon to pay

them have the effect of suspending him from good standing as a member of the league, or to prevent the enforcement of the payment of his coupon. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

19. In levying assessments the directors act ministerially, and not judicially, and no presumption arises in favor of their legality. (*Hogan v. Pacific Endowment League*, 99 Cal. 248.)

20. The acceptance by a mutual benefit association of assessments, after knowledge of a forfeiture by reason of nonpayment thereof within the required time, operates as a waiver of the forfeiture in the absence of convention of the parties to the contrary. (*McDonald v. Supreme Council of the Order of Chosen Friends*, 78 Cal. 49.) Cited 81 Cal. 346, 347.

Waiver of forfeiture for nonpayment. See post, 27.

21. The rights of the parties must be governed by the constitution and by-laws of the association. If these documents impose other conditions of reinstatement after forfeiture or suspension for nonpayment of sums due beside the payment thereof such conditions must be complied with. But the rights of the members are not affected by the mere assertions of the officers, or by what they may choose to put upon assessment notices. (*McDonald v. Supreme Council of the Order of Chosen Friends*, 78 Cal. 49.)

22. Under the constitution and by-laws shown by the record the provisions for a reelection and a new medical certificate of a member whose assessments have remained unpaid for a certain time do not apply, unless there has been an adjudication of the suspension by the council. (*McDonald v. Supreme Council of the Order of Chosen Friends*, 78 Cal. 49.)

V. Beneficiary, Nomination and Change of.

23. When the constitution of an association for mutual benefit provides that each member shall designate in writing some person as nominee for the benefits, and that, upon the death of the member, the nominee so designated shall receive a certain sum of money, the association is liable only to the nominee of a deceased member; and, if there is no nominee, there is no legal liability to pay the money to any person. (*Order of Mutual Companions v. Griest*, 76 Cal. 494.)

24. Where there is no legal liability of a mutual benefit association to pay life insurance money to any one, the heirs of a deceased former wife, who had been nominated for benefits, after her death, by the association, without designation in writing by the husband, are not legally aggrieved by a judgment of the court directing that insurance money, which the association is willing to pay without liability, shall be paid to the executor of the will of the deceased member. Appellants who have no interest or ownership in the money cannot complain if the court gave property not theirs to the wrong party. It should go, in good conscience, to the person designated by the will.

(*Order of Mutual Companions v. Griest*, 76 Cal. 494.)

25. Where a certificate of membership in a mutual benefit association, purporting to be an insurance on the holder's life, payable after his death to his wife as beneficiary, provides that the member may, in writing filed with the association, substitute some other beneficiary, the sending of a letter to and filing it with the association by the holder of the certificate, requesting that the beneficiary be changed to the executors named in his will, and an indorsement upon the certificate, signed by the secretary, changing and substituting the beneficiary, is a substitution in writing of another beneficiary, in accordance with the provisions of the certificate. (*Bowman v. Moore*, 87 Cal. 306.)

26. It is not necessary, to effect a change of the beneficiary, that the change should be wholly in the handwriting of the member; but it may be done through the agency and handwriting of the secretary, provided it was done by the authority of the member, and for him. (*Bowman v. Moore*, 87 Cal. 306.)

27. When the rules of a benefit association permit a member in good standing to change the name of the beneficiary from that of a deceased wife to that of another wife, the fact that certain assessments levied upon the death of members had become delinquent, and worked a suspension of membership, will not affect such right, if the association accepted payment of all such assessments before the change was made. The acceptance of such payment waived all forfeiture of the benefit certificate, and the fact that a formal order of reinstatement from suspension of membership was not made until after the change of the beneficiary is immaterial. (*Millard v. Supreme Council of American Legion of Honor*, 81 Cal. 340.)

28. The substitution of the executors of the member as his beneficiaries, and the insertion in his will of a direction to them to apply the proceeds in payment of his debts, is not an attempt to devise by will the policy or its proceeds. (*Bowman v. Moore*, 87 Cal. 306.)

VI. Payments on Death; Sick Benefits; Conclusiveness of Decision of Association.

29. The by-laws of the petitioner, a benevolent association, provided that upon the death of a member, and in order to make up the amount to be paid to his nominee, each member should pay one dollar, and that the nominee should be entitled to receive from the association the amount collected on the assessment to be levied therefor. Held, that a nominee was only entitled to receive the amount actually collected on an assessment made for his benefit, and not a sum equal to one dollar from each member. (*Matter of Application of La Solidarite etc. Assn.*, 68 Cal. 392.)

30. At a meeting of the members of the association a resolution was passed directing a larger amount to be paid to certain nominees than the amount of the respective assessments collected for their benefit. A by-law

of the association provided that no money could be drawn or appropriated from the treasury without the order of the directors. Held, that, in the absence of an adoption or ratification by the directors, the resolution was inoperative. (*Matter of Application of La Solidarite etc. Assn.*, 68 Cal. 392.)

31. The voluntary submission, by a member of a benevolent and mutual aid association, of his claim against the association for "sick benefits," to a tribunal of the association established for the purpose of settling all matters of difference which might arise between the association and any of its members, growing out of a refusal upon the part of the association to pay benefits claimed, is an implied agreement upon his part to be bound by their judgment and award. (*Robinson v. Templar Lodge No. 17, I. O. O. F.*, 97 Cal. 62.)

Interference of court with action of association in expelling members. See post, VII.

Right of action for sick benefits. See post, X.

Proof of death on action against. See post, X.

VII. Expulsion and Secession of Members; Interference of Court.

32. A member of an unincorporated association may be expelled therefrom for a violation of such of the established rules of the association as have been subscribed or assented to by the members, and as provide expulsion for such violation, or for such conduct as clearly violates the fundamental objects of the association, and, if persisted in and allowed, would thwart those objects or bring the association into disrepute. (*Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 308.) Cited 99 Cal. 257.

33. An unincorporated association, having a benefit fund in which all of its members are entitled to participate, cannot expel a member for an offense which, by the rules of the association, is punishable by a fine only. (*Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 308.)

34. The expulsion of a member, nominally for an offense for which such punishment is proper, but in reality for an offense punishable only by fine, is invalid. (*Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 308.)

35. In the matter of an expulsion, the association acts in a quasi judicial character, and so far as it confines itself to the exercise of the powers vested in it, and in good faith pursues the methods prescribed by its laws, such laws not being in violation of the laws of the land or any inalienable right of the member, its sentence is conclusive, like that of a judicial tribunal. The courts will, however, decide whether the ground for expulsion is well taken. (*Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 308.)

Exclusion of member as ground for dissolution. See post, XI.

36. Courts will interfere for the purpose of protecting property rights of members of unincorporated associations, in all proper cases, and, when they take jurisdiction, will follow

and enforce, so far as applicable, the rules applying to incorporated bodies of the same character. (*Otto v. Journeymen Tailors' etc. Union*, 75 Cal. 308.)

37. A member of an incorporated benevolent association cannot maintain an action against the association to recover damages on account of his suspension for misconduct, under a provision of the by-laws, where such suspension has been affirmed upon an appeal taken by himself, under the constitution of the society, to the whole body of the members of the corporation; and it is immaterial whether the facts upon which the determination was predicated justified the suspension or not. (*Peyre v. Mutual Relief Society of the French Zouaves*, 90 Cal. 240.)

Conclusiveness of decision of association as to sick benefits. See ante, VI.

38. Where the laws governing a voluntary unincorporated association provide a remedy within the association for any offense committed by its officers, no opposition by the officers to the authority under which they act in the performance of their functions, nor irregularity in the performance thereof, will authorize a part of the members of the association to secede for the purpose of expelling its regularly elected officers, declaring their offices vacant, and constituting themselves successors. (*McCallion v. Hibernia Savings and Loan Society*, 70 Cal. 163.)

Suspension or expulsion is not necessary to forfeiture. See post, VIII.

VIII. Forfeiture for Violation of By-laws.

39. A certificate of life insurance issued by a beneficial temperance association upon the life of a member, on the express condition that the insured, while a member of the association, should in every particular comply with the laws, rules, and requirements of the association, becomes forfeited if the insured, after its issuance, uses liquors as a beverage, in violation of a requirement of the association. (*Hogins v. Supreme Council of the Champions of the Red Cross*, 76 Cal. 109.)

40. The fact that a by-law of the association made a breach of such requirement punishable by suspension or expulsion does not render suspension or expulsion necessary in order to work a forfeiture of the policy. (*Hogins v. Supreme Council of the Champions of the Red Cross*, 76 Cal. 109.)

IX. Action by Treasurer of.

41. An action is maintainable by the duly elected treasurer of a voluntary association, who sues on behalf of himself and the other members of the association, except the defendant, the former treasurer of the association, to compel him to pay over trust funds belonging to the association, which should be in the custody of its treasurer, and which the defendant has refused to pay over on demand. (*Gieske v. Anderson*, 77 Cal. 247.)

X. Actions Against; Action by Members to Enforce Trust.

Action for damage for expulsion will not lie where suspension affirmed by association. See ante, VII.

Venue of actions against. See Venue, I, 3, b. Service of summons, what insufficient. See Summons, 80.

42. The constitution of the corporation provided that members when sick, upon complying with certain conditions, should be entitled to an allowance out of the funds of the corporation; that the board of trustees should examine all the claims of members for such allowance, and that no money should be paid out of the corporate funds except upon the order of the trustees. Held, that a member could not maintain an action to recover the allowance until after the board of trustees had been given an opportunity to examine his claim therefor. (*Robinson v. Irish-American Benevolent Society*, 67 Cal. 135.)

43. A complaint against an unincorporated endowment association, composed of a large number of persons, which alleges that the object of the association is the payment of endowments in the sum of six hundred dollars at certain periods, until the aggregated payments to each member amount to the sum of six thousand dollars, payable out of a special benefit fund, composed of the proceeds of assessments and fines levied upon the members, and accumulation of interest from investments, that the plaintiff, while a member of the association, in good standing, presented a coupon to the secretary of the association, which provided that it "shall not exceed six hundred dollars, and shall not mature before the month of June in the year 1891," and that it would be void if detached from a certificate annexed thereto, but that, upon presentation of the coupon, payment was refused, although there were ample funds to pay it, but which fails to show how much, if any thing, the plaintiff had been paid in endowments, or that the plaintiff was entitled to draw any thing from the fund, or that any assessment had been made to meet that particular demand, or whether the obligation has matured, or how much, if any thing, is due under the contract, does not state a cause of action. (*Rebut v. Legion of the West*, 96 Cal. 661.)

44. When, by the rules of the supreme council of a benefit association, evidence of death of a member is to be furnished by the subordinate council of which deceased was a member, it is not necessary, in an action against the supreme council upon a benefit certificate issued by the supreme council, to find whether the beneficiary furnished proof of the death. (*Millard v. Supreme Council of American Legion of Honor*, 81 Cal. 340.)

45. If, in a complaint against a company by its company name, under the six hundred and fifty-sixth section of the Practice Act, there is an entire absence of any statement showing the existence of the conditions named in the section, and judgment is rendered against the company by default, is the judgment void, or are these conditions matters to be pleaded in abatement, and, if not thus pleaded, waived, query? (*Welsh v. Kirkpatrick*, 80 Cal. 202.)

46. If a complaint, in an action against a company by its company name, states substantially the conditions mentioned in the

six hundred and fifty-sixth section of the Practice Act, and the sheriff returns that he has served the summons on one of the members of the company, and judgment by default is entered up against the company by its name, to be enforced against the joint property of the members, the judgment is not void, but may be enforced by execution against the company property. (*Welsh v. Kirkpatrick*, 30 Cal. 202.)

47. Such judgment is not a judgment against the person served with process, but against the company. (*Welsh v. Kirkpatrick*, 30 Cal. 202.)

48. It seems that if an association of persons transacting business under a common name contracts a debt which is secured by a mortgage of one or more of the associates or of a third person, the mortgagee in his action to foreclose may, if he chooses to do so, proceed against the association by its common name under section 388 of the Code of Civil Procedure, for the purpose of obtaining a deficiency judgment, binding only the joint property of the associates. (*Goodlett v. St. Elmo Investment Co.*, 94 Cal. 297.)

49. In an action to foreclose a mortgage alleged to have been executed by the trustee of an association acting in behalf of the association, where the association was sued, and also the individual members thereof, all of whom appeared and answered to the merits, and the complaint, though ambiguous, is not clearly indicative of an intention to proceed under section 388 of the Code of Civil Procedure, or to forego the right of plaintiff to a deficiency judgment against the individual members, and the answers of the defendants admitted the genuineness and due execution of the articles of association as set forth in the complaint, and did not controvert the partnership relation of the members and their joint liability to third persons upon obligations of the company incurred while they were such members, and the trial court impliedly found that the trustee executing the mortgage had authority to do so for the company, and that it bound the company and its members, the mortgagee is entitled to a deficiency judgment against the defendants who were members of the association at the date of the execution of the mortgage, and a deficiency judgment against the association alone will be reversed upon appeal of the mortgagee. (*Goodlett v. St. Elmo Investment Co.*, 94 Cal. 297.)

50. Where, in an action against a mutual benefit society to recover an installment of sick benefits, the defense was that the by-law under which plaintiff claimed was altered by a subsequent by-law, and the question litigated was whether the defendant had power to make the alteration, a judgment in favor of the plaintiff is conclusive of the want of power, and estops the defendant from maintaining the same defense in an action for installments subsequently due. (*Wiese v. San Francisco Musical Society*, 82 Cal. 645.)

51. Above rule applied to the judgment of a superior court rendered on appeal from a justice's court. (*Wiese v. San Francisco Musical Society*, 82 Cal. 645.)

52. Defendants held the legal title to the land, which they acquired from the plaintiff and another in trust for the members of a league, the plaintiff, as a member of the league, may enforce the trust in an action to which all the beneficiaries were parties, but not otherwise. (*McBrown v. Dalton*, 70 Cal. 89.)

XI. Dissolution of and Distribution of Assets.

53. If a benevolent association exclude a member from its meetings, because he refuses to take an oath, to be administered by the president, which oath was not required by the constitution or by the by-laws, and is foreign to the objects of the association, it is ground for a dissolution. (*Gorman v. Russell*, 14 Cal. 531.)

54. The "Riggers and Stevedores' Union Association of San Francisco," a voluntary association for mutual relief, having excluded plaintiffs from the association because of their refusal to take an oath not required by the constitution or by-laws of the association, and foreign to the objects thereof, plaintiffs as members brought suit for dissolution of the association and distribution of its funds, and the supreme court having decided on demurrer to the complaint that the association was a partnership, and would be dissolved by a court of equity for improperly excluding a member, and the cause having been remanded for further proceedings, the defendants rescinded their resolutions requiring an oath, and filed an answer offering to admit plaintiffs to all their rights and privileges in the association. Held, that this action of the association suffices to prevent a decree of dissolution, and that the bill was properly dismissed. (*Gorman v. Russell*, 18 Cal. 688.)

55. A benevolent association, incorporated to promote the cause of temperance, and not for pecuniary profit, cannot divide any part of the corporate property or funds among its members; and any member of such association may maintain an action to prevent or set aside such a plain misappropriation of the corporate funds. Every stockholder or member of a corporation has the right to sue in equity to prevent any departure from the chartered purposes of a corporation by the action of the majority. (*Ashton v. Dashaway Assn.*, 84 Cal. 61.)
Cited 96 Cal. 79.

UNITED STATES.

State and federal governments. See Constitutional Law, III.

Title of to lands in California. See Public Lands, I.

Officer of, ejectment against. See Ejectment, IV, 3.

Prescription against. See Adverse Possession, III, 2.

Effect of statute of limitations on. See Statute of Limitations, V, 1.

Power of federal government to acquire property. See cross-references under Federal Government.

UNITED STATES COURTS.

See United States District Court.

Laws relating to jurisdiction of. See Constitutional Law, III, 1.

Federal practice. See Federal Practice.

Conflict between state and federal courts. See Judgments, XXII.

Judgments of. See Judgments, XXII.

Jurisdiction of federal courts in suit between aliens. See Aliens, 49.

UNITED STATES COMMISSIONER.

Jurisdiction over deserting seamen. See Shipping, XI.

Oath, power to administer. See Swamp and Overflowed Lands, 110.

Cannot administer oaths. See Estates of Deceased Persons, 106.

UNITED STATES DISTRICT COURT.

1. If an act of Congress gives jurisdiction to a district court of the United States to adjudicate on the title to certain lands, the court has no authority, under the act, to adjudicate on the title to lands other than those mentioned in the act. (*Umbarger v. Chaboya*, 49 Cal. 525.)

2. If a district court of the United States is authorized by a special act of Congress to adjudicate on the validity of a Mexican grant to a tract of land described in a petition filed by the claimant in said court, the court has jurisdiction to reject the grant except a portion thereof, and confirm that portion not thus rejected. (*Umbarger v. Chaboya*, 49 Cal. 525.)

UNITED STATES MAIL.

See Mail Contracts; Postmasters.

UNITED STATES MARINE HOSPITAL.

Title to lot. See San Francisco, 159, et seq.

UNITED STATES MARSHALS.

See Marshals.

1. A trespass committed by a deputy marshal or sheriff, in his official character, is considered, in law, as committed directly and personally by his principal. (*Hirsch v. Rand*, 39 Cal. 315.)

2. When a trespass is committed by a marshal or sheriff, either personally, or by deputy, his official character does not relieve him from personal responsibility. (*Hirsch v. Rand*, 39 Cal. 315.)
Distinguished 79 Cal. 32.

3. In an action against an officer, such as sheriff or marshal, for a trespass committed through his deputy, it is not necessary to state the official character of the defendant in the complaint, or to charge the trespass as having been committed through a deputy. (*Hirsch v. Rand*, 39 Cal. 315.)

4. District courts have jurisdiction of actions for trespass against a United States marshal. (*Hirsch v. Rand*, 39 Cal. 315.)

UNITED STATES SUPREME COURT.

Appeals to. See Appeals, XIV.

Decisions of. See *Stare Decisis*.

UNIVERSAL PARTNERSHIPS.

See Partnership, IV.

UNIVERSITIES.

See State University.

Colleges. See Colleges.

UNIVERSITY OF CALIFORNIA.

See Hastings Law College; State University.

UNLAWFUL DETAINER.

See Forcible Entry and Unlawful Detainer.

USAGES.

Whether binding. See Master and Servant, 70.

Meaning given words by usage will be followed. See Contracts, 94.

Presumption arising from uniform procedure. See Pleading and Practice, XV.

Admitted, submitting to jury. See Instructions, 129.

1. Where authorities differ the court ought to adopt that opinion which is most in unison with the former condition of things in California, and which will best conduce to uphold and carry into execution the intention of the parties. Per Bennett, J. (*Panaud v. Jones*, 1 Cal. 488.)
Cited 22 Cal. 71.

2. The custom of merchants is not admissible in evidence to vary the plain meaning of a written contract. (*Corwin v. Patch*, 4 Cal. 204.)

3. If a contract for the delivery of wool contains an express warranty that it is to be delivered in good order, evidence of a custom which would relieve the warrantor from liability under it is not admissible. (*Polhemus v. Heiman*, 50 Cal. 438.)
Cited 60 Cal. 287.

4. Parol evidence of the usage and custom of trade is inadmissible to contradict or vary an unambiguous clause of a charter party providing that a commission at a specified rate shall be paid by the vessel after loading to the charterer. (*Holloway v. McNear*, 81 Cal. 154.)

5. Where evidence of such usage is admitted without objection on the trial, the court may properly instruct the jury not to consider it for the purpose of varying the terms of the written instrument. (*Holloway v. McNear*, 81 Cal. 154.)

6. Though evidence of usage is not admissible to relieve a party from his express stipulation or to vary a contract certain in its terms, it has a legitimate office in aiding to interpret the intention of the parties to a contract, the character of which is to be ascertained from general implications and presumptions. (*Burns v. Sennett*, 99 Cal. 363.)

Established usage of firm becomes part of contract of partnership. See Partnership, 70.

To supply place of express contract. See Agency, 22.

Entering into contract of employment, evidence of. See Master and Servant, 78.

Evidence of custom to inspect goods on sale by sample. See Sales, 184.

Regarding interest on balances. See Interest, 47.

Overdrafts, usage as to allowance of. See Banks and Banking, 14.

7. In an action brought to recover a sum of money alleged to be due as the first payment or margin on a written contract for the sale of stock by a member of a board of brokers, to be delivered to the buyer in thirty days, if the contract acknowledges the receipt of such first payment, the plaintiff may give evidence of what the custom of the board of brokers was with regard to making and delivering such contracts, for the purpose of accounting for the delivery of the contract without receiving the money. (*Winans v. Hassey*, 48 Cal. 635.)
Cited 99 Cal. 372.

8. Under the Mexican law custom is sometimes allowed not only to control, limit, modify, and interpret the general rules of the system, but even to establish a rule in direct contravention of the positive written law. Thus, custom may attain the force of law, not only when there is no law to the contrary, but when the effect of it is to overturn the previous law which stands in opposition to it. Per Bennett, J. (*Von Schmidt v. Huntington*, 1 Cal. 55.)
Cited 6 Cal. 160; 10 Cal. 477; 31 Cal. 522.

9. A verdict of a jury will not be disturbed on the ground that evidence was offered and received at the trial, after objection, that a custom had prevailed in California, amongst Spanish and Mexican residents, before the acquisition of the country by the Americans, that no more than two witnesses were requisite to attest the execution of a will, when it appears from such evidence that the custom had prevailed generally and for a long time. (*Panaud v. Jones*, 1 Cal. 488.)
Cited 10 Cal. 478; 11 Cal. 169; 31 Cal. 522; 9 Mont. 465.

Customs in California previous to the session as to probate of wills. See Wills, 103.

Execution of will, customs as to under Mexican law. See Wills, 24.

Of secretary to serve without compensation. See Corporations, 495, et seq.

Want of care, custom will not excuse. See Shipping, 31.

Negligence, usage, effect on liability. See Negligence, 27.

To permit animals to run at large. See Railroads, 149.

Custom of boys to play on street. See Railroads, 260.

As to herding cattle. See Animals, 8, 9.

Cannot override law. See Mines and Mining, 160.

Local mining customs, rules and regulations. See Mines and Mining, VI.

Regulating extent of mining claim. See Mines and Mining, 101, 102.

USE AND OCCUPATION.

Action for survives. See Abatement, 37.

1. The right to recover for use and occupation is founded alone on contract. (*O'Connor v. Corbitt*, 3 Cal. 370.)
Cited 5 Cal. 223.

2. A decree was made directing that the plaintiff pay into court a sum of money, and that the defendant thereupon make a deed conveying certain land to the plaintiff, and also that he surrender possession thereof. Held, that the plaintiff could maintain an action for mesne profits for the period after said payment during which the defendant refused to surrender possession, although no deed was made pursuant to the decree. (*Hidden v. Jordan*, 57 Cal. 184.)

3. After such payment the decree operated to invest the plaintiff with the legal title. Mr. Justice McKinstry, concurring. (*Hidden v. Jordan*, 57 Cal. 184.)

4. No action for use and occupation will lie, where possession is adverse and tortious, for such possession excludes the idea of a contract, which, in all cases of this action, must be either express or implied. (*Sampson v. Schaeffer*, 3 Cal. 196.)

5. When a person has occupied land with the acquiescence and consent of the owner no rents and profits can be recovered in ejectment during the period of such acquiescence and consent. (*Ross v. Evans*, 65 Cal. 439.)

6. In an action *ex contractu*, the complaint, consisting of two counts, alleged, in the first, that defendants were indebted to the plaintiffs in the sum of ten thousand dollars, for the use and occupation of plaintiffs' certain wharf by the defendants, at their instance and request, and by the sufferance of the plaintiffs, and that, in consideration thereof, defendants promised to pay said sum to plaintiffs, on request; and, in the second count, that at the request of the defendants the plaintiffs had suffered and permitted the defendants to use a certain berth at said wharf for a period and in a manner particularly specified, and that, in consideration thereof, the defendants promised to pay to the plaintiffs, on request, so much as they reasonably deserved to have therefor, which sum was alleged to be ten thousand dollars. The answer was a general denial. It appeared from the proofs at the trial and the findings of fact filed, that defendants did occupy plaintiffs' said wharf in the manner and for the period alleged, but was so done neither in pursuance of the express contract alleged by plaintiffs in said first count, nor by the permission or sufferance of the plaintiffs as alleged in said second count, but that said occupancy by the defendants at the time of its commencement was wholly unauthorized by any contract, and was a trespass upon the plaintiffs' wharf. Held, that this is an action for use and occupation, and that such action does not lie where the occupation was tortious and not under a contract, or at least permissive. (*Hathaway v. Ryan*, 35 Cal. 188.)
Cited 19 Nev. 428.

Assignee can recover for, when. See Assignments of Contracts, 110.

Rents and profits, right to on forfeiture by vendee. See Vendor and Vendee, 173.

Tenant holding over, liability for. See Landlord and Tenant, 310.

Rights of purchaser at tax sale to rents and profits. See Taxation, XII, 5, f, D.

Rents and profits on foreclosure. See Mortgages, XIX, 18, j.

Rents and profits where mortgagee in possession. See Mortgages, X, 1, e.

7. Where damages are claimed for use and occupation prior to the commencement of the action the complaint must state the title of plaintiff as existing at some prior date (to be designated), and as continuing up to the commencement of the action, and the entry of defendant at some date subsequent to that of the alleged title. (*Payne v. Treadwell*, 16 Cal. 220.)

8. The allegation that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, was the allegation of a contract; and this plaintiff is bound to establish to enable him to succeed. (*Sampson v. Schaeffer*, 3 Cal. 196.)

Joint action, when demands are several. See Parties, 41.

Allegations as to rents and profits. See Ejectment, V, 3, d.

Attachments in actions for. See Attachments, III, 4.

Limitation of actions for rents and profits. See Statute of Limitations, VI, 3, c.

Bill of particulars cannot be called for in. See Pleading and Practice, 211.

Damages for admission by failure to deny. See Damages, 99, 100.

9. In an action for use and occupation the court was asked to instruct the jury "that it was necessary, to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff; and, if the jury believe defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant," which the court refused. Held, that in this the court erred. (*Sampson v. Schaeffer*, 3 Cal. 196.)

10. Ordinarily, the actual damage which one sustains by being deprived of the use and occupation of land is the value of the use and occupation of the land during the time he is deprived of possession. (*Eva v. McMahon*, 77 Cal. 467.)

11. In actions for mesne profits the court will not interfere if, in cases where the plaintiff is entitled to recover more than the rental value of the land, the jury find, as damages, a gross sum made up of the value of the rents and interest; but the court cannot, as a matter of law, add interest to the amount of damages found by the jury or by the court. (*Haggin v. Clark*, 51 Cal. 112.) Cited 72 Cal. 330.

12. In an action for mesne profits the value of the improvements placed on the land by the defendant before the plaintiff acquired title cannot be set off against damages by way of mesne profits which accrued subsequent to the conveyance to the plaintiffs. (*Haggin v. Clark*, 51 Cal. 112.)

13. An allowance for the value of improvements made upon land can be made only as an offset for damages claimed for withholding possession, and where the property is

awarded to the heirs of a testator as against the purchasers at a void executor's sale, and the court finds that the value of the improvements made by the purchasers is in excess of the value of the rents and profits, it is proper to allow no judgment for rents or damages, and no further allowance can be made for improvements. (*Huse v. Den*, 85 Cal. 390.)

Improvements as setoff against. See Set-off, 12.

Claim for as counterclaim. See Counterclaim, 14, 15.

14. If the court, in an action for mesne profits, finds the value of the rents, issues, and profits of the land during a certain period, it may be assumed that the finding is equivalent to a finding of the amount of damages sustained. (*Haggin v. Clark*, 51 Cal. 112.)

15. A judgment rendered for use and occupation should not draw any interest whatever. (*Osborn v. Hendrickson*, 8 Cal. 31.) Cited 15 Nev. 319; distinguished 31 Cal. 471.

Damages and mesne profits. See Ejectment, XVIII.

Recovery of value of. See Interpleader, 13. Judgment for damages in currency in ejectment. See Judgments, 43.

Judgment for is error in suit to quiet title. See Quieting Title, 165.

Stay bond on appeal. See Appeals, 1762.

Sureties, liability for. See Appeals, 755.

USER.

See Adverse Possession; Easements, II, 2.

Highways, acquiring by user. See Highways, I, 2.

Effect of. See Dedication, II, 5.

USES.

Charitable. See Charitable Uses.

Whether the Statute of Uses (27 Henry VIII, c. 10) was ever in force in this state, query? (*Chandler v. Chandler*, 55 Cal. 267.)

USURPATION.

Office, usurpation of. See Offices and Officers, VI.

Franchises, usurpation of. See Franchises, VI; Municipal Corporations, VIII; Railroads, X, 3.

Right to build turnpike. See Turnpike Companies, III.

USURY.

Doctrine of under Mexican law. See International Law, 1.

1. Illegality of usury is wholly creature of legislation, and in this state nothing has been prescribed by the legislature to relieve parties from contracts providing for exorbitant rates of interest. (*Coleman v. Commins*, 77 Cal. 548.)

2. No usury law was in force in California in January, 1850, though the Mexican laws had not then been abolished by legislation. (*Fowler v. Smith*, 2 Cal. 39.) Cited 14 Cal. 179.

3. To establish usury the party must show that the rate agreed upon was greater than that which was customary, at the time

and place of the contract. (*Fowler v. Smith*, 2 Cal. 568.)

VACANCY.

Office, vacancy in. See *Offices and Officers*, XIV.

Trustees, vacancy in. See *Trusts and Trustees*, VII, 10.

VACATION.

Validity of judgment rendered after. See *Judgments*, XII, 17.

Entry of judgment in vacation. See *Judgments*, II, 8, e.

Terms of court. See *Courts*, IV.

Filing, finding in. See *Findings*, 29.

Judgments, vacation of. See *Judgments*, XIV.

Order on motion for new trial, vacation of. See *New Trial*, XI, 4.

Writ of assistance, vacation of. See *Assistance*, V.

Streets, vacation of. See *Streets*, VII.

VACCINATION ACT.

Is valid. See *Constitutional Law*, 250.

VAGRANCY.

See *Criminal Law*, XXI, 54.

VALLEJO.

Statute removing state capital to. See *State Capital*, 2, et seq.

VALUATION.

See cross-references under *Appraisalment*.

Property, valuation of. See *Taxation*, V, 11.

Board of equalization making original valuation. See *Taxation*, VI, 4.

VALUE.

Standard of. See *Taxation*, 325.

Evidence as to. See *Eminent Domain*, X, 6, g; *Evidence*, IX, 13, a.

Evidence as to cost. See *Trover*, 30.

Evidence as to value of leasehold. See *Trespass*, 51.

Presumption as to value of property. See *Presumptions*, 23.

Misrepresentations as to value. See *Vendor and Vendee*, III.

Market value. See *Market Value*.

Market value, evidence as to. See *Sales*, 265.

Testimony as to market value in action for nuisance. See *Nuisance*, 79.

Action for breach of contract to convey, market value of land. See *Vendor and Vendee*, 243.

Actual cash value. See *Insurance*, II, 6.

Homestead, value of. See *Homesteads*, VII.

Statement of in homestead declaration. See *Homesteads*, IV, 4.

Probate homestead, value of. See *Homesteads*, XV, 5.

Statements as to. See *Insurance*, I, 4.

VAN NESS ORDINANCE.

See *San Francisco*, XIV, 7.

VARIANCE.

I. Rule that Allegata and Probata Must Agree; Materiality and Effect of Variance.

II. Objection, how Taken Advantage of; Waiver of; Effect of Verdict.

Arson, variance in prosecution for. See *Criminal Law*, 1186.

Burglary, variance in prosecution for. See *Criminal Law*, 1414.

Forgery, variance in. See *Criminal Law*, XXI, 27, c.

Larceny, variance in prosecution for. See *Criminal Law*, XXI, 36, g, H.

Indictment for larceny and commitment, variance between. See *Criminal Law*, XXI, 36, f, H.

Indictment for false pretenses and proof, variance between. See *Criminal Law*, 1589.

In criminal prosecution. See *Criminal Law*, XVIII, 14, v.

Acquittal for variance. See *Criminal Law*, XVII, 3, g.

Accident, insurance policy, variance in action on. See *Insurance*, 236.

Agent, action against, variance in. See *Agency*, 235.

Amendment to conform to proofs. See *Pleading and Practice*, XI, 15.

Amendment to permit evidence. See *Pleading and Practice*, XI, 15.

Assumpsit, variance in. See *Assumpsit*, 59.

Bills and notes, action on, variance in. See *Bills and Notes*, XVIII, 5.

Claim of property, defense of must be pleaded. See *Sheriffs*, 37.

Compensation, action for, variance in. See *Attorney and Client*, VII, 6, b.

Ejectment, variance in. See *Ejectment*, 372, 373.

Execution and judgment, variance between. See *Executions*, 43.

Findings and complaint, variance between. See *Appeals*, 2651, 2652.

Fire, variance in action for injury from, what is not. See *Railroads*, 181.

Fire insurance policy, variance in action on. See *Insurance*, 141.

Forcible entry, variance in action for. See *Forcible Entry and Unlawful Detainer*, 246.

Judgment, variance in. See *Judgments*, XII, 9.

Libel, variance in. See *Libel*, IV, 4, e.

Mechanic's lien, variance in action on. See *Mechanics' Liens*, 372.

Mortgage, variance in suit to foreclose. See *Mortgages*, 653, 654.

Name, variance in. See *Bail*, 85.

Profits of resale, variance in action for. See *Vendor and Vendee*, 232.

Schedule in insolvency, variance in. See *Bankruptcy and Insolvency*, 133.

Slander, proof of publication of, variance in. See *Slander*, 31.

Slander, time of utterance of, variance in. See *Slander*, 32, 33.

Street contract, variance in. See *Streets*, XIV, 8.

Sureties, actions against, variance in. See *Suretyship*, IV, 3, e.

Trespass, variance in actions for. See *Trespass*, III, 8.

Use and occupation, action for, variance in. See Use and Occupation, 6.

I. Rule that Allegata and Probata Must Agree; Materiality and Effect of Variance.

1. The rule is, that the allegations and proof must correspond, and a consequence of the rule is another, which is, that evidence of a fact essential to the support of the action cannot be heard unless it be averred in the complaint. (*Maynard v. Fireman's Fund Ins. Co.*, 34 Cal. 48.) Cited 68 Cal. 352.

2. It is a cardinal rule in equity, as in all other pleadings, that the allegata and probata must agree, and that averments material to the case omitted from the pleading cannot be supplied by the evidence. (*Murdock v. Clarke*, 59 Cal. 683, cited 76 Cal. 49; *Green v. Covillaud*, 10 Cal. 317, cited 36 Cal. 179, 56 Cal. 264, 76 Cal. 49, 1 Idaho, N. S., 678.)

3. The rule that the allegata and probata must correspond is not abrogated by the Civil Practice Act. The plaintiff must prove his contract as alleged in his complaint, or he is not entitled to recover. (*Stout v. Coffin*, 28 Cal. 65.) Cited 36 Cal. 175.

Allegata and probata must correspond. See Common Carriers, 50.

4. A plaintiff cannot recover upon cause of action developed by proofs but not stated in the complaint. (*Burke v. Levy*, 68 Cal. 32.)

5. Plaintiff must be confined to allegations in his complaint. (*Branger v. Chevalier*, 9 Cal. 353.)

One must recover according to pleadings and not proofs. See Husband and Wife, 313. Evidence must be predicated upon proper pleadings. See Watercourses, 185.

6. Seventy-first section of the Practice Act, requiring immaterial variances between the pleadings and proofs to be disregarded, is a most beneficial provision, and should be liberally construed and carried out. (*Began v. O'Reilly*, 32 Cal. 11.) Cited 39 Cal. 175.

7. Plaintiff cannot recover where the contract declared on is essentially different from the contract set up by the defendant and proved and found by the court to have been made between the parties; and the respective rights and obligations of the parties under the one are essentially different from what they are under the other. (*Cox v. McLaughlin*, 63 Cal. 196, 207.)

8. In an action against a common carrier for not complying with a contract to carry and deliver a draft the complaint alleged that it was signed "John Q. Jackson"; the proof showed that it was signed "John Q. Jackson, Agent." Held, that the variance was immaterial. (*Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263.) Cited 98 Cal. 114.

9. Where the plaintiff declared upon a note made by one McKinley and one Campbell, and gave in evidence a note signed by H. C. McKinley and C. Campbell & Co., held, that

the variance was important and substantial, and that the district court erred in admitting it in evidence. (*Cotes v. Campbell*, 3 Cal. 191.)

Cited 56 Cal. 264; 69 Cal. 621; 78 Cal. 257.

Complaint alleging bill to be drawn to A where evidence shows it to be payable to B. See post, 28.

10. If the complaint alleges a promise to pay money to a corporation, and the promise proved was made to a committee of a church, there is a fatal variance between the complaint and proof. (*Christian College v. Hendley*, 49 Cal. 347.) Cited 55 Cal. 440.

11. The party making an allegation in a pleading that the sale of a mining claim under which he claims title was in writing is not thereby precluded from proving that the sale was a verbal one. (*Patterson v. Keystone Min. Co.*, 30 Cal. 860.) Cited 7 Nev. 327.

12. A joint contract cannot be given in evidence where the pleadings set up a several contract alone. (*Stearns v. Martin*, 4 Cal. 227.)

13. An alleged cause of action for goods sold and delivered is not sustained by proof of delivery of the goods to the defendant, to be sold on commission. (*Evans v. Bailey*, 66 Cal. 112.)

14. In an action to enforce a promise alleged to have been made by the defendant on a certain day the plaintiff is entitled to recover upon proof that the promise was made at any time before the commencement of the action. He need not prove that it was made on or about the time alleged in the complaint. (*Biven v. Bostwick*, 70 Cal. 639.)

15. A plaintiff, who bases his right to an accounting upon an allegation of a partnership between himself and the defendant, is not entitled to such relief upon the mere proof of a tenancy in common. (*Noonan v. Nunan*, 76 Cal. 44.)

16. Where the complaint alleged that the plaintiffs became tenants in common with the defendants in the ditch and water rights in controversy by express agreement with the defendants, who were the then owners, in consideration of the plaintiffs' labor, the plaintiffs cannot recover upon an unpleaded theory, inconsistent with their allegation, that the labor done by them and the defendants in enlarging the ditch destroyed the identity of the original ditch, and created a new one, in which the plaintiffs were entitled to share as tenants in common with the defendants. (*Hayes v. Fine*, 91 Cal. 391.)

17. The complaint alleged that the plaintiffs entered into a contract with the Sonoma & Marin Railroad Company (afterward merged into and consolidated with the defendant), for the construction of a tunnel—the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company, and for the purpose of defrauding the plaintiffs, omitted certain work from his estimates. Upon the trial the plaintiffs offered to prove that they did extra work, on the promise of the engineer (subsequently

ratified by the president of the company) that they should be paid for it, as for similar work under the contract. Held, that as the plaintiffs had not sued for extra work, but for work done under the original contract, the evidence was not admissible. (*Hinkle v. San Francisco etc. R. R. Co.*, 55 Cal. 627.)

18. A variance between the allegations of the complaint and the evidence, stated in the opinion, and held to be immaterial. (*Quackenbush v. Sawyer*, 54 Cal. 439.)

Recovery cannot be had for excessive levy where no allegation. See *Sheriffs*, 40.

Evidence of title to land not described in complaint is not admissible. See *Watercourses*, 425.

Evidence of repetition of words where repetition not alleged. See *Slander* 36, 37.

Plaintiff alleging title cannot recover by showing lien. See *Quieting Title*, 123.

One claiming title cannot recover on proof of possession. See *Quieting Title*, 154.

Evidence of negligence other than that alleged. See *Railroads*, 165.

Special damages cannot be proved unless alleged. See *Watercourses*, XIV, 1, f.

Proof of excuse for nonperformance does not meet allegation of performance. See *Contracts*, 340.

Judgment, pleadings must be sufficient to support. See *Judgments*, XII, 3.

Judgment must be based upon pleadings. See *Judgments*, XII, 3.

19. Unless the facts essential to the support of the case be alleged in the pleadings evidence upon such omitted facts cannot be heard or considered. (*Hicks v. Murray*, 43 Cal. 515.)

20. If the answer sets up as a defense in an action on a bill of exchange a total failure of consideration, and the proof shows a partial failure only, the variance is not an available one under our practice. (*Plate v. Vega*, 31 Cal. 383.)

21. Where it is alleged in the complaint that goods damaged by water through the negligence of a water company were in the building of the plaintiff, proof that some of them were on the roof of the building is not a material variance. (*Yik Hon v. Spring Valley W. W.*, 65 Cal. 619.)

22. In an action under the statute for causing by wrongful act the death of a person, where the allegation of the complaint was that defendants owned, as tenants in common, the entire block in front of which the accident occurred, and the proof was that they owned it in distinct parcels in severalty, the variance was immaterial. (*Gay v. Winter*, 34 Cal. 153.)

23. The plaintiff alleged that "*Hull & Co.*" were indebted to him, but failed to prove that there were others in company with Hull in the transaction. Held, that the words "*and company*" might be treated as surplusage, and the action proceed as against Hull alone. (*Mulliken v. Hull*, 5 Cal. 245.)

24. A complaint (where there is more than one plaintiff) in an action to recover damages for the alleged seizure of goods, which avers

that the defendant took and carried away "certain goods, chattels, and effects, of and belonging to the said plaintiffs," does not necessarily aver a joint ownership of the goods in the plaintiffs; but would be sustained by proof that the plaintiffs owned the property as partners, or as tenants in common, and that their respective interests therein were very unequal. (*Pelberg v. Gorham*, 23 Cal. 349.)

25. The action was brought to recover for the wrongful conversion of certain shares of the capital stock of a corporation. The complaint averred generally that the plaintiff loaned the stock to the defendant, and that he converted it to his own use. The evidence showed that the stock was loaned for the special purpose of being used by the defendant to raise money to pay and take up a certain promissory note of which the defendant was maker and the plaintiff the accommodation indorser, and that the defendant did not use it for that purpose, but converted it to his own use. The answer denied that the plaintiff was the owner of the stock, or that the defendant had borrowed it, and averred that he had bought it of the plaintiff. Held, that the variance between the evidence and the allegations of the complaint was immaterial, as under the pleadings the defendant could not have been misled to his prejudice. (*Hitchcock v. McElrath*, 72 Cal. 585.)

26. Plaintiff sues to enjoin the enforcement of a judgment recovered by defendant T. against plaintiff G., and avers that G. paid T. the amount of the judgment and procured an assignment of it to defendant V., who seeks to enforce it against plaintiff. Held, that on the trial plaintiff could not be permitted to show that G. paid the judgment with the joint funds of himself and plaintiff, because the complaint avers the payment to have been made by G. (*Coffee v. Tevis*, 17 Cal. 239.)

Immaterial, when. See *Appeals*, XI, 12, d; *Agency*, 232; *Guaranty*, 28.

Complaint and findings, variance between, when immaterial. See *Mechanics' Liens*, 372, 373.

Variance between original complaint and copy, when immaterial. See *Summons*, 34.

Variance between complaint and case proved is ground for reversal. See *Appeals*, 2467.

Dates, variance as to, is immaterial. See *Libel*, 47.

Variance in prosecution for receiving stolen goods, when immaterial. See *Criminal Law*, 2473.

Variance between information and proof, when immaterial. See *Criminal Law*, 1553.

Findings, variance in, when immaterial. See *Findings*, 226.

Variance is no ground for reversal. See *Appeals*, 3152.

II. Objection, How Taken Advantage of; Waiver of; Effect of Verdict.

27. If the cause of action shown by the evidence is somewhat, but not radically, different from that stated in the complaint, the objection should be presented either by a specific objection to evidence, or by a motion for nonsuit particularly indicating the precise ground. (*Eversdon v. Mayhew*, 85 Cal. 1.)

28. Where the complaint in an action on a bill of exchange describes it as payable to the order of A, whereas the bill offered in evidence is drawn payable to B, it is a variance to be taken advantage of by objecting to the evidence, or by a motion of nonsuit. (*Farmer v. Cram*, 7 Cal. 135.) Cited 69 Cal. 621.

29. If the plaintiff claims damages from a railroad by reason of the negligence of one of its employees, and the evidence of the plaintiff tends to show that the act of the employee was willful and without the scope of his duty, the defendant must take advantage of it by motion for a nonsuit, or asking an instruction to the jury. (*Hahn v. Southern Pac. R. R. Co.*, 51 Cal. 606.)

30. A material variance between the contract as alleged and proved is a ground of nonsuit, unless the plaintiff obtains leave to amend his complaint so as to make it conform to the proofs. (*Tomlinson v. Monroe*, 41 Cal. 94.)

Nonsuit for, when error. See *Mechanics' Liens*, 373.

Nonsuit, variance as ground for. See *Nonsuit*, III, 3.

Objection on ground of cannot be first raised on appeal. See *Appeals*, 2365.

Variance between evidence and findings of facts and pleadings, objection when to be taken. See *Appeals*, 2453.

Waiver by failure to object. See *Sales*, 245.

31. An objection to evidence on the ground that it is immaterial, irrelevant, and incompetent, in that it does not support the allegation of the complaint, is not sufficient to raise the question of variance. (*Knox v. Higby*, 76 Cal. 264.)

32. If, in the progress of a trial, evidence is offered by the plaintiff at variance with the allegations of the complaint, and the counsel for the defense does not object to it at the time, nor move to strike it out upon the ground of variance, the error is waived, and the court may instruct the jury in relation to the whole field of inquiry covered by the evidence. (*Boyce v. California Stage Co.*, 25 Cal. 460.) Cited 65 Cal. 620; 76 Cal. 488.

33. When the case made by plaintiff's proof differs from the averments of the complaint, and defendant makes no objection to the introduction of the evidence on this ground, the supreme court will not reverse the judgment on account of the variance. (*Marshall v. Ferguson*, 23 Cal. 65.) Cited 5 Utah, 634.

34. When the pleadings aver a contract to be fulfilled at a specified time, and a written agreement of contract, to be fulfilled at another time, is offered in evidence, the offer is obnoxious to no objection but that of "variance"; and if this objection be not taken, and it be shown that the time of performing the written agreement had been extended by a subsequent oral agreement, so as to correspond with the pleading all objections are thereby cured. (*Waugenheim v. Graham*, 39 Cal. 169.)

35. Objections to the sufficiency of a complaint to support the proof cannot be made

after a verdict is rendered upon the trial of the case, if the complaint is sufficient to support the judgment. (*Horn v. Hamilton*, 89 Cal. 276.)

VEINS.

Intersecting. See *Mines and Mining*, XI, 6.

VENDITIONI EXPONAS.

See *Executions*, IX, 1.

VENDOR AND VENDEE.

I. Execution of Contract for Conveyance.

1. *Contract Signed by Vendor Only.*
2. *Offer and Acceptance.*
3. *Description of Property.*
4. *Consideration.*
5. *What Constitutes Sale or Agreement for Sale; Express Agreement to Purchase, Necessity of.*
6. *Mistake in.*
7. *Under Civil or Mexican Law.*

II. Proof of Conveyance.

III. Validity of; Fraud or Deceit and Remedies for.

IV. Construction of Contract; Deed in Name of Third Person.

V. Interest Passing Under Contract; "More or Less"; Imposing Conditions After Absolute Conveyance.

VI. Estoppel of Vendor or Vendee.

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I. Execution of Contract for Conveyance.**1. Contract Signed by Vendor Only.**

1. An executory contract for the sale of real estate is valid and binding, and can be enforced by the vendee, if signed by the vendor alone. (*Vassault v. Edwards*, 43 Cal. 458.) Cited 59 Cal. 31; 79 Cal. 510; 87 Cal. 225; 88 Cal. 549, 551; 91 Cal. 447; 98 Cal. 171.

2. Contract for the sale of real estate is not void because signed by the vendor only and not by the purchaser. The vendor is the party to be charged, and his signature to the contract, taken in connection with its delivery to the purchaser and a partial payment thereunder, binds both parties. (*Scott v. Glenn*, 98 Cal. 168.)

3. A contract to convey land in payment of the indebtedness of the vendor, unless otherwise paid by a certain date, is binding upon the vendor from its delivery to a third person in escrow, without the signature of the vendee or any contract in writing from him. If the vendee agrees verbally to the terms of the written agreement to convey he is estopped from enforcing the indebtedness until the time fixed by the agreement. (*McDonald v. Huff*, 77 Cal. 279.) Cited 88 Cal. 551.

4. The fact that the contract was signed by the vendor alone does not entitle the purchaser to recover back the money paid thereunder, regardless of whether the contract could not have been enforced against the purchaser. It is sufficient that it is enforceable against the vendor, and that the payment was founded upon a valuable consideration which has not failed. (*Bradford v. Parkhurst*, 96 Cal. 102.) Cited 99 Cal. 261.

Ratification of signature by co-vendor, conclusiveness of findings. See Appeals, 2625.

2. Offer and Acceptance.

5. If contract is extended in order that the vendor may perfect his title, and the vendee, as soon as the title is perfected, accepts the same, and tenders the money, he accepts the

vendor's proposal within a reasonable time, and it then ripens into a complete contract of sale. (*Vassault v. Edwards*, 43 Cal. 458.)

6. An acceptance of a proposal for the sale of land, and the compliance with the terms of the proposal, held, to have been made within a reasonable time. (*Phillips v. Deck*, 76 Cal. 384.)

7. When the owners of land are not legally bound to convey it a proposed purchaser may withdraw his offer to purchase at any time before a lawful contract is consummated, and may recover the full amount of any deposit made by him on account of his proposed purchase, after his offer of purchase has been so withdrawn. (*Bogart v. Crosby*, 91 Cal. 278.) Cited 95 Cal. 577.

Acceptance of offer contained in railroad circular. See post, I, 5.

Acceptance of offer contained in circular. See post, I, 5; 396, et seq.

Parties must have consented to the contract in the same sense. See post, 240.

Acceptance, payment of deposit is. See Statute of Frauds, 113.

3. Description of Property.

8. Rule as to particularity of description required in executory contracts to convey land is extremely liberal in favor of their sufficiency. An incomplete description may be aided by extrinsic parol evidence to apply it to the subject matter, provided the land can be thereby identified, and a new description is not introduced into the contract. But the complaint must aver the necessary extrinsic matter, to show in connection with the description what particular land was intended; and it is not sufficient, in an action for damages for nonperformance of the contract, to allege that by an imperfect description contained in the contract the parties intended to convey certain property, nor can such contract be received in evidence under such an averment. (*Marriner v. Dennison*, 78 Cal. 202.)

9. Description of land by name in a contract of sale is, or may be, sufficient if the boundaries are known and well defined. The name of the county where the land is situated is not essential if the description is otherwise sufficient. (*Burnett v. Kullak*, 76 Cal. 535.)

10. The description need not be absolutely certain, either from the writing itself or by reference to some other writing, but it is sufficient if the subject matter is identified, and the terms appear reasonably certain, when the court is placed by parol evidence in the situation of the parties, in consonance with the maxim, *Certum est quod certum reddi potest*. (*Preble v. Abrahams*, 88 Cal. 245.) Cited 99 Cal. 398, 399.

11. In an action upon a contract to purchase the balance of a certain town property, when the evidence for plaintiff shows that there are two maps of the town property indicating it of different size, and that the purchaser intended to take the balance of the town property as shown by an unrecorded map, which indicated the town of greater size, and it appears that the town as thus indicated

was of more than twice the value of the sum offered, and the evidence makes it probable that the vendor intended only to sell the town property as indicated by a smaller map, which alone had been recorded as the official map of the town, the proof of plaintiff indicates such a misunderstanding as to the subject matter of the proposed purchase and sale, or at least shows that the contract was left so uncertain in this particular, that a nonsuit of the plaintiff is proper. *Beatty, C. J.*, and *Thornton, J.*, dissenting. (*Breckinridge v. Crocker*, 78 Cal. 529.)

Description, sufficiency of. See Statute of Frauds, 119.

4. Consideration.

12. In a contract for the sale of lands the consideration named in the instrument will be presumed to be fair and adequate, in the absence of evidence to the contrary. (*Hall v. Rice*, 64 Cal. 443.)

Agreement to share profits of resale. See post, X, 8.

5. What Constitutes Sale or Agreement for Sale; Express Agreement to Purchase; Necessity of.

13. An instrument setting forth that A "has this day sold" a piece of land to B for a sum of money then paid, and a further consideration agreed to be paid; and further providing that, on payment of said further agreed consideration, the said A "binds himself, his heirs, etc., to make a general warranty deed of said land free and clear from all persons claiming through or under him," held, to be an executory contract for a deed, and not a present conveyance. (*Ellis v. Jeans*, 7 Cal. 409.)

14. Although the word "sold" is used, it must be construed with the whole of the instrument to ascertain the intention of the parties. If the parties had considered it a present conveyance they would probably have omitted all express words defining the kind of estate intended to be conveyed, whether for years, for life, or in fee simple. (*Ellis v. Jeans*, 7 Cal. 409.)

15. The grantor's relation to the land in such a case is an equitable lien upon the purchase money, holding the legal title as security for the enforcement of the lien. (*Ellis v. Jeans*, 7 Cal. 409.) Cited 32 Cal. 59.

16. A proposal to sell real estate, reduced to writing, and signed by the vendor alone, in which he recites that he has sold to the vendee the land for a price named, and has received a certain sum as a deposit, as part payment, which the vendor was to refund if the title was rejected or bad, the sale to be subject to a search of and approval of title, and the vendee to have twenty days for the examination of the title, is a valid contract of sale entered into between the parties. (*Vassault v. Edwards*, 43 Cal. 458. Cited 77 Cal. 282, 283; 98 Cal. 171; 5 Col. 305; 13 Col. 556; 10 Mont. 14, 15.)

17. A memorandum signed by a vendor, acknowledging the receipt of a sum of money as a deposit and part payment, on account of a bargain and sale of land therein described, at

a specified price, and providing that the deposit should be forfeited if further payments of purchase money therein specified were not made, and that it should be returned to the purchaser if the title should be defective, is not a mere agreement for the purchase of an option, but is a valid contract for the sale of the land. (*Easton v. Montgomery*, 90 Cal. 307.)

18. A memorandum signed by a vendor, acknowledging the receipt of a certain sum of money as a deposit on account of the sale of certain land therein described, for a price fixed, and providing that the sale should be null and void, and that the deposit should be returned, in case the title did not prove satisfactory to the purchaser, is a valid contract for the purchase and sale of the land, and not a mere sale of an option to the purchaser to buy the land. (*Benson v. Shotwell*, 87 Cal. 49.)

Cited 90 Cal. 312; 98 Cal. 171.

19. The action was brought to recover the possession of certain land forming part of the railroad lands of the plaintiff. The defendant settled upon the land, under the provisions of a printed circular issued by the plaintiff, inviting settlers to go upon its lands and occupy and use them until the company was ready to sell, and giving to such settlers the right to purchase on certain terms and conditions, all of which the defendant had complied with, except the completion of the purchase, which the plaintiff refused to permit. Held, that the acceptance by the defendant of the offer contained in the circular constituted a contract of sale, and established the relation of vendor and vendee between the plaintiff and the defendant, and that, as the defendant was rightfully in possession, the plaintiff could not recover. (*Southern Pac. R. R. Co. v. Terry*, 70 Cal. 484.)

Cited 8 Mont. 207.

20. An agreement signed both by the vendors and by the purchaser, in which the vendors agree to sell to the purchaser a certain tract of land at a certain price per acre, and upon payment of the price to make, execute, acknowledge, and deliver to the purchaser a good and sufficient deed, vesting the title of the property in him, obligates the purchaser as strongly to buy and to pay the price specified as it does the vendors to sell for that price, and needs no reformation to insert an express agreement by the purchaser to purchase the property, which is alleged to have been omitted by mistake. (*Preble v. Abrahams*, 88 Cal. 245.)

Cited 99 Cal. 398, 399.

6. Mistake in.

21. If land is sold by metes and bounds, with a statement of the number of acres, a mistake as to the number of acres affords no ground of action, unless it appears beyond controversy that quantity was one of the principal conditions of the contract. (*Board of Commrs. v. Younger* (No. 1), 29 Cal. 172.)

22. The action was brought to recover the possession of land. The defendant filed a cross-complaint setting up a written agreement for the sale of certain land to him by the

grantor of the plaintiff, and alleged in effect that at the time of the agreement both the parties thereto intended that it should, and understood that it did, include the land sued for, but that the same was omitted therefrom by mistake. Held, in the absence of a demurrer, that the mistake in the execution of the agreement was sufficiently alleged. (*Peasley v. McFadden*, 68 Cal. 611.)

Uncertainty and ambiguity in description. See ante, I, 3.

Mistake as to subject matter, effect on contract. See Mistake, 1.

Conveyance by mistake, pleading in action for reconveyance. See Mistake, 19.

7. Under Civil or Mexican Law.

23. The sale of land in presenti, with a delivery of possession, there being no adverse claim, is valid under the Mexican law; and the delivery of the title papers is a symbolical delivery, and for all purposes equally valid with a delivery by formal entry on the land. Per *Burnett, J.*, dissenting. (*Stafford v. Lick*, 7 Cal. 479.)

24. By the civil law every conveyance of land was required to be made before an escribano, or, if there was none, then before the judge of the first instance. (*Hayes v. Bona*, 7 Cal. 153.)

25. Though there is some doubt whether the civil-law rule, that conveyances of land had to be made before an escribano or judge of first instance, was in force in California, yet it seems that, by the custom of the country, conveyances were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer, and the price paid. (*Hayes v. Bona*, 7 Cal. 153.)

26. Where the defendants in ejectment set up in defense title derived under an instrument in writing, claimed to be a conveyance, but lacking all these requisites, held, that such defense was insufficient against a party holding a subsequent deed from the same grantor. (*Hayes v. Bona*, 7 Cal. 153.)

II. Proof of Conveyance.

27. The acts and declarations of the vendor of real estate are competent evidence to show that the vendee took possession of the land sold under a parol agreement that it was to be conveyed when paid for, and that the vendor had received the agreed price, and thereafter held the naked legal title in trust for the vendee and his grantees. (*Bryan v. Tormey*, 84 Cal. 126.)

28. Where an assignment does not in terms convey real estate, and cannot be fairly construed as doing so, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land in question. (*Lord v. Sherman*, 2 Cal. 498.)

III. Validity of; Fraud or Deceit and Remedies for.

29. A sale of land, with a reservation to the vendor of the right to repurchase, is not op-

posed to public policy. (*Henley v. Hotaling*, 41 Cal. 22.)

30. Where a party contracts orally for the purchase of a house and lot, and furniture therein, and enters into the possession under such oral agreement, and the vendor subsequently fails to make a conveyance, the vendee has the right to quit the premises, and return the personal property. (*Reynolds v. Harris*, 9 Cal. 338.)

31. If the seller has the means of ascertaining the quantity of land and does not do so equity will afford him no relief on the ground that the buyer misrepresented the quantity. (*Board of Commrs. v. Younger* (No. 1), 29 Cal. 172.)

32. A sale of land will not be set aside at the instance of the vendee on account of false representations by the vendor of mere matters of opinion as to its value and productiveness. (*Rendell v. Scott*, 70 Cal. 514.) Cited 81 Cal. 6.

33. Misrepresentations by the vendor of land, to the effect that the land was abundantly watered by means of forty-five shares in a timber ditch water company, and that there would be flowing in the timber ditch a specified amount of water, which would be ample to irrigate the whole land, and produce crops at all seasons of the year, are not mere expressions of opinion, but are statements of material and important facts as to an existing supply of water sufficient for the purposes stated. (*Hill v. Wilson*, 88 Cal. 92.)

34. In estimating the damages to a vendee for fraudulent representations of the vendor in regard to prospects affecting the value of the land sold, where part only of the representations made are untrue, it is not proper to consider what would be the value of the land if all the representations made were untrue, nor what its value would be exclusive of an existing prospect, in respect to which the representations were partially false; but the difference should be taken between the price paid by reason of the false representations as to its value, supposing them to be true, and the actual value of the land at the time of purchase, in view of prospects actually existing. (*Harvey v. Hadley*, 87 Cal. 557.)

35. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants. (*Peabody v. Phelps*, 9 Cal. 213.) Doubted 22 Cal. 604.

36. It is not the duty of a vendor to disclose to the vendee his knowledge of the proposed location of a railroad, affecting the value of the property sold, but when he seeks to relieve himself by rescission of the contract of purchase, and fraud is charged in procuring such rescission, the fact of such knowledge by the vendor should be considered as a material circumstance tending to show fraud, as furnishing a motive for the attempt to relieve himself from his contract. (*Marriner v. Denison*, 78 Cal. 202.)

37. The mere fact that a vendor of land was

aware of the existence of a judgment which was an encumbrance on the land at the time of his sale, and failed to inform the vendee of the existence of such judgment, is not a fraud so as to constitute a defense to suit on a note for the purchase money, where the means of information—to wit, the county records—were equally accessible to both parties. In such case, if the vendee neglect to inform himself, he is guilty of negligence, and cannot set up his ignorance as a ground of fraud, unless by deceit or misrepresentation he has been misled. (*Ward v. Packard*, 18 Cal. 391.)

38. The vendor in such cases has a right to act on the presumption that the vendee has informed himself of whatever he deemed it his interest to know, and courts will treat the transaction as a purchase made with notice of the facts. (*Ward v. Packard*, 18 Cal. 391.)

Concealment by vendor that he holds title merely as tenant. See post, 130.

39. Where the consent of purchasers to make a purchase of land was procured by fraud the purchaser may elect either to rescind the contract, or to ratify it and sue for damages, though he cannot obtain a valid judgment for damages without personal service or appearance of the defendants; but, if he elects to rescind, he may, upon and after rescission, sue an absent defendant to enforce the rescission, so far as the means of enforcing it are within the jurisdiction of the court. (*Loaiza v. Superior Court*, 85 Cal. 11.)

40. An action for deceit in the sale of land to which the grantor had no title should be brought by all the grantees jointly, unless there has been a conveyance of the cause of action to the plaintiff. A conveyance by one of the grantees to the others of his interest in the land does not assign the cause of action for deceit, so as to enable the assignees to sue for the deceit in their names. (*Lawrence v. Montgomery*, 37 Cal. 183.)

41. An action for deceit is a personal action, founded on fraud, and not upon any covenant in the deed running with the land. (*Lawrence v. Montgomery*, 37 Cal. 183.)

42. Suit on note for the purchase of land. Answer set up, that the note was given for the land, fencing, and building materials; that plaintiff falsely represented that there was building material for building a barn—that this material was so insufficient in quantity that it cost defendant six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good. Held, that defendant, having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to fences, they being, in this case, part of the freehold. Held, further, that a special demurrer being put in to the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for lumber, but for the value of lumber contracted for and not delivered, and this at the time of contracting. (*Kinney v. Osborne*, 14 Cal. 112.)

43. The answer is also fatally defective in

not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity of lumber. (*Kinney v. Osborne*, 14 Cal. 112.)

Fraud, as a defense in action for price. See post, XI, 5, d.

Fraud in conveyance of mining claim. See Mines and Mining, XII, 4.

Fraudulently selling land twice. See Criminal Law, XXI, 29.

Fraudulent representations as to value, personal inspection by purchaser. See Fraud, 48.

Right to recover back price on fraudulent sale. See Fraud, 74.

Fraud, finding as to. See Fraud, IV, 11.

Fraudulently inducing vendee to accept part for whole. See Specific Performance, 110.

Contract signed by vendor only is valid. See ante, I, 1.

Unsealed bill of sale of land, validity of. See Seals.

Contract is not void for uncertainty, when. See Contracts, 61.

Contract for sale of land is sufficiently certain, when. See Specific Performance, III, 4.

Parol agreements, enforcement of. See Specific Performance, IV, 12.

IV. Construction of Contract; Deed in Name of Third Person.

44. When a printed blank is used in a contract for the sale of land, if there is any doubt about how the contract is to be construed, and words found in the printed part are repugnant, to the general scope and purpose of the contract, as the same appears from the original or written parts thereof, the latter must control. (*Vorwerk v. Nolte*, 87 Cal. 236.)

45. Where a large tract of land is sold upon installments, with the express understanding that, upon the making of the first deferred payment, the vendee should have the right to subdivide the same into smaller tracts, with streets and roads upon and through the same, and to make and record maps thereof, etc., and the contract contains a clause which provides that the "inclosure of the party of the first part shall be left practically unimpaired," the removal of the position of a fence so as to place without, instead of within, the inclosure a strip of land along the westerly line of the tract, which had been appropriated as a public highway, as contemplated by the contract, is not a "practical impairment" of the inclosure, if the fences are otherwise left intact and the inclosure of the tract remains complete. (*Wolfskill v. County of Los Angeles*, 86 Cal. 405.)

46. An agreement for the sale and conveyance of land by the owner thereof, which acknowledged receipt of part of the purchase money, and by the terms of which the balance of the purchase money was to be paid on the delivery of a deed, free from encumbrances, within sixty days thereafter, upon receipt of which payment the vendor was to execute a good and sufficient deed conveying the title thereto, and that in case of failure to make the deed the money paid was to be returned, does not give the vendor the option of

conveying the lot or not, as he might choose, but gives the purchaser the right to an enforcement of the vendor's unconditional agreement to make a conveyance of the land, the provision for the return of the money in the case of failure to execute the deed being for the benefit of the purchaser alone. (*Grant v. Beronio*, 97 Cal. 496.)

47. Where the deed of land bought for a married woman is taken in the name of a third person, under an executory agreement on his part to convey to her, on the payment of a certain sum, and she goes into possession, she enters under claim of right, with a vested equitable interest in the land, which, on payment of the sum agreed, becomes a perfect equity. (*Morrison v. Wilson*, 13 Cal. 494.) Cited 6 Or. 204.

48. And if, in such case, before the payment of the money, she acquires the real title from another source, the first deed being from parties without title, this real title is not divested in favor of a vendee or mortgagee of such third person, because she holds the inferior title from him, or entered, or claimed under it. (*Morrison v. Wilson*, 13 Cal. 494.)

49. Claiming or taking the one title is no abandonment of the other. And her possession, if not to be referred to the good title, would not be referred exclusively to the bad. (*Morrison v. Wilson*, 13 Cal. 494.)

What interest passes to vendee. See post, V.

Construction of agreement as to title. See post, VIII, 2.

Agreement for conveyance, construction of. See ante, I, 5.

Agreement for profits of resale. See ante, I, 4.

Construction of contract, in relation to default in payment. See post, XI, 2.

Contract making time of essence of contract, construction of. See post, X, 1.

Conveyance with provision for reconveyance. See Statute of Limitations, 163.

Stipulation for valuation is not agreement of submission to arbitration. See Arbitration and Award, 9.

Enlarging contract by parol. See Evidence, 378.

V. Interest Passing Under Contract; "More or Less"; Imposing Conditions After Absolute Conveyance.

50. All title which vendor has at time passes to the vendee, as against volunteers or donees, even though the deed under which the vendor holds be unrecorded. (*Snodgrass v. Ricketts*, 13 Cal. 359.)

51. A contract to convey land passes equitable fee-simple title to the grantee and his heirs, even if it runs to the grantee alone, and not to the grantee and his heirs. (*Bodley v. Ferguson*, 30 Cal. 511.)

52. A contract by which the Western Pacific Railroad Company sells a quarter section of the land, granted by Congress to the Central Pacific Company to aid in the construction of a railroad, and agrees to execute to the purchaser a deed when the company receives a patent, vests in the purchaser a perfect equity,

with an absolute right to a conveyance as soon as the company receives the patent. (*Baldwin v. Morgan*, 50 Cal. 585.)

Title and rights of vendee of mining claim. See *Mines and Mining*, XII, 2.

Vendee cannot acquire greater title than vendor. See *Landlord and Tenant*, 118.

Equitable title to land under contract of sale. See *Homesteads*, 83.

Equitable estate of vendee may be charged with lien. See *Mechanics' Liens*, 124.

Judgment, effect of on interest of one in possession under contract. See *Judgments*, 256.

53. The feudal doctrine that the fee simple passes only by a deed running to the grantee and his heirs does not extend to contracts to convey land. (*Bodley v. Ferguson*, 30 Cal. 511.)

54. A contract to convey tract, to be so surveyed as to include dwelling-house of the party who is to receive the conveyance, and "also the fields and fenced lands in front of and about said house," does not, by its terms, include a "corral" on the land out of which the survey is to be made. (*Hearst v. Pujol*, 44 Cal. 230.)

55. A written contract for the sale of land for a gross sum, which does not except the growing crops, binds the vendor to convey the land with the crops. (*Fiske v. Soule*, 87 Cal. 313.)

56. When contract provides for certain private roadways to be constructed to and over the land by the vendor to connect with a certain drive, and to be used in common by the vendor and purchaser, their heirs and assigns, it is not error for the court, in enforcing the contract, to allow to the purchaser a right of way or easement, instead of a fee in the land over which such roadways pass. (*Brandt v. Clark*, 81 Cal. 634.)

57. Where a contract for the sale of land describes as appurtenant to the land sold the regular portion of water stock usually deeded with lands similarly located, and it appears that the fee of the land sold, exclusive of private roadways constructed to and over the land by the vendor, is entitled to three shares of water stock, it is not error to limit the decree for a conveyance to that number of shares, without including the roadways in the estimate of land entitled to water stock. (*Brandt v. Clark*, 81 Cal. 634.)

58. Where party who owns but undivided one-half of a tract of land enters into a contract by which he agrees that, upon the payment of the purchase money, he will convey the whole of the land to another party, who is induced to regard him as the owner of the entire premises, the vendor is deemed to have sold not only his own interest in the land, but the whole of the land. (*Marshall v. Caldwell*, 41 Cal. 611.)

59. In the face of such an agreement the vendor will not be permitted to aver, if he brings an action to recover possession from the party holding under the contract, that he sold less than the whole title to the land, unless he can also aver that the written contract, by reason of fraud, mistake, or the like, does

not show the real contract. (*Marshall v. Caldwell*, 41 Cal. 611.)

60. Where a tract of land sold for a gross sum is described by specific boundaries, and as containing so many acres, more or less, the vendor cannot recover for the overplus, if in a survey it be ascertained that more land is contained in the tract than the precise amount named in the deed. (*Chipman v. Briggs*, 5 Cal. 76.)

More or less. See *Trust Deeds*, 12.

61. If the owner of land makes an absolute conveyance of the same, and afterward makes a conveyance to the grantee or his assign, loaded with conditions, the conditions cannot operate, for there is no estate remaining in the grantor upon which the conditions can take effect. (*Aleman v. Daly*, 36 Cal. 90.) Cited 6 Mont. 606.

VI. Estoppel of Vendor or Vendee.

62. As between vendor and vendee estoppel has its origin in contract, its operation is limited to the title in reference to which the contract was made, and does not extend to the question of the right of possession. (*Holten v. Andrews*, 38 Cal. 119.)

63. It would be a fraud, which no court of equity could tolerate, to hold that the vendor of land on a contract to convey, receiving a portion of the purchase money, and seeing the vendee expend large sums of money, improving the property, without objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid, and all the improvements, and deny all obligation on his part to comply with his engagements. (*Farley v. Vaughn*, 11 Cal. 227.) Cited 23 Cal. 37; 40 Cal. 30; 65 Cal. 510.

64. A vendee may deny the title of his vendor. Parties with clear titles may buy out settlers and trespassers rather than incur the expense and delay of establishing their rights by litigation; and where, in such case, they are made parties to a suit to foreclose a mortgage executed by their grantor previously to the conveyance to them, they are not estopped from denying the title of the mortgagor, and from claiming that their rights under their previous titles are superior to those of the mortgagee. (*San Francisco v. Lawton*, 18 Cal. 465.) Cited 90 Cal. 459; 2 Utah, 462.

65. A grantee of land in fee may deny that he received any estate by the conveyance. With the execution of the conveyance the transaction between the parties is closed. Thenceforth the grantee holds the property for himself, and is neither bound to surrender possession to his grantor or to maintain the validity of his title. (*San Francisco v. Lawton*, 18 Cal. 465.)

66. A party entering into the possession of the land of another, and in subordination to his title, is estopped from denying his grantor's title. (*Walker v. Sedgwick*, 8 Cal. 398, cited 64 Cal. 20; *Hoen v. Simmons*, 1 Cal. 119, cited 7 Cal. 416, 8 Cal. 402, 64 Cal. 20.)

67. One who obtains the possession of public land of the United States from a prior possessor under a contract of purchase with which he has not complied is not estopped from setting up a subsequently acquired title from the United States, in an action brought by the vendor to recover the possession. (*Holden v. Andrews*, 38 Cal. 119.)

68. A person who has acquired the possession of lands under a contract of purchase is precluded, while he continues in possession, from disputing the title of his vendor; but he is not estopped to show that his vendor's title has expired. (*Holden v. Andrews*, 38 Cal. 119.)

69. The rule that the purchaser, remaining in possession after a breach of the contract, is estopped from setting up title from any other source, has reference only to title adverse to the vendor. It has no application when the subsequently acquired title is consistent with the vendor's, and when the contract was made with full recognition of such title as the permanent title. (*Holden v. Andrews*, 38 Cal. 119.)

70. In the cases in which it is permitted to the vendee, entering under a contract of purchase, to show that the vendor's title has ceased, the defense is allowed on the ground that, without fault or fraud on the part of the vendee, the vendor's title has expired. (*Holden v. Andrews*, 38 Cal. 119.)

71. But this reason has no application to the sale of a possessory claim, of which alone the possession is sold, and to which the vendee knew the vendor had no other title than the possession. (*Holden v. Andrews*, 38 Cal. 119.)

Estoppel of vendee in possession to deny vendor's title. See post, IX, 2, d.

Owner of undivided interest, estoppel of to deny ownership of whole tract. See ante, 59.

Estoppel of vendor of mining claim. See *Mines and Mining*, XII, 2.

Estoppel by deed. See Estoppel. IV.

Adverse possession by vendee. See Adverse Possession, III, 4, c.

Declaration of vendor, estoppel of vendee from. See Estoppel, 49.

Estoppel of vendor by matter in pais. See Vendor and Vendee, 63.

Vendor estopped to acquire subsequent title, when. See Estoppel, 65.

Notice to vendor is not notice to vendee. See Eminent Domain, 108.

VII. Bond for Title.

72. A bond given by the owner of land to a person, conditioned to convey the land to him in trust for the stockholders of a corporation, and their successors in interest, in proportion to the amount of stock held by each, with power to the trustee to sell under the direction of the board of trustees of the corporation, makes the corporation the real cestui que trust, and in equity it will be so regarded. (*Coleman v. San Rafael T. R. Co.*, 49 Cal. 517.)

73. A vendor of real estate, who makes no conveyance, but gives a bond, conditioned for the execution of a conveyance, on payment of

the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien. (*Gouldin v. Buckelew*, 4 Cal. 107.)

Cited 7 Cal. 415; 32 Cal. 59.

74. The lien which springs out of a title bond predicated upon the covenants for the purchase money attaches upon the land, unless expressly reserved; and, if such reservation be made, it lies upon the purchaser to show it. (*Truebody v. Jacobson*, 2 Cal. 269.)

Cited 6 Cal. 226; 32 Cal. 59.

75. The lien of a title bond attaches to the land, and an assignment with or without notice cannot affect it. (*Truebody v. Jacobson*, 2 Cal. 269.)

76. It is not the vendee's duty to hunt up the assignees; they must look after their interest when the vendor sues for his money; the only protection is payment of the money; this alone will release the bond. (*Truebody v. Jacobson*, 2 Cal. 269.)

77. If the time for payment be extended beyond the period named in a bond for title this does not release the lien. (*Truebody v. Jacobson*, 2 Cal. 269.)

78. Breach of bond for title does not discharge debt due for the purchase money. (*Bagley v. Eaton*, 5 Cal. 497.)

79. A failure on the part of the vendee to pay the purchase money for two years and more does not forfeit his right under a bond for a conveyance on payment of the purchase price, as the vendor may proceed to enforce the payment of the debt at any time after it becomes due. (*Gouldin v. Buckelew*, 4 Cal. 107.)

Cited 5 Or. 239.

80. Where the parties to a bond for title stipulate among themselves for a forfeiture such forfeiture cannot defeat the plaintiff's rights to the purchase money. (*Bagley v. Eaton*, 5 Cal. 497.)

81. The vendee having failed to complete the purchase the remedy of the vendor is to institute proceedings to foreclose the rights of the vendee to purchase under the contract. (*Fairchild v. Mullan*, 90 Cal. 190.)

82. The plaintiff on breach of a bond for title can either resort to a court of equity to enforce its performance or maintain an action at law. (*Bagley v. Eaton*, 5 Cal. 497.)

83. To maintain an action on a bond made by defendant to plaintiffs, conditioned that if the obligor "shall, on or before the fifteenth day of April, 1859, make, execute, and deliver to said W. and E. B. Kinkead, a quitclaim, good, and sufficient deed" to certain premises, "provided, that on or before the fifteenth day of April, 1859, W. and E. B. Kinkead do well and faithfully pay to B. Shreve, or order, certain promissory notes," etc., demand by the obligees upon the obligor to make the deed according to the bond is essential. (*Kinkead v. Shreve*, 17 Cal. 275.)

84. Where agent through whom conveyance is made took the bond for the performance of certain conditions in his own name, and as it imported a direct obligation of conditional reconveyance of the land to him

within a year, he would have the same rights to discharge, modify, or control the obligation of the contract as he had to make it; and that, as he did direct a reconveyance to himself within a year, and as the reconveyance was accordingly in effect made, the condition of the bond was satisfied. (*Ricketson v. Richardson*, 19 Cal. 330.)

Bond for title, whether mortgage. See Mortgages, II, 3.

Assignment of bond for title. See Assignments of Contracts, 82.

Breach of bond to deliver land warrants, damages for. See Damages, 9.

VIII. Title and Encumbrances.

1. Implied Warranty of Title; Rule of Caveat Emptor.

85. The vendor in an executory agreement for the sale of land impliedly represents that he has a good title thereto as one of the considerations for inducing the vendee to enter into the contract, and that the conveyance therein agreed to be made by him will transfer such title. (*Wilcox v. Lattin*, 93 Cal. 588.)

86. In every executory contract for the sale of land there is an implied condition that the title of the vendor is good, and that he will transfer to the purchaser by his deed of conveyance a title unencumbered and without defect. (*Easton v. Montgomery*, 90 Cal. 307.)

87. Caveat emptor applies in sales of real estate where there is no fraud, warranty. (*Salmon v. Hoffman*, 2 Cal. 138.)

Warranty, implied doctrine of under Mexican law. See International Law, 1.

Title, selling property without. See Criminal Law, 1578, 1579.

Facts putting on inquiry. See Notice, II, 2.

Possession as notice, duty of vendee to inquire. See Notice, II, 3, a.

2. Construction of Contract as to; Abstract, Duty to Furnish and Sufficiency; Evidence as to.

88. Under an agreement for the sale of real estate, a general provision in the contract, to the effect that the defendant will pay on receiving a valid and perfect title to the property, is not restricted by a clause designating particular persons from whom conveyances and relinquishments should be obtained; the intent of such a contract is that all clouds and encumbrances should be removed before the defendant could be called upon to pay. (*Jonghaus v. McCormick*, 18 Cal. 660.)

Agreement that title is to be "indisputable and satisfactory." See post, XI, 6.

89. Where there is no provision in the memorandum that the condition of the title shall be ascertained from any particular abstract, or that the vendor shall furnish the abstract, it is incumbent upon the purchaser to provide it, and to satisfy himself as to the condition of the title. (*Easton v. Montgomery*, 90 Cal. 307.)

90. When a certificate of title is furnished by the vendor, instead of an abstract of title, as agreed in the written contract of sale, evidence on the part of the purchaser as to a

parol agreement that an abstract should be furnished instead, and submitted to the decision of a specific attorney as to whether it showed good title or not, cannot be objected to on the ground that it is incompetent to change the terms of the written contract. Such evidence, if irrelevant and immaterial, could work no injury to the vendor if the abstract did not in fact show a good record title. (*Smith v. Taylor*, 82 Cal. 533.) Cited 2 Col. App. 564.

91. Where a contract for the sale of land provided that the purchase money should be payable in installments the first installment to be paid on the signing of the agreement, the "title to be good or the money to be refunded, party of the first part to furnish abstract of title to said land," and the vendor furnished an abstract which failed to show a good title, the purchaser may rescind the contract, and recover the money already paid, although the vendor, as matter of fact, had a good title to the property, if the vendor did not offer to remedy the abstract, or cause a perfect abstract to be furnished before the time arrived for payment of the second installment. (*Boas v. Farrington*, 85 Cal. 535.) Distinguished 90 Cal. 313.

92. When a contract for the sale of land provides that an abstract of title is to be delivered by the vendor, the title to prove good, or no sale, and purchase money paid to be refunded, the only fair interpretation of the contract is, that full abstract of title is to be furnished, which must show good title on its face, in order to bind the contract of sale; and if such abstract does not show a good record title, the purchaser is not bound to make any investigation outside of the abstract, or to take the chances of any litigation which the abstract showed to be either pending or probable; and evidence aliunde is not admissible, in an action to recover back the purchase money paid, to show that the claims of persons who appeared by the abstract of title to be asserting adverse title to the land, and who had suits pending regarding the same, were groundless. Nor is evidence admissible to show a subsequent oral agreement, after the delivery and examination of the abstract, that defendant was to quiet title against such adverse claimants, and that the sale was to be then completed, and that defendant's title had since been quieted as agreed. (*Smith v. Taylor*, 82 Cal. 533.) Cited 2 Col. App. 564; distinguished 90 Cal. 313.

3. Encumbrances or Liens, What are; Duty to Remove.

93. An attachment purporting to have been levied on certain land, but which was not served or levied as required by law, or in such a manner as to constitute a lien thereon, is not an encumbrance within the meaning of an agreement to sell the land free from all encumbrances. (*Gates v. McLean*, 70 Cal. 42.) Cited 80 Cal. 467; 83 Cal. 56.

94. Under a contract for the purchase of land by the terms of which the vendor was to return to the vendee a deposit made upon the purchase price if any valid liens should be

found to exist upon the premises, unless such liens were removed within a stipulated time after notice to the vendor of the existence thereof, liens upon the property for taxes remaining unpaid at the date of the said agreement, although payable more than four years before the date of the agreement, were subsisting liens at that date, and, upon the refusal of the vendor to remove them, the vendee is entitled to recover the deposit paid. (*Lewis v. Rothchild*, 92 Cal. 625.)

95. Where the real estate brokers entered into a contract with an intending purchaser of the land, acknowledging the receipt of a deposit from such purchaser, and stipulating that the title was to prove good, or no sale, in which latter case the deposit was to be returned, and such contract was ratified by the owner of the land, the failure of such owner, within the time limited by the terms of the contract, to remove a defect in the title caused by an unpaid mortgage upon the land, and a pending suit for an interest in the property, discharges the purchaser from his obligation to purchase, and entitles him to the return of his money. (*Smith v. Schiele*, 93 Cal. 144.)

96. In another action upon a contract to convey by an assignee of the vendor for the purchase money, held, that a tender of a conveyance by the vendor while a mortgage remained unsatisfied was not a compliance with the contract. (*Reese v. Hoeckel*, 58 Cal. 281.)

97. On the trial of action to recover a deposit made by a purchaser under an executory contract for the sale of land the plaintiff gave evidence that the abstract of title with which he was furnished disclosed that two unpaid mortgages encumbered the land, and that, upon ascertaining the fact, he declined to complete the purchase, and demanded a return of his deposit. Held, that such evidence establishes a prima facie case in favor of the plaintiff, and that the title to the land was not directly drawn in question thereby. (*Schroeder v. Wittram*, 66 Cal. 636.)

98. The fact that the owner of the encumbered land tendered the purchaser a grant deed, containing a covenant of warranty, and demanded payment of the balance of the purchase money, did not release the owner of the land of his obligation to convey a good title, there being no offer to cure the defect in the title and to remove the encumbrances. The covenant of warranty is a mere personal obligation, which the purchaser is not bound to accept. (*Smith v. Schiele*, 93 Cal. 144.)

99. The tender of a deed of the land purchased, and a demand of the purchase money before a mortgage has been paid off, will not defeat a suit for the purchase money, if the tender was not objected to on that ground, and the mortgage was in fact released before the trial, and a good and sufficient deed tendered at the trial. If the amount of the mortgage is less than the purchase price the purchaser could have retained a sufficient sum to satisfy the mortgage debt. (*Rhorer v. Bila*, 83 Cal. 51.)

Duty to take land subject to encumbrances. See post, 154.

Duty of vendor to disclose knowledge as to encumbrances. See ante, III.

Assumption of mortgage by vendee. See *Mortgages*, XI, 1.

Parol evidence of agreement by purchaser to assume encumbrances. See *Evidence*, 374.

Failure of vendor to release mortgage as to lots sold. See *Rescission of Contracts*, 59.

Vendee may recover amount of mortgage as money paid, when. See *Assumpsit*, 23.

4. Conveyance to Third Person Before Time to Convey to Purchaser, Effect of.

100. The conveyance of the land contracted for by the vendors to a third party before the time for performance of the contract of sale is not a breach of that contract, and does not entitle the purchaser to treat the contract as abandoned or rescinded before the time for performance arrives. One may contract to sell land which he does not own, and yet be able, when the time of performance arrives, to make a good title. (*Joyce v. Shafer*, 97 Cal. 335.)

Cited 99 Cal. 261.

Conveyance to third person, recovery back of purchase price. See post, XI, 6.

5. Title in Vendor at Time Contract Entered Into.

101. Vendor of option to purchase is in duty bound to be ready at all times within the period of the option given, during which a conveyance may be demanded by the purchaser, to convey a good title to all the land which he has agreed to sell upon further payment by the purchaser. (*Burks v. Davies*, 85 Cal. 110.)

102. It is not necessary that vendor should be absolute owner of the property at the date of the agreement of sale; but he may contract for the sale of property in which he has an equitable interest, under a contract of purchase or otherwise, and if a contract for the sale of land is made by the vendor in good faith, and he has at the time such an interest in the land, or is so situated with reference thereto, that he can carry into effect the agreement on his part at the time when he has agreed so to do, the contract will be upheld. (*Easton v. Montgomery*, 90 Cal. 307.)

103. If vendor, though not absolute owner, has it in his power by the ordinary course of law or equity to make himself such owner, he will be permitted within a reasonable time to do so; but if he has no contract for the title, and makes no attempt to obtain it until after the contract of purchase has been rescinded, and could not have conveyed it during the time within which the contract was to be performed, it is immaterial that he thereafter receives an offer for it on condition that the purchaser is ready to take the property, and the court need not pass upon the question whether the purchaser was then willing or anxious to take it. (*Burks v. Davies*, 85 Cal. 110.)

Cited 90 Cal. 315.

104. The vendor sufficiently complies with his obligation if he is able to give a good title at the time when, by the terms of his contract of sale, he is required to make the conveyance, and the mere fact that the vendor's

title was defective or encumbered at the date of the contract does not give the purchaser the right to recover the deposit paid by him. (*Easton v. Montgomery*, 90 Cal. 307.)

6. Perfect Title, What Constitutes; Opinions as to; Examination of and Removal of Defects.

105. The title to land is not perfect, within the meaning of a contract for the sale thereof, unless it be free from litigation, palpable defects, and grave doubts, and consists of both the legal and the equitable titles, and is fairly deducible of record. (*Turner v. McDonald*, 76 Cal. 177, cited 86 Cal. 542, 93 Cal. 292, 1 Wash. 557; *Reynold v. Corel*, 86 Cal. 538, cited 95 Cal. 292.)

106. In order to fully satisfy a covenant for a perfect title the title must be good and valid beyond all reasonable doubt, and should be free from litigation, palpable defects, and grave doubts, should consist of both legal and equitable titles, and should be fairly deducible of record. (*Sheehy v. Miles*, 93 Cal. 288.)

107. To satisfy a contract for the conveyance of a "good and perfect title" the title must not only be good in point of fact, but it must also be apparently perfect when exhibited—that is, free from any reasonable objection. It is not sufficient that it can be shown to be good as the result of an action instituted for the purpose of reforming defects existing in any deed which is necessary to make the chain of title complete. (*Peckham v. Stewart*, 97 Cal. 147.)

108. Under an agreement for the purchase of land on condition that title would be satisfactory to the purchaser the purchaser is entitled to a good paper title of record, which is sufficient in law, and is not bound to accept a title resting upon the statute of limitations, or to take the risk of determining from facts dehors the record whether or not an adverse claim is barred by limitation. (*Benson v. Shotwell*, 87 Cal. 49.) Cited 90 Cal. 313.

109. A purchaser of land cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him, nor is it sufficient for him to raise a doubt as to vendor's title. There must be at least such reasonable doubt as affects its value and would interfere with its sale to a reasonable purchaser. (*Phillips v. Day*, 82 Cal. 24.)

110. Where a contract for the sale of land was conditioned that if the title was found imperfect, and could not be made good, the deposit made by the purchaser would be returned, and certain imperfections were found in the abstract of title, which there was a reasonable probability might give rise to litigation, and which made the title subject to grave doubts, and which the vendor refused to remedy or remove or warrant the purchaser against, an action will lie in favor of the purchaser to recover the amount of the deposit made by him. (*Reynolds v. Borel*, 86 Cal. 538.)

111. Where the abstract of title showed that the title of record came into "H. P. Hepburn," and there was no deed from him, but the next deed of record was from "H. P. Hopkins," and the vendor claimed that the

record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn, but refused to submit his proof for examination of the purchaser or permit the deed to be recorded correctly, a good title is not shown, and the purchaser is justified in refusing to buy the land, and may claim return of the deposit, even though it may be afterward proved that the title was good. (*Benson v. Shotwell*, 87 Cal. 49.)

112. Where the legal title to land is in a person bearing the name of K. F. Redmond, the execution of a deed of the land by one K. F. Redman does not transfer such a title to the vendee named therein as an intending purchaser from such vendee is bound to accept; and a subsequent execution by the said Redman of another deed to the same land to the same vendee, in which he recites that he derived title thereto under the name of K. F. Redmond, that his name was erroneously written Redmond in the conveyances to himself, and that he is the identical person to whom such conveyances were in fact made, under the name of K. F. Redmond, does not, of itself, cure the apparent defect in the vendee's title. (*Peckham v. Stewart*, 97 Cal. 147.)

113. A title is not good, within the meaning of the foregoing rule, when the records show that a previous deed purporting to convey an interest in the land had been made to a person with whom the vendor does not connect himself, or when circumstances exist which render it possible for creditors of a prior owner of the land to attach a conveyance under which the vendor holds. (*Reynolds v. Borel*, 86 Cal. 538.)

114. The title to lands in this state is not perfect, within the meaning of the rule, when it is acquired through a quitclaim deed from a devisee under a foreign will which has never been admitted to probate in this state. (*Turner v. McDonald*, 76 Cal. 177.)

115. Where the validity of the title to land depends on the question as to whether or not a homestead confers absolute title upon the survivor by reason of having been declared upon community property, and all the purchaser knows about the status of the title is from the recorded homestead, the recitals in which are not binding upon third parties, he need not accept the title, where it is conceded that if the homestead was not upon community property, or was defective, an undivided part of the land belongs to minor children. (*Sheehy v. Miles*, 93 Cal. 288.)

116. Under a written agreement for the sale of a lot, providing that twelve days should be allowed for an examination of the title, and that if the title should not prove to be valid the deposit made under the agreement should be returned, the deposit may be recovered if it appears that a portion of the lot contracted to be conveyed had been dedicated and used as a public street, and the plaintiff may also recover as damages the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, and interest on the deposit from the time of the demand and refusal to return the same. (*Turner v. Reynolds*, 81 Cal. 214.)

117. A conveyance of land to L. B. & Co. vests the legal title of the same in L. B. alone, and his deed will give to his grantee a good and valid title. (*Winter v. Stock*, 29 Cal. 407.)

Cited 7 Mont. 219; 12 Nev. 367.

Defect, lien for tax payable more than four years before. See ante, VIII, 3.

118. A purchaser of land is not justified in refusing to accept a conveyance, and in demanding back a deposit paid by him on account of purchase money, merely because of the opinion of learned counsel, given in good faith, that the title is not safe, if the opinion is erroneous, and the record title is in fact perfect. The purchaser must take the risk of the soundness of the advice upon which he acts. (*Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284.)

119. The opinion of a witness as to the title to real property is not evidence of title. (*Schroeder v. Wittram*, 66 Cal. 636.)

120. A purchaser of land under a contract for a perfect title is not required to examine into evidence aliunde the record, or to rely upon the oral statement of the vendor that he has a good title to the land. (*Sheehy v. Miles*, 93 Cal. 288.)

121. A provision in the memorandum, that the "title to prove good or no sale, and this deposit to be returned," specifying no time within which the examination of the title is to be made, implies a reasonable time therefor. (*Easton v. Montgomery*, 90 Cal. 307.)

122. In a contract of sale, where the title was to be good or there was to be no sale, had no time been fixed for the examination and approval of title, the vendee would have been entitled to a reasonable time in which to exercise his election, but, time having been fixed, it is of the essence of the contract, and the court has no power to extend it. (*Vassault v. Edwards*, 43 Cal. 458.)

123. It is incumbent upon the purchaser, who assumes to examine the title for the purpose of determining whether or not it is defective, to make a complete examination thereof, and to point out the defects, if any, to the vendor, and, if there is no time fixed in the agreement of sale within which the vendor should remove the defects, and the vendor fails to remedy them within a reasonable time after notice thereof, the purchaser, in an action to recover the deposit paid by him, on the ground that the title is defective, is limited to such defects as were then pointed out. (*Easton v. Montgomery*, 90 Cal. 307.) Cited 92 Cal. 41.

Abstract not showing title, parol evidence showing that claims were groundless. See ante, VIII, 2.

Abstract not showing title, duty of vendee to make investigation outside of. See ante, VIII, 2.

Failure to remove defect. See ante, VIII, 3.

Acceptance within reasonable time after title perfected. See ante, I, 2.

Defective title, time to perfect. See Rescission of Contracts, III, 5.

Delay in procuring title. See Rescission of Contracts, 43.

Agreement to return money if title invalid. See Statute of Limitations, 139.

7. Merger of Contract in Deed.

124. The plaintiff agreed to sell land to the defendant, and to convey a good title, and afterwards made a deed which was accepted by the defendant as a performance of the contract. The title to part of the land was in the United States, but the defendant knew that fact when he accepted the deed. Held, that the rights of the defendant depend on the deed, and not on the previous contract, the latter being merged and extinguished by the former. (*Bryan v. Swain*, 56 Cal. 616.)

Failure to object to deed where encumbrance not removed, effect of. See ante, 99.

8. Indemnity Against Defect.

125. Where A. sold a lot of land to B., and delivered possession, and, in a written contract respecting the same, it was stipulated, among other things, that in the event that B. should be dispossessed by legal judgment at any time within three years, A. should pay back to B. two thousand dollars; and should suit be brought against B. for the lot, then B. should notify A. of it, in order to enable him to assist in the defense of the title. Held, that the giving of the notice by B. to A. of the institution of suit against B. for the lot was indispensable to enable B. to recover of A. on such contract. (*Bensley v. Atwill*, 12 Cal. 231.)

126. Nor does it matter of what value this notice was to A., or whether it was of any value. In a court of law effect is to be given to the bargain according to its terms, and courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. A. bound himself only in a given way, and can be held only by the bargain he made, at least in the form of this action. (*Bensley v. Atwill*, 12 Cal. 231.)

127. In a suit on such contract B. should aver that he had been evicted after notice to A. The payment of the money is dependent upon this fact. (*Bensley v. Atwill*, 12 Cal. 231.)

9. Remedies Where Title Defective; Defense to Action; Recovery of Price.

128. If a party takes a conveyance without covenants he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. (*Peabody v. Phelps*, 9 Cal. 213.)

129. Where a tenant in possession by deed of bargain and sale conveys the premises occupied by him, for a valuable consideration, and his vendee is subsequently ejected by the landlord, in the absence of warranty or with only special warranty against the acts of the vendor, the vendee is not entitled to relief, either in law or in equity, against his vendor. (*Hastings v. O'Donnell*, 40 Cal. 148.)

130. Concealment of the fact by a vendor of real property that he holds merely as tenant, does not constitute such fraud as will entitle his vendee to relief in equity. (*Hastings v. O'Donnell*, 40 Cal. 148.)

131. The decision in *Peabody v. Phelps*, 9 Cal. 213, to the effect that an action for a false and fraudulent representation as to the naked fact or title in the vendor of real estate cannot be maintained by the purchaser who has taken possession of the premises sold under a conveyance with express covenants, and that, if a party takes a conveyance without covenants, he has no remedy in case of failure of title, commented on and its correctness, when applied to cases of fraud, questioned. (*Wright v. Carillo*, 22 Cal. 595.)

132. In order to rescind a contract for the sale of land on the ground that the vendor cannot perform it, because he has no title to the land, it is necessary for the vendee to aver and show an outstanding paramount title in another. (*Riddell v. Blake*, 4 Cal. 284.) Cited 8 Cal. 403.

133. When a purchaser of land does not obtain the title which the deed purported to convey and the covenants embrace, and he goes into and retains possession under the deed, and the failure of the title goes to the entire consideration paid, or to be paid, for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount title in another, and offering to redeliver possession, and account for the rents and profits. (*Walker v. Sedgwick*, 8 Cal. 398.)

134. In an action for the purchase money of land conveyed by deed, without covenants, want of title in the vendor is no defense, unless the vendee has been evicted. (*Fowler v. Smith*, 2 Cal. 39.) Affirmed s. c. 2 Cal. 568; cited 4 Cal. 567; 39 Cal. 364.

135. In a suit for the recovery of the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land, the defendant in his answer denied that the plaintiff was the lawful owner, or that he had any title to the land. Held, that, to have enabled him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that, failing in this, his defense to the action was defective. (*Thayer v. White*, 3 Cal. 228.) Cited 4 Cal. 267; 10 Cal. 160; 19 Cal. 267.

136. If McL. and wife convey to R., for the sum of one thousand dollars, and on the same day, and as part of the same transaction, R. gives McL. and wife a contract for the sale of the same land, for the same price, payable by installments, and for a good and lawful deed upon the payment of the purchase money, in an action by R. to recover an installment, McL. and wife cannot rely upon an alleged want of title to the land in R. as a defense to the action. (*Rourke v. McLaughlin*, 38 Cal. 196.)

Vendee remaining in possession is liable for purchase price although title is defective. See post, IX, 2, c.

137. Money paid by the vendee as part of the purchase price, under a contract for the sale of land, may be recovered if the vendor did not have the title at the time the contract was made, nor acquire it afterward. (*Sanders v. Lansing*, 70 Cal. 429.) Cited 85 Cal. 113; 87 Cal. 60.

138. Where there is a defect in the title the vendee may recover the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, and interest on the deposit from the time of the demand and refusal to return the same. (*Turner v. Reynolds*, 81 Cal. 214.)

139. Where the defendant in action to recover the purchase price denied that the plaintiff was able to convey the land free from encumbrance, or that he could furnish title according to the contract, and there was evidence tending to show an existing encumbrance, a failure to find upon such issue is material. (*Samuel v. Allen*, 98 Cal. 406.)

140. An issue tendered in an action for the recovery of a deposit made under a contract of sale, as to the fact that a portion of the lot was dedicated by deed as a public street, is immaterial, so far as the question of dedication by deed is concerned, and only the ultimate fact that there was a valid dedication of a portion of the lot to the use of the public as a street needed to be alleged or found. (*Turner v. Reynolds*, 81 Cal. 214.)

Money paid cannot be recovered where title was good. See post, XI, 6.

Recovery of deposit where encumbrance not removed. See ante, VIII, 3.

Action to recover back deposit because of defective title, parol evidence as to adverse claims. See ante, VIII, 2.

Expenses incurred in examining title may be recovered. See ante, 116.

Interest on deposit may be recovered. See ante, 116.

Remedy of vendee on failure of title. See post, IX, 2, c.

Estoppel of grantee to deny grantor's title. See ante, VI.

False representations as to title. See ante, 35.

Cross-complaint in action by vendor for failure of title. See Cross-complaint, 20.

Defective title, recovery of deposit. See Rescission of Contracts, III, 5.

Judgment for purchase price where vendor has no title. See Injunctions, 70, et seq.

IX. Possession.

1. By Grantor.

141. Person who conveys property by warranty deed, and remains in possession, is not entitled to notice to quit or demand of possession from his grantee or those claiming under him before the commencement of an action to eject him. (*Dodge v. Walley*, 22 Cal. 224.) Cited 75 Cal. 345.

142. Possession of grantor is that of purchaser, which could be only terminated either by legal proceedings to enforce the lien, or by sale to an innocent purchaser. (*Ellis v. Jeans*, 7 Cal. 409.)

143. Where a person in possession of land conveys to another, and thereafter remains in possession, he does so as the tenant at will of the grantee. The conventional relation of landlord and tenant does not, however, exist between the grantor and grantee. The grantor holds in subserviency to the grantee, who

may recover possession at any time. (*Brooks v. Hyde*, 37 Cal. 386.)

2. By Vendee.

a. Necessity of.

144. In order that the grantee may succeed to the right of possession of his grantor it is not necessary that he should have a personal residence on the land, or should personally cultivate it. It is sufficient if he enter into the possession through an agent or tenant. (*Dodge v. Yates*, 76 Cal. 251.) Cited 89 Cal. 315.

b. Right of Vendee to Possession or to Maintain Possession; Rights While in Possession.

145. In a contract for the sale and purchase of land, which is silent as to possession, there is no implied license for the purchaser to enter. (*Gaven v. Hagen*, 15 Cal. 208, cited 22 Cal. 615, 70 Cal. 49, 86 Cal. 364, 10 Mont. 4, distinguished 22 Cal. 618, 59 Cal. 588; *Gates v. McLean*, 70 Cal. 42, cited 86 Cal. 364, 91 Cal. 517, 518, 10 Mont. 5.)

146. The doctrine of *Gaven v. Hagen*, 15 Cal. 208, that a vendee of real estate under a contract of purchase, which is silent as to the possession, has no right to the possession until a performance of the conditions prescribed by the contract to entitle him to a deed, commented upon and questioned. (*Willis v. Wozencraft*, 22 Cal. 607.) Cited 40 Cal. 567; 59 Cal. 590; 61 Cal. 241; 64 Cal. 20; 70 Cal. 49; 91 Cal. 351, 381; 10 Mont. 4; distinguished 59 Cal. 588.

147. Unless there is a stipulation in a contract for the sale of land surrendering the possession of the property to the purchaser the vendor is entitled to retain the possession until the legal title passes to the purchaser. (*Stratton v. California Land and Timber Co.*, 86 Cal. 353.)

148. Where vendee gives three notes for the purchase price, and, after the payment of the second note, he is to receive a deed for the premises and give a mortgage back for the balance, he is not entitled to the possession; that until the payment of the first two notes the vendor is entitled to the possession and could maintain ejectment. (*Gaven v. Hagen*, 15 Cal. 208, 212.)

149. To make a valid tender, so as to give the vendee a right of possession, under such contract, the money should be offered to the vendor and a deed demanded of him, with an offer to execute the mortgage. (*Gaven v. Hagen*, 15 Cal. 208.)

150. If, after the plaintiff in an action has recovered judgment against the defendant for the possession of land, the plaintiff, without enforcing the judgment, contracts to sell the land to the defendant, without making any agreement concerning the judgment for possession, the right of possession is not in the vendee, and the vendor can remove him at any time by an execution. (*Troy v. Clarke*, 30 Cal. 419.)

151. Where contract is made to convey land by quitclaim deed at future time an action cannot be maintained by the vendee against

the vendor, on the ground that a third person has intruded upon a portion of the land, and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. (*Tewksbury v. Laffan*, 1 Cal. 129.)

152. Where a contract is made to convey lands by quitclaim deed at a future time an action cannot be sustained by the vendee because a third person has intruded on the ground that the vendor, long after the execution of the contract, gave the vendee a certificate to the effect that, at the time of making the agreement, he consented and agreed that the vendee should take possession of the lot forthwith. (*Tewksbury v. Laffan*, 1 Cal. 129.)

153. Where the agreement for the sale of land provided that possession would be given and guaranteed to the purchaser the purchaser is entitled to an actual possessio pedis of the whole land, and constructive possession by attornment of tenants is not sufficient; and where it appears that the tenants refused to give possession, and several of the houses were locked up and the occupants absent, and that an adverse right had grown up as to part of the land, the promise by several of the tenants to attorn to the purchaser does not constitute the delivery of possession required by the contract. (*Benson v. Shotwell*, 87 Cal. 49.)

154. The fact that the contract of sale provided that the purchaser should be entitled to rent from a day anterior to the date of the contract does not bind the purchaser to take the lot subject to encumbrances, or to the right of possession of tenants at the time of final completion of the terms of the agreement, nor modify a provision in the contract for delivery of possession. (*Benson v. Shotwell*, 87 Cal. 49.)

155. A vendee cannot be moved by ejectment if he has performed the conditions of the contract, and is in a position to demand a conveyance; and in such case it would seem that he may even recover the possession at law, if ousted by the holder of the naked legal title. (*Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585.) Cited 70 Cal. 486.

156. Under our system a vendee, if entitled to the possession under the contract, may defend his possession at law; and he cannot be deprived of his possession at law if its continuation is not dependent upon his performance of the conditions of the contract under which he entered. (*Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585.) Cited 70 Cal. 49.

157. A vendor of land, though in law the owner of the legal title, holds it simply as a trustee for his vendee, and therefore cannot turn his beneficiary out of possession so long as the latter is willing to perform, or offers to perform, or if he has performed, the contract; but, if the purchaser refuses to complete the contract, the vendor has the right to treat him as a trespasser, or as a tenant at will, at his election. (*Whittier v. Stege*, 61 Cal. 238.) Cited 64 Cal. 20; 70 Cal. 486; 82 Cal. 126; 83 Cal. 55.)

158. When a vendor of land allows the purchaser to take possession the purchaser, so long as he complies with his contract, has the right, under his equitable ownership, to any use and enjoyment thereof which does not impair the condition or diminish the value of the property of which he received the possession, and he cannot be chargeable with waste for such use and enjoyment. (*Miller v. Wadtingham*, 91 Cal. 377.)

Payment and delivery of possession are concurrent conditions, when. See post, X, 5.

Right of vendor to maintain ejectment. See Ejectment, 12.

Ejectment by vendor, outstanding title in vendee. See Ejectment, 236.

Possession under contract of purchase as equitable defense. See Ejectment, 278, et seq.

Purchaser under void verbal contract, removing. See Forcible Entry and Unlawful Detainer, 35.

Breach of contract to give possession, liquidated damages. See Damages, I, 2.

Entry and repairing under contract of purchase. See Mechanics' Liens, 150, 151.

Erection of building by vendee. See Mechanics' Liens, 158.

Vendor, whether may enjoin removal of buildings by vendee. See Injunctions, 132.

Vendor, rights against vendee in possession on loss of buildings by fire. See Insurance, 174.

Vendee in possession, rights of. See Insurance, 174.

Possession under contract, effect of. See Possession, 61.

c. Title or Contract Price, Questions Concerning Where Vendee Remains in Possession.

159. Where the contract provides for the vendee taking possession his remedy, in case the title of the vendor fails, or he is unable to make a conveyance as stipulated in the contract, is to rescind or offer to rescind the contract, and to restore the possession, in which event he may recover the purchase money advanced, with interest thereon, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably be worth. If, on the contrary, the vendee chooses not to rescind, but to retain possession under the contract, he can do so only on condition that he pay the purchase money and interest according to the contract. In the latter case it is considered that he is willing to receive such title as the vendor is able to give, and is content with the personal responsibility of the vendor upon his covenants. (*Gates v. McLean*, 70 Cal. 42.)

Cited 83 Cal. 55; 86 Cal. 365.

160. A purchaser of land in possession thereof under a contract of sale, by the terms of which the vendor is to give a warranty deed of the property, conveying a good and perfect title thereto, cannot, upon the vendor's failure and inability to convey a good and perfect title, retain both the land and the purchase money until a perfect title shall be offered him, but he must pay the purchase price according to the contract, and receive

such title as the vendor is able to give, if he chooses to retain the possession of the land, or he may rescind the contract, restore the possession to the vendor and recover the purchase money paid, together with the value of his improvements, after deducting therefrom the fair rental value of the premises; and, if he fails and refuses to adopt either course, he is liable to an action of ejectment by the vendor. (*Worley v. Nethercott*, 91 Cal. 512.)

161. A purchaser cannot remain in possession of lands under a contract, and at the same time refuse to pay the stipulated purchase price. He must surrender possession or show an eviction before he can defend a suit for the purchase money, or show a failure of consideration, or counterclaim to the purchase money, or damages for delay in performance of the contract by the vendor. So long as he retains possession he waives all objections, whether of defect of title or of delay in completing it, and is bound to accept title according to the terms of the contract, if offered while he still retains possession. (*Rhorer v. Bila*, 83 Cal. 51.)

Cited 91 Cal. 517.

162. Where land is sold with covenant of warranty, accompanied with delivery of possession, as long as the grantee remains in possession the purchase money cannot be reduced. (*Norton v. Jackson*, 5 Cal. 262.)

163. Where there is a covenant of warranty the payment of the purchase money cannot be resisted as long as the grantee remains in possession. (*Norton v. Jackson*, 5 Cal. 262.)

164. A purchaser in possession cannot reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed. (*Salmon v. Hoffman*, 2 Cal. 138.)

Cited 8 Cal. 403; 64 Cal. 20.

Estoppel of grantee entering into possession. See ante, VI.

Vendee in possession cannot sue for fraud. See ante, 35.

Surrender of possession before action to recover purchase price. See post, XI, 6.

Eviction, necessity of to enable vendee to recover purchase price. See post, XI, 6.

d. Action by Vendor to Recover Possession on Default by Vendee.

165. Ejectment will lie against a vendee in possession of land under a contract of purchase, who, after part performance, refuses to further comply with the terms and conditions of the contract, or surrender the possession. (*Hicks v. Lovell*, 64 Cal. 14.)

Cited 70 Cal. 49; 79 Cal. 53; 83 Cal. 55; 88 Cal. 325; 92 Cal. 430, 528.

166. A vendee in possession under a contract of purchase who has not performed his contract, but is in default with his payments, without excuse, cannot maintain an equitable defense to an action of ejectment by the vendor or his grantee. (*Connolly v. Hingley*, 82 Cal. 612.)

Cited 83 Cal. 510.

167. When the purchaser under a contract for the sale of land for the sum of nine hun-

dred dollars, to be paid in monthly installments, the contract not fixing the amount of the installments, takes possession with the consent of the vendor, and improves the property, but makes no payment beyond the sum of ten dollars at the date of the contract for the period of nearly three years, and refuses to make further payment, when a deed is tendered at the expiration of said period on demand of the whole price and interest due, the vendor may, after serving a demand in writing for possession of the property, recover the premises in ejectment. (*Hannan v. McNickle*, 82 Cal. 122.)
Cited 83 Cal. 55.

168. Where a contract for the sale of land contains a provision that, upon default of the vendee in payment of the principal or interest, or in any other stipulation of the contract, the vendor may re-enter, and the vendee makes default, and, on demand, refuses to deliver possession, the vendor may maintain ejectment. (*Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585.)
Cited 70 Cal. 49; 82 Cal. 126; 92 Cal. 526.

169. In such case, if the vendor recovers possession, the vendee may go into equity (where a separate court of equity exists) within a reasonable time, where time is not of the essence, offer payment of the balance of the purchase money, with interest, and obtain a decree for the performance of the contract; and, in California, he may attain the same end by filing a cross-complaint. (*Central Pac. R. R. Co. v. Mudd*, 59 Cal. 585.)
Cited 64 Cal. 20; 88 Cal. 325.

Action by vendor to recover possession on breach of condition by vendee. See post, X, 6.

170. Where, by the terms of a contract for the sale of lands, the vendor is authorized, upon default in the payment of any installment of the purchase money or interest thereon, to declare the contract forfeited by depositing a written notice to that effect in the office of the county recorder of the county where the lands are situated, and to enter immediately into the possession of the premises, and be restored to his former estate therein, held the vendor's right to possession was not lost by mere delay in declaring the forfeiture, nor by the death of the vendee before such declaration, nor by a failure to present a claim to the administrator of the vendee. (*Kerns v. McKean*, 65 Cal. 411.)
Cited 77 Cal. 557, 559, 560; 92 Cal. 526.

171. It is not necessary, in order to the recovery by a vendor in an action of ejectment against a purchaser who is in default in paying the purchase money, that he should rescind the contract or return any part of the purchase money. Equitable principles cannot affect the plaintiff's right of recovery, since equity follows the law, and rules as the law rules. (*Hannan v. McNickle*, 82 Cal. 122.)

172. Where a contract has been made for the sale of land, the vendee being in possession, and having paid a portion of the purchase money, the mere fact that the vendor has not returned, or offered to return, the money so paid is no defense to an action by

him to recover the possession. (*Hoffman v. Remnant*, 72 Cal. 1.)
Cited 82 Cal. 126.

173. If a contract of purchase provides that in case of nonpayment of purchase money the vendor may declare all rights thereunder forfeited and ended, by depositing a notice to that effect in the office of the county recorder, and that the vendor shall retain all moneys paid as compensation for the use of the premises, the vendor cannot, under any circumstances, recover rents for any period prior to the filing of the notice of forfeiture, as his right to rents and profits prior to that act is limited to the payments which had been made on the contract. (*Kerns v. Dean*, 77 Cal. 555.)

174. In an action of ejectment by a vendor, or his grantee, against a purchaser in possession under a contract of sale, the complaint may merely state a cause of action in ejectment, in which event the defendant must set up the equities which he claims under the contract. But if the complaint states the contract, and also states cause of action in ejectment, it is not demurrable, because it states facts affording the defendant an opportunity to redeem, by complying with the contract within a reasonable time, so as to avoid the effect of a judgment of restitution; nor is such complaint demurrable as containing separate causes of action which are not separately stated. (*Kerns v. Dean*, 77 Cal. 555.)

175. A vendee in the possession of land, who entered under a contract of sale, agreeing to pay interest on the purchase price in place of rent, and expressly agreeing that the vendor could re-enter in case of a failure to pay, but who afterward repudiated the contract, refusing to pay the interest due, and claimed the title adversely to the vendor, is not entitled to a notice to quit, and the complaint in an action by the vendor to recover the possession of the property need not aver a demand and refusal. (*Coates v. Cleaves*, 92 Cal. 427.)

176. Where a vendee, under a contract of purchase, has been out of possession for five or six years after default in his payments, and then re-enters, no demand is necessary to make his possession tortious. (*Connolly v. Hingley*, 82 Cal. 642.)

177. In an action of ejectment by the vendors of land against defaulting vendees the plaintiffs proved the tender of a deed and a demand and refusal to pay the balance of the purchase money, and also offered to prove a demand and refusal of possession, but were not permitted to do so. The plaintiffs were nonsuited. Held, the plaintiffs were entitled to prove the demand and refusal of possession, and to recover in the action, subject of course to any equitable relief to which the defendants might be entitled under any equitable defense to the action. (*Whittier v. Stege*, 61 Cal. 238.)
Cited 70 Cal. 50; 88 Cal. 325.

178. In an action for the recovery of real estate a contract in writing, signed by both plaintiff and defendant, for the sale and conveyance of the land in dispute by plaintiff to defendant, is admissible in evidence on behalf of plaintiff, for the purpose of proving that defendant obtained possession of the premises

from plaintiff, and went in under him. (*Frisbie v. Price*, 27 Cal. 253.)
Cited 7 Nev. 48.

179. A vendee of land who enters into its possession under a contract of purchase from the vendor, and afterwards repudiates the contract, is estopped from denying his vendor's title in an action of ejectment against him by the vendor. (*Coates v. Cleaves*, 92 Cal. 427.)

180. In order to sustain equitable defense to an action of ejectment by a vendor the purchaser in possession under a contract of sale must show that he is not in default in the performance of his contract, and has paid all the installments of purchase money that are due. He cannot hold possession after default in the payment of installments until all the installments become due. The fact that he has made valuable improvements cannot enable him to refuse to perform the contract and yet retain possession; nor does the fact that interest is to be paid on overdue installments operate to extend the time for payment of the principal. (*Hannan v. McNickle*, 82 Cal. 122.)
Cited 82 Cal. 643.

181. A purchaser in possession, under a contract of sale, who is in default under the contract, is not entitled, in the absence of statutory provision therefor, to set off the value of his improvements, erected before demand of possession by the vendor, against rents and profits which the vendor is entitled to recover from the time of such demand up to the time of trial. The provisions of section 741 of the Code of Civil Procedure for set-off of improvements apply only to improvements made in good faith, under color of title, where the holding is adverse; and the holding of such purchaser is not adverse to his vendor until after the demand for possession. (*Hannan v. McNickle*, 82 Cal. 122.)

182. Where the purchaser in possession under a contract of sale, when sued in ejectment by the vendor, denies that he is in default, and does not offer to pay what is due under the contract, no question is raised as to whether time was of the essence of the contract. (*Hannan v. McNickle*, 82 Cal. 122.)

183. The court, in an action of ejectment by a vendor or his grantee against a purchaser in possession under a contract of sale, where issues are raised thereon, should find specifically as to the seisin of plaintiff, and as to whether the plaintiff's right to recover is barred by the statute of limitations, and also as to the knowledge by the vendor of an adverse possession of the purchaser in possession under the contract of purchase. (*Kerns v. Dean*, 77 Cal. 555.)

X. Performance.

1. Time of; Time as Essence of Contract.

184. Where a vendor covenanted in his deed of conveyance to procure a reconveyance to himself of such portions of the land described in the deed as he may have conveyed to others, or to convey other lands of equal value, etc., held, that the vendor must procure such conveyance within a reasonable time, and eight

years is not a reasonable time for that purpose. (*Vance v. Peña*, 41 Cal. 686.)
Cited 82 Cal. 125.

185. Intention to make time essence of contract must govern, and no particular form of stipulation is necessary, but any clause will have that effect which clearly and absolutely provides that the contract is to be void, if the fulfillment is not within the prescribed time. (*Martin v. Morgan*, 87 Cal. 203.)
Cited 9 Utah, 263.

186. A stipulation in a contract for the conveyance of land, to the effect that the vendor would convey within sixty days from the date thereof upon condition that the final payment of the purchase money should be made within said time, otherwise the "agreement to be null and void," shows a clear intention to make time the essence of the contract; and a failure by the vendee or their assignees to make the payment due within the time fixed avoids the contract. (*Martin v. Morgan*, 87 Cal. 203.)

187. Time is of the essence of a contract for the sale of land, which provides that the consideration is to be paid in installments at stated times, that a good and sufficient deed is to be delivered upon receiving the payments at the times and manner agreed upon, and that, in the event of a failure to comply with the terms of the contract by the vendee, the vendor is to be released from all obligations to convey the property, and the vendee is to forfeit all rights thereto. (*Woodruff v. Semi-Tropic Land and Water Co.*, 87 Cal. 275.)

188. When a deed contained the provision that the grantee, within one year from its date, should reconvey to the grantor a specified quantity of the land conveyed, to be selected by the grantor, the right to select the land to be reconveyed, and to a reconveyance, is not lost to the grantor by his failure to exercise the right within one year. (*Hearst v. Pujol*, 44 Cal. 230.)

189. When the provision that "time is of the essence of the contract" is used in a contract of sale with reference to payments of purchase money, its object is to protect the vendor against delays in future payment, and it has no application where the price is already fully paid, and nothing remains to be done but to make the conveyance; and, if such provision is contained in a printed form used in making the contract, it will not be construed to apply to the written promise of the vendor to execute a deed within one year. (*Vorwerk v. Nolte*, 87 Cal. 236.)
Cited 90 Cal. 494.

190. If, in contract for conveyance, the parties have made time essential in performing the conditions of the contract courts of equity will not inquire into their motive for doing so. (*Grey v. Tubbs*, 43 Cal. 359.)
Cited 84 Cal. 320; 87 Cal. 207, 280; 92 Cal. 133.

191. The fact that the contract of sale expressly makes time of the essence of the contract, and that the vendor did not tender a deed at the time when the last payment fell due, does not put him in default so as to preclude a recovery by him of unpaid purchase money. (*Scott v. Glenn*, 98 Cal. 168.)

192. The stipulation in the contract that time should be of the essence of the contract is applicable only to the agreement on the part of the purchaser to pay the purchase money, and is intended for the benefit of the vendor alone, who may elect either to rescind or enforce the contract, and the purchaser cannot work a rescission by mere default on his part in payment of the purchase money. (Newton v. Hull, 90 Cal. 487.)

Cited 95 Cal. 261, 338, 575; 96 Cal. 105; 97 Cal. 499; 98 Cal. 171; 99 Cal. 86.

193. Though in an original contract for the sale of real estate time is made of the essence of the contract, and provision is made for forfeiture of payments if other payments are in default for a certain period, a supplemental agreement substituting personal services to be rendered within a different period, instead of cash payment without provision therein for forfeiture, eliminates that feature from the contract by necessary implication. (Wakeham v. Barker, 82 Cal. 46.)

194. When time is made of the essence of a unilateral contract to convey land upon payment of the purchase money within a definite period, the fact that the vendee entered into possession of the land, plowed, surveyed, and platted it into lots, without making any other improvements thereon, will not entitle him to a specific performance of the contract, if he has failed to tender the purchase money within the time limited. (Martin v. Morgan, 87 Cal. 203.)

Cited 9 Utah, 263.

Time as essence of contract. See post, 210; Contracts, 221, 222.

Question as to whether time of essence, when not raised. See ante, 182.

Time of tender of price. See post, XI, 1.

Time of tender of deed. See post, X, 3.

Time of exercise of option. See post, X, 4.

Forfeiture by vendor, effect of. See Rescission of Contracts, 135.

Forfeiture. See Contracts, 91; Forfeiture; Specific Performance, 112.

2. Duty to Prepare and Tender Deed; Evidence of Demand of Conveyance.

195. Under a contract to cause land to be conveyed by bargain and sale deed, to be paid for in installments, it is the duty of the vendor, on tender of the balance due under the contract, to execute and deliver a deed of conveyance to the purchaser, and the purchaser is not bound to tender to the vendor a conveyance for execution. (Chatfield v. Williams, 85 Cal. 518.)

196. It is the duty of the grantor to prepare, execute, and deliver the deed; the grantee need do no more than tender the purchase money. (Morgan v. Stearns, 40 Cal. 434.)

197. The defendants are not bound to tender a deed and demand the purchase money, in order to avoid the contract. In this state there is no rule on the subject, but in England it is the duty of the vendee to tender a deed. (Brown v. Covillaud, 6 Cal. 566.)

198. Refusal in writing to execute convey-

ance is evidence proving demand of such conveyance. (Goodale v. West, 5 Cal. 339.)

Tender of deed, necessity of. See Specific Performance, V, 4, a.

Tender of deed, necessity of before suing for price. See post, XI, 5, c.

Recovery of possession by vendor on default of vendee. See ante, IX, 2, d.

3. Time of Tender of Deed.

199. When the vendee remains in possession and receives the rents and profits after the time limited for the tender of a deed he cannot avail himself of a promise of the vendor to return the purchase money, with three per cent per month interest thereon, if he should fail to deliver a deed within one year, if a deed conveying good title is tendered within three days after a demand made therefor, and within eight days after the expiration of the year. (Vorwerk v. Nolte, 87 Cal. 256.)

200. The fact that the vendor tendered a deed after the time limited for performance of the contract on the part of the purchaser, who had failed to pay the purchase money as agreed, and that the contract made time of its essence, does not render the tender ineffectual, or establish a default on the part of the vendor, or show that the contract had been mutually abandoned or rescinded. (Bradford v. Parkhurst, 96 Cal. 102.)

201. Under a contract for the sale of land providing for the payment of purchase price in installments, to be paid upon specified dates, and for the execution of a deed upon the payment of the last installment, and which makes time of the essence of the contract, and provides for a forfeiture of all moneys paid upon default of the purchasers, and that the vendor shall thereupon be released from all obligation to convey, the vendor is not in default until his refusal to convey upon a tender of the purchase money, and is entitled, upon tendering the deed, to demand payment of the purchase money even after the last installment is overdue, and, upon the purchaser's refusal to pay, may bring an action to reform the agreement for a mutual mistake therein, and to foreclose his lien upon the property for the unpaid portion of the purchase money. (Newton v. Hull, 90 Cal. 487.)

Cited 95 Cal. 261, 338, 575; 96 Cal. 105; 97 Cal. 499; 98 Cal. 171; 99 Cal. 86.

202. T. and J. contracted with L. for the purchase of certain real property, paid the purchase money, took from L. an obligation for a deed within five days, and entered into possession. Forty days afterwards L. tendered a deed, which was objected to by the vendees on account of its form, and subsequently, at the request of the vendees, another deed was tendered, which was also objected to on the ground that it was not executed by the proper parties; but no objection to either deed was made on account of the time at which it was tendered. Held, that the stipulation as to the time of the execution of the conveyance was waived. (Clarkin v. Lewis, 20 Cal. 634.)

4. Options in Contract, Time of Exercise and Waiver of.

203. Where a party contracts to convey to another a specified quantity of land within one year, to be selected in a square form by the person to whom the conveyance is to be made, and the person who is to make the selection fails within the year to do so, and the other then makes the selection, and offers to make the conveyance, which offer is neither accepted nor rejected at the time, but the offer is afterwards accepted and a conveyance demanded, the one who is to make the conveyance cannot object because the selection was not in a square form, or made within one year, or for any other reason. (*Hearst v. Pujol*, 44 Cal. 230.)

204. If the grantee of land agrees by parol with the grantor that he may keep the land and work it one year, and at the end of the year make his election whether he will keep it and pay the purchase money or restore it to the grantor, the grantee is in time to avoid payment of the purchase money, if, on the first day after the end of the year, he notifies the grantor of his election, and tenders him or his agent a deed of the property. (*Rhine v. Ellen*, 36 Cal. 362.)

205. A provision in a contract for the sale of land, that the purchaser may make inquiry and satisfy himself with its quality, situation, and title, and, if not satisfied, may rescind the contract, is solely for the purchaser's protection, which he may waive; and a conveyance taken by him, without such inquiry, is valid and effective. (*Morenhout v. Barron*, 42 Cal. 591.)

Optional contract, enforcement of. See Specific Performance, 18, 74.

5. Mutual and Dependent Covenants.

206. Obligations of parties are mutual and dependent where one is to convey, and the other, at the same time, to pay the purchase price, and neither can put the other in default except by tendering a performance on his part, unless the other party waives the tender, or by his conduct renders it unnecessary. (*Dennis v. Strassburger*, 89 Cal. 583, cited 95 Cal. 338, 575, 576, 97 Cal. 150, 98 Cal. 171; *Englander v. Rogers*, 41 Cal. 420, cited 64 Cal. 20, 89 Cal. 589, 90 Cal. 492, 493, 95 Cal. 337, 575, 97 Cal. 150.)

207. In a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or upon the time of the payment of the money, or as soon as it is paid, the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform, on his part. Performance, or an offer to perform, on the one part is a condition precedent to the right to insist upon a performance on the other part. (*Hill v. Grigsby*, 35 Cal. 656.)

Cited 38 Cal. 200; 45 Cal. 304; 46 Cal. 16; 65 Cal. 524; 87 Cal. 59; 89 Cal. 589; 90 Cal. 493; 97 Cal. 150; 14 Or. 360.

208. The vendor, on tendering a deed, which he is bound to make, may insist on

payment of the purchase money as a condition of delivering the deed. (*Salmon v. Hoffman*, 2 Cal. 138.)

209. The general rule is that, in the absence of special provisions, the purchaser is not entitled to a conveyance until full payment of the purchase money, and that the acts of payment and conveyance being mutual and dependent, neither party is in default until after tender and demand by the other. (*Eaton v. Montgomery*, 90 Cal. 307.)

210. When a contract for the sale of land provides for a cash payment as a forfeit, and for the execution of a deed upon the payment of a second installment of purchase money at a date fixed and of a mortgage from the purchaser for the residue, and by its terms makes time of the essence of the contract, the covenants to pay the second installment and to execute the deed are mutual and dependent, and if neither party tenders performance on his part, or demands performance from the other, at the date fixed, the contract is at an end, and cannot thereafter be enforced by either party. (*Cleary v. Folger*, 84 Cal. 316.) Cited 87 Cal. 280; 90 Cal. 493; 95 Cal. 259, et seq., 575, 576; 96 Cal. 105; 97 Cal. 337; 99 Cal. 261, 683; doubted 90 Cal. 492; overruled 98 Cal. 171.

211. Where, by the terms of a contract for the sale of real estate the vendor agreed to execute a conveyance of the property on or before a specified date, provided the purchasers should, on or before that date, pay the balance of the purchase price, the covenants are mutual and dependent, and the purchasers cannot sue for damages for failure of the vendor to make the conveyance, unless the complaint alleges a full performance, or offer to perform, on their part; but it is sufficient to aver an offer in writing by the purchasers to pay the residue of the purchase money, accompanied by a demand for a deed; and it is not incumbent upon the purchasers to allege or prove an actual production or tender of the money to the vendor, in order to enable them to maintain the action, if the vendor did not signify his acceptance of the offer. (*Peckham v. Stewart*, 97 Cal. 147.)

212. Where a vendor agrees to execute to the vendee a good and sufficient deed on the payment of the purchase price the execution of the deed and the payment of the price are intended to be simultaneous acts, and the covenants for their performance are dependent covenants. (*Hill v. Grigsby*, 35 Cal. 656.)

213. The fact that the purchaser alleged and proved that the vendor, within thirty days after the making of the contract, did not tender the purchaser a deed, does not show a default of the vendor entitling the purchaser to rescind the contract, if the purchaser failed to tender the purchase money and demand the deed. (*Dennis v. Strassburger*, 89 Cal. 583.)

Cited 95 Cal. 338, 575, 576; 97 Cal. 150.

Tender of deed, necessity of before suing for price. See post, XI, 5, c.

214. Where, by the terms of the contract, the delivery of possession and transfer of title by the vendor, and payment of purchase

money by the purchaser, were to be simultaneous and concurrent, the conditions are mutual and dependent, and the vendor is not entitled to demand the purchase money until delivery of possession. (*Benson v. Shotwell*, 87 Cal. 49.)

Covenants. See Covenants.

Covenant to resell to grantor does not bind heirs or assignees. See Covenants, 33.

Dependent covenants, promise to pay and warranty. See Contracts, 279.

6. Conditions, Performance, Breach and Waiver of; Evidence as to.

215. When a contract of purchase of land is conditioned upon the proper cultivation by the purchaser of land held under a farming lease, and, upon the payment by him of all water assessments against the vendor, a breach of the contract in failing to pay some of the water assessments against the vendor is not excused by reason of the fact that he has an offset against the water company for indebtedness due him; and a failure on his part to cultivate the land as required will render his equitable rights of purchase under the contract unavailing as a defense to an action of ejectment by the vendor and cannot be remedied by a mere tender and payment into court of the purchase money. (*Wallace v. Maples*, 79 Cal. 433.)

216. The fact that the purchaser had sowed alfalfa and planted fruit trees on the land purchased cannot defeat a recovery in ejectment by the vendor if the purchaser fails to make good his equitable title by a performance on his part of the contract. (*Wallace v. Maples*, 79 Cal. 433.)

217. When condition of a contract of purchase as to the cultivation of land is broken by the purchaser, and evidence is given on his part tending to show that part of it was not broken because of the extreme dry weather, evidence as to his instructions to his men as to planting the land, provided the rains should come, is immaterial, and may properly be excluded. (*Wallace v. Maples*, 79 Cal. 433.)

218. If the contract contains a covenant that the vendees shall, within a specified period, intermediate between the time of making and the time for the final performance of the same, make certain improvements on the land sold, and also a stipulation to the effect that, if the vendees fail to comply with their part of the agreement, the contract shall be held null and void, and the land shall revert to the vendors; should the vendees make default and no steps be taken by the vendors towards a rescission of the contract until after the expiration of the time for its completion they will be held as having acquiesced in the breach of the condition, and waived the forfeiture, if any occurred thereby. (*Steele v. Branch*, 40 Cal. 4.)

219. An averment that the vendor duly performed all of the conditions of the contract to be performed by him up to the time of bringing suit is a sufficient averment of the

performance of conditions precedent. (*Smith v. Mohn*, 87 Cal. 489.)

Cited 95 Cal. 260; 98 Cal. 171.

220. Evidence of an independent promise by a vendor, made without consideration, to advance money to a purchaser to enable him to comply with the conditions of his contract of purchase, may properly be excluded as immaterial and irrelevant. (*Wallace v. Maples*, 79 Cal. 433.)

221. A general question to a defendant in ejectment who relies upon a contract of purchase as his defense, as to whether or not he had performed all the conditions and covenants contained in the contract, is improper, as calling for a conclusion and asking the witness to decide a question that is for the court alone to determine from the facts proved. (*Wallace v. Maples*, 79 Cal. 433.)

222. Finding that grantor had not sustained any injury by breach of conditions, and that the price paid for the lots was the then market value, is immaterial. (*Parsons v. Smilie*, 97 Cal. 647.)

Imposing conditions after absolute conveyance. See ante, V.

Agreement to convey in consideration of services. See Contracts, 271.

Conveyance upon condition precedent. See Deeds, VIII, 7, c.

7. What Conveyance or Deed Satisfies Contract; Identity of Subject Matter.

223. It will be presumed that the vendor undertook to make such a conveyance as will render the sale effective, if there be a sale of real property, and the conditions of the sale, on the part of the purchaser, have been fully complied with. (*Hoffman v. Fett*, 39 Cal. 109.)

224. Where one agreed to execute and deliver a good deed, conveying all the right, title, and interest of the vendor in and to one undivided half interest in a certain mill and premises, said deed to be sufficient to convey one undivided half interest in and to said property free of encumbrance, the covenant to convey would be satisfied by a conveyance or tender of the right, title, and interest which the vendor had in the undivided half of said property at the date of said agreement. (*Hill v. Grigsby*, 35 Cal. 656.)

225. A contract for the conveyance of a specified tract of land is not satisfied by the conveyance of a part of such tract; and a deed of part thereof does not merge the contract in the deed if the deed is not accepted in satisfaction of the agreement. (*Cavanaugh v. Casselman*, 88 Cal. 543.)

226. In an action against the vendor for damages for breach of the contract, in not conveying to the vendee all the property described in the agreement of sale, testimony of witnesses pointing out and defining the property which was the subject matter of the contract, and which was imperfectly described in the contract, is competent for the purpose of enabling the court to determine whether the vendor had fully complied with his agreement. (*Cavanaugh v. Casselman*, 88 Cal. 543.)

Cited 98 Cal. 171.

227. Where the owner of a Mexican grant in California, in 1847, contracted to sell it for a certain price if the purchaser should, after inquiry, be satisfied with the title, and pay the price, and, after more than half the price was advanced, the vendor executed, and the purchaser received, a deed, in the Mexican form, in which the contract was set forth as a part thereof, held, that, by the execution of the deed, all the purposes of the contract were accomplished, and that the provision that it should be attached to the deed amounted to no more than a recital, and did not have the effect of keeping it on foot as a subsisting contract. (*Morenhout v. Barron*, 42 Cal. 591.)
Cited 62 Cal. 338.

228. Where, in pursuance of an agreement to convey land, the grantee presents a different deed to the grantor for execution than that called for in the contract the grantor must make his objections to the deed when presented, or within a reasonable time, or when possession of the premises is demanded. He cannot be permitted to avail himself of it for the first time as a defense when sued for a breach of the covenant. (*Morgan v. Stearns*, 40 Cal. 434.)

Contract for good and sufficient deed, what satisfies. See Deeds, IX.

8. Agreement to Share Profits of Resale.

229. In an action to divide proceeds of land conveyed by plaintiff to the defendant which defendant agreed to sell and divide proceeds with plaintiff, a finding that the defendant agreed with the plaintiff to pay all costs and expenses which might be incurred in or about the recovery, sale, or disposal of the land being sufficiently supported by the evidence, the defendant is not entitled to a credit of money paid to an attorney for advice and assistance; and where it appears that the total amount allowed to the defendant is excessive by more than one-half of such attorney's fees, the defendant could not be prejudiced by a failure to allow him such credit, even if he were entitled thereto. (*Faivre v. Daley*, 93 Cal. 664.)

230. A contract for the sale of a farm for a specified sum, and one-half of the excess above that sum for which the farm can be resold, does not require an actual resale in order to fix liability for one-half of the profits which might be realized by accepting any bona fide offer. (*Pettinger v. Fast*, 87 Cal. 461.)
Cited 92 Cal. 85.

231. If an actual resale of the farm for an advance is alleged in the complaint in an action to recover one-half of the excess, such allegation is sufficiently sustained by proof of an agreement of the vendee to resell the farm for an advance, though no money was paid upon the contract of resale. (*Pettinger v. Fast*, 87 Cal. 461.)

232. If the complaint alleges a resale of the farm for a specified amount, and the proof shows a resale for two thousand dollars less than the amount alleged, with a reservation of standing timber of the value of two thousand dollars, the proof is at variance with the

allegation of the complaint, and a finding that the amount of resale is as alleged is not sustained by the evidence. (*Pettinger v. Fast*, 87 Cal. 461.)

233. The vendor's right to recover upon the contract for one-half the excess for which the farm can be resold is not limited to the sum agreed to be paid in case of a resale by the vendee with reservation of timber; but the vendor may recover, in addition to one-half the excess in price paid for the farm, one-half the market value of the timber reserved, or one-half of the net sum for which it may be sold, at his option, though such recovery can only be justified by a complaint showing the facts as they really exist. (*Pettinger v. Fast*, 87 Cal. 461.)

Agreement regarding proceeds of resale, whether within statute. See Statute of Frauds, I, 10, k.

Agreement to divide proceeds of sale, evidence. See Contracts, 350.

9. Canceling Contract or Quieting Title on Breach by Vendee.

234. Where the purchaser of land pays a deposit on account of the sale, under an agreement with the vendor, by which he was to have the deposit returned to him if the title should not be satisfactory, and it appears that the purchaser is entitled to a return of the deposit, the vendor cannot have his title quieted against the purchaser until he first restores the money received. (*Benson v. Shotwell*, 87 Cal. 49.)

235. A cross-complaint by the vendors seeking the cancellation of an unacknowledged and unrecorded contract of sale as a cloud upon their title, and not offering to refund the purchase money received, does not entitle them to any affirmative relief other than that given by a judgment on the pleadings in favor of the plaintiff for a recovery of the purchase money paid, it being conclusively established by the admissions of the pleadings and by the judgment that the agreement had been rescinded and annulled by the parties. (*Drew v. Pedlar*, 87 Cal. 443.)
Cited 95 Cal. 259, et seq., 338, 575, et seq.; 96 Cal. 105; 97 Cal. 337; 99 Cal. 261, 683.

236. Where the contract of sale provides for a rescission of the contract by the vendor upon default of the purchaser in payment of purchase money, in an action to quiet title by the vendor, the facts entitling the defendants to a return of purchase money must be specifically pleaded; and, if it appears that the vendor was ready and willing to comply with his contract, and the purchaser or those claiming under him were not able or willing to comply with the contract of purchase, the vendor may treat the contract as abandoned, and maintain his action to quiet title without a return of the purchase money received. (*Stratton v. California Land and Timber Co.*, 86 Cal. 353.)

Vendor quieting title must return consideration. See Quieting Title, 74.

Rescission of contracts. See Rescission of Contracts.

Rescission, placing party in statu quo. See Rescission of Contracts, 70.

Abandonment of purchase, what amounts to. See Specific Performance, 117.

Abandonment of contract and becoming tenant. See Quietting Title, 153.

10. Action for Breach of Contract; Equitable Remedy of Vendor.

237. The remedy of the vendor in equity for the persistent default of the vendee is to institute proceedings to foreclose the right of the vendee to purchase, the decree usually giving the latter a definite time within which to perform. (*Keller v. Lewis*, 53 Cal. 113.) Cited 59 Cal. 590; 63 Cal. 227; 64 Cal. 21; 90 Cal. 194.

238. In the view of a court of equity, in the case of an agreement to sell land, the title being retained by the vendor as security for the balance of the purchase money, if the vendor obtains his money and interest, he gets all he expected when he entered into the contract. (*Keller v. Lewis*, 53 Cal. 113.)

239. Where it appears from the defendant's act, in expressly repudiating a contract for a sale of land, that a demand upon them for a deed would have been refused, the defendants cannot object that no such demand was made by the plaintiff before suit for breach of the contract. (*Remy v. Olds*, 88 Cal. 537.)

Action by vendor to recover possession on default by vendee. See ante, IX, 2, d.

240. To sustain an action for damages for breach of a contract of sale of real estate the contract must be complete and certain in its terms, and the parties must have consented to the same subject matter in the same sense; and the burden is upon the plaintiff to show that a contract, definite and certain in its terms, was entered into between the parties as a condition of obtaining any relief. (*Breckinridge v. Crocker*, 78 Cal. 529.) Cited 91 Cal. 448.

241. In an action for a breach of a contract of purchase, where the complaint alleges that a contract which the defendant represented he had made before the contract with plaintiff was executed was in fact made afterward, the evidence of the second contracting party is relevant and material to prove the allegation; and he may testify by parol that such contract was made when the question is not as to the contents of a writing, but as to whether one has been made or not, and comes collaterally in issue. (*Marriner v. Dennison*, 78 Cal. 202.)

242. The fact that the vendor failed to object to evidence offered by the vendee as to the increased value of the property, and concurred in submitting the question to the jury, does not estop him from claiming the benefit of the objection upon appeal, that there was no allegation in the complaint to support the finding of the jury. (*Yates v. James*, 89 Cal. 474.)

243. The price at which lots are sold may be shown as tending to prove their value, but it is the market value—that is, the price at which equivalent property might be bought—that is controlling in an action for damages for breach of contract to convey the lots; and the price at which the lots in controversy were sold to the agent of a railroad company

cannot control, where it appears that the plaintiff wanted the lots for a residence, and could have purchased as good, if not better, lots for that purpose in the immediate vicinity for a much less price. (*Marriner v. Dennison*, 91 Cal. 555.)

244. The defendant, on an agreement to sell a tract, part of a larger tract, agreed to fence the larger tract, and the court found that he failed to do so, and that the plaintiff was thereby damaged in the sum of one hundred dollars. Held, the evidence (which is stated in the opinion) was insufficient to show that the plaintiff was damaged. (*Booth v. Chapman*, 59 Cal. 149.)

Action for breach, allegation and proof of offer to perform. See ante, 211.

Allegations as to description in action for damages. See ante, I, 3.

245. The measure of damages caused by the breach of a contract to convey lands on the part of the vendor is the price paid, and the expense of examining the title and preparing the necessary papers, with interest thereon, and, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land. (*Yates v. James*, 89 Cal. 474.)

246. Where the failure of a vendor to convey land on which a homestead has been declared is caused by the refusal of his wife to unite in a deed, and bad faith on the part of the vendor is neither alleged, found, nor proved, the allowance, as damages, of the increased value of the property is error. (*Yates v. James*, 89 Cal. 474.)

247. In an action for a breach of a valid contract for the conveyance of land the measure of damages would be the value of the land agreed to be conveyed. But for the recovery of money paid, or services rendered upon a void contract for the conveyance of land, the measure of plaintiff's relief is the amount of the money paid and interest or the value of the services rendered; and, in such a case, evidence of the value of the land is inadmissible. (*Fuller v. Reed*, 38 Cal. 99.)

248. Mere nominal damages do not belong to a case where there is a willful breach of a covenant to convey land, especially where the land has considerably appreciated in value since the making of the contract. (*Morgan v. Stearns*, 40 Cal. 434.)

249. If a contract for the purchase of land is set out in *hæc verba* in the complaint a finding that the vendor entered into an agreement in writing with the vendee for the sale of the land, upon the terms and conditions set forth in the complaint, is a sufficient finding that the vendee executed the contract; and a further reference in the findings to an exhibit which is not made a part of the pleadings, findings, or record, may be rejected as surplusage. (*Smith v. Mohn*, 87 Cal. 489.)

250. A finding of the amount due the vendor upon the contract is sufficient, without stating that it was due from the vendee, where the vendor and vendee are the only parties who signed the contract. (*Smith v. Mohn*, 87 Cal. 489.)

251. A finding that L. promised and agreed with M. to sell him all his right, title, and interest in a certain rancho is substantially a finding that M. purchased and was entitled to a conveyance of the interest in the rancho owned by L., including that which stood in the name of his wife, and which was community property. (*Mercier v. Hemme*, 50 Cal. 606.)

Action for damages, abatement of. See Abatement, 22.

Action to compel reconveyance. See Forfeiture, 14.

Judgment denying specific performance as bar to action for breach of agreement of sale. See Judgments, 356.

Enforcement of part of contract. See Specific Performance, V, 5.

Limitation of actions to compel conveyance. See Statute of Limitations, VI, 3, b.

11. Purchaser from One Having Exclusive Power of Sale, Rights Against Original Vendor.

252. When one who has an exclusive privilege to sell the lands of another at a fixed price finds a purchaser at an advanced price, and contracts in his own name as grantee of the owner to sell the lands to such purchaser, and afterward obtains an agreement from the owner to deed the lands to him or order upon specified terms, the contracts must be considered as separate, and the purchaser has no privity of contract with the original owner of the lands which will entitle him to sue such owner for breach of his contract to convey, unless he obtains from the one with whom he contracted an order for a conveyance of the lands or an assignment of his interest in the contract with such owner. (*Uhlhorn v. Goodman*, 84 Cal. 185.)

253. When the interest of such purchaser at an advanced price has been assigned, one who claims to be a principal for whom such purchaser and his assignee acted as agents, though he may offer evidence tending to prove such agency, is properly nonsuited in an action for damages for breach of the contract of the original owner to convey, if he fails to prove an order for a conveyance of the lands, or an assignment of an interest in the contract sued upon. (*Uhlhorn v. Goodman*, 84 Cal. 185.)

XI. Price.

1. Time of Tender of.

254. Where the plaintiffs gave their note to the defendants, payable in one year and only bearing interest at ten per cent per annum, at a time when the current rate of interest was ten per cent per month, in consideration of which he received a covenant from the payees to convey them certain land, on the payment of the note at maturity, the low rate of interest raises the presumption that the parties intended that the note should be paid at maturity. (*Brown v. Covillaud*, 6 Cal. 566.)

255. Term within which payment may be made by the vendee to extinguish the lien is limited, and ends after a sale under a judgment for the purchase money. (*Truebody v. Jacobson*, 2 Cal. 269.)

256. Tender of purchase money made before time provided for payment by the strict

letter of the contract cannot put the vendor in default for nondelivery of the deed. (*Rhorer v. Bila*, 83 Cal. 51.)

257. Where the failure of the purchasers to tender the purchase money at the time fixed by the contract is the result of oversight, and not of intentional neglect, and it is not pretended that there was any trifling with the vendor or with the contract, or that the purchasers intended to vex the vendor in any manner, and the situation of the parties and subject matter of the contract has not changed so that injury will result, the delay of the tender is excusable. (*Miller v. Cox*, 96 Cal. 339.)

258. Where a contract for an interest in lands is such that the purchasers could not know how much they were to pay until after they had an accounting with the vendor, although it fixes a date for settlement and payment of all sums due and to become due under the contract, under penalty of a forfeiture of the right to a conveyance, it does not make time of the essence of the contract, if not expressly so declared; and it is the duty of the vendor, if he wishes to put the purchasers under fault, to inform them of the items of account claimed by him as the basis of settlement and payment, and, if he fails to do so, there is no forfeiture of the right to a conveyance; and a tender, after the date so fixed, of an amount greater than the vendor is entitled to receive under the contract, is not made while the purchasers are in default. (*Miller v. Cox*, 96 Cal. 339.)

259. In such case it is not necessary for the purchasers to deposit the money in court, to make their tender good. (*Miller v. Cox*, 96 Cal. 339.)

260. When vendor has not suffered any actual damage from failure of purchaser to pay the installment of the purchase money on the very day named in the contract, and the purchaser is willing, able, and anxious to take the land and pay the contract price, evidence tending to show a depreciation in the market value of the land and the removal by the vendor of a cloud on the title is immaterial. (*Easton v. Cressey*, 100 Cal. 75.)

261. When a contract for the purchase of land makes the purchase money payable in monthly installments, without fixing the amount of the installments, the most that can be said is, that there must be at least two installments; and the mere first payment of ten dollars at the date of the contract, without definite agreement as to the amount of monthly installments, will not have the effect to fix such amount or determine the time of payment. The time not having been fixed by the contract, if the purchase money did not become due at once, or at the end of two months, it became due in a reasonable time. A period of nearly three years is more than a reasonable time for the payment of nine hundred dollars. (*Hannan v. McNickle*, 82 Cal. 122.)

Default in payment. See post, XI, 2.

Time of payment, time when essence of contract. See ante, X, 1.

Forfeiture for failure to pay in time. See ante, X, 1.

2. Payment; Demand for; Contemporaneous Agreement; Default in, Rights and Liabilities on.

Claim for unpaid price, presentation of. See *Estates of Deceased Persons*, 79.

Payment, waiver of delay in. See *Specific Performance*, 160.

262. Under a contract for the sale of land, in which the vendee agrees to pay a balance of the purchase money on or before a certain date, and the vendor agrees to convey upon such payment, and which provides that if the vendee shall fail to make such payment he shall forfeit all right to the land, and the vendor shall be released from all obligations to convey, "and the agreement shall be void" if the vendee neglects or refuses to pay, the vendor has the option to avoid or enforce the contract, and may, if he so elects, sue and recover the unpaid balance of the purchase money. (*Wilcoxson v. Stitt*, 65 Cal. 596.) Cited 87 Cal. 498; 90 Cal. 494; 91 Cal. 609; 95 Cal. 260; 98 Cal. 171.

263. If a contract for the sale of land provides that the purchase money shall be paid by installments, and that if the vendee, at any time, fails to meet his payments, he will surrender the possession of the land to the vendor, this does not entitle the vendee to elect whether he will pay the purchase money or surrender the possession of the land. (*Rourke v. McLaughlin*, 38 Cal. 196.) Cited 59 Cal. 591.

Vendee cannot avoid contract by defaulting in payment. See *ante*, 192.

264. Under a contract for the sale of land, providing that time shall be of its essence and that a failure on the part of the vendee to comply with its terms shall forfeit all his rights thereunder, the failure of the vendee to make the payments provided for does not make the contract void as to the vendor, and he may, upon default of the vendee, enforce the contract, and sue for the amount of purchase money due. (*Smith v. Mohn*, 87 Cal. 489.) Cited 90 Cal. 494; 91 Cal. 609; 95 Cal. 260; 98 Cal. 171.

265. Where the vendor tendered a deed, and demanded the payment of the whole purchase money, without allowing credit for a small payment made by the purchaser, an objection to the tender of the deed because of such demand is waived if the purchaser made no objection on the score of amount at the time of the tender and did not offer to pay any thing, but denies in his answer that any thing was then due. (*Hannan v. McNickle*, 82 Cal. 122.)

266. The acceptance, by the vendor, of an order payable at a future time, when the deed was to be delivered, in a less sum of money than that acknowledged in the agreement as received, in lieu of the cash payment acknowledged, will be regarded as a contemporaneous agreement between the parties in modification of the price to be received for the conveyance, and is not inconsistent with or contradictory of the acknowledgment in the agreement; nor can the vendor object to the application of the money to be obtained upon

such order in satisfaction of liens created by him upon the land, which was agreed to be conveyed free of encumbrance. (*Grant v. Beronio*, 97 Cal. 496.)

267. A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it was created; and, when time is not of the essence of a contract of sale, mere failure to make payment at maturity does not ipso facto make the agreement void, and an option to avoid it and forfeit the payment made must be expressed by proper notice after demand and refusal to make the required payment. (*Alexander v. Jackson*, 92 Cal. 514.)

268. The failure of the vendee under a contract for the sale of land to pay the purchase price within the time stipulated, or to perform other conditions of the contract, is no ground for decree in equity declaring a forfeiture of his rights. A court of equity will never enforce a penalty or forfeiture. (*McCormick v. Rossi*, 70 Cal. 474.)

269. The provision in the contract for the payment of the first installment in cash "as a forfeit" is to be construed as making such payment in the nature of liquidated damages, if the purchaser should fail to comply with his agreement at the time fixed. (*Clary v. Folger*, 84 Cal. 316.) Cited 90 Cal. 179; 95 Cal. 575, 576; 96 Cal. 105; 97 Cal. 337; 99 Cal. 261, 683.

270. In an action for money had and received a nonsuit should be granted where the plaintiff's evidence merely shows that the money was paid as part of the purchase price of land under a contract which provided that the money was paid upon the express condition that it was not to be returned, but was to be forfeited unless further payments of the purchase price were made within a definite period. (*Scott v. Glenn*, 87 Cal. 221.) Cited 95 Cal. 575, 576.

271. It was stipulated, in an agreement between a vendor and vendee, that in case any installment of said purchase money, etc., should remain overdue and unpaid for the space of six months, then, at the option of the party of the first part, the agreement should become null and void, and all payments previously made thereupon should be deemed paid as compensation for the use and possession of said land up to the date of said forfeiture. Held, before the defendant could enforce this clause of the agreement, it would be necessary for him to prove that he himself had performed fully up to the time of the failure of the plaintiff to perform on his. (*Booth v. Chapman*, 59 Cal. 149.)

272. Where the plaintiff gave his note, payable four months after date, in consideration of which the defendants executed a contract for a deed of land, upon payment of the note, held, that after a tender of the deed, and demand and refusal to pay the note after its maturity, the plaintiff had forfeited his right to insist on a performance of the contract. (*Pearis v. Covillaud*, 6 Cal. 617.) Cited 64 Cal. 20.

Forfeiture for failure to pay in time. See *ante*, X, 1.

Failure to pay as forfeiture under bond for title. See ante, VII.

273. The provision in a contract of sale, for a forfeiture at the maturing of the time fixed for payment, is waived by the execution of a deed under the contract. (*Alexander v. Jackson*, 92 Cal. 514.)

274. Where a contract for the sale of land provides for the payment of the purchase price in installments, and for the execution of a deed upon the final payment, and for a forfeiture of all amounts paid by the purchaser upon his default in the payment of any installment, and that the contract shall thereupon become void, if it does not appear that the vendor has abandoned the contract, or failed or refused to perform any part of his contract to convey, upon a tender of the entire purchase money, the purchaser, who has failed to pay or tender the residue of the purchase money, is not entitled to recover back the installments paid. (*Bradford v. Parkhurst*, 96 Cal. 102.)
Cited 99 Cal. 261.

275. Where a contract for the sale of land provides for a cash payment as a forfeit, and that the remainder of the purchase price is to be paid in deferred installments, and that a deed is to be executed upon the payment of a third deferred installment at a date fixed, and that a mortgage is to be given by the purchaser for the residue, and by its terms makes time of the essence of the contract, and provides that the contract shall terminate upon failure to pay any installment, if the vendee pays the first deferred installment of purchase money, but makes default as to the second installment, and then elects to forfeit the original cash payment, and refuses to proceed further under the contract, he may recover back the first deferred installment of purchase money paid. (*White v. Buell*, 90 Cal. 177.)
Cited 95 Cal. 259, 260, 261.

276. When vendor, under power of sale, reserved in contract for conveyance on the payment of the purchase price, sells the property either at public or private sale, the surplus, beyond the purchase money due, belongs to the vendee, and the payment of it may be decreed by judgment of the court against the vendor. (*Gouldin v. Buckelew*, 4 Cal. 107.)

Duty of vendor to return deposit on suit to quiet title. See ante, X, 9.

3. Vendor Procuring Release from Defaulting Vendees, Rights of and of Third Persons.

277. A vendor under a contract for the sale of land who, upon default of the purchaser and of his assignee in the payment of the last installment of the purchase money after demand for the same, and tender of a conveyance, procures from such purchaser and his assignee, with whom he dealt individually throughout the transaction, a release of all claims against him in favor of each of them, for a valuable consideration, without notice of a resulting trust existing in favor of a corporation whose funds have been used by them in payment of the previous installments of purchase money, takes the land freed of such trust, and may maintain an ac-

tion to quiet his title against the corporation and its successors in interest. (*Stratton v. California Land and Timber Co.*, 86 Cal. 353.)

278. The releases so obtained extinguished the equitable interest in the land acquired by the contract of sale, and the vendor became thereby the legal and equitable owner of the lands as completely as though the contract of sale had never been executed and partly performed. (*Stratton v. California Land and Timber Co.*, 86 Cal. 353.)

279. A subcontract of the purchaser purporting to sell the same land at an increased price to the corporation whose funds had been used in obtaining the purchase, though its contents may be known to the vendor, does not charge the vendor with notice of the implied trust, or put him on inquiry as to the company's interest in the original contract of sale. (*Stratton v. California Land and Timber Co.*, 86 Cal. 353.)

280. A subcontract by a purchaser for the sale of the same land does not operate as an assignment of the original contract of sale. (*Stratton v. California Land and Timber Co.*, 86 Cal. 353.)

4. Lien for.

a. Right to and Nature of.

281. Section 3046 of the Civil Code, which provides that "one who sells real property has a vendor's lien thereon for so much of the price as remains unpaid and unsecured, otherwise than by the personal obligation of the buyer," is but a repetition of the common law, and the term "vendor's lien" referred to therein is the ordinary vendor's lien recognized by equity courts. (*Claiborne v. Castle*, 98 Cal. 30.)

282. So long as title is retained vendor has express lien for the unpaid purchase money, which exists by virtue of the contract of sale and reservation of the title, and for which equity makes no special provision, but leaves the parties to rely upon their contract. (*Avery v. Clark*, 87 Cal. 619.)
Cited 97 Cal. 71; 98 Cal. 33, 34.

283. A vendor's lien, properly so called, is not the result of any agreement or intention of the parties, but is a simple equity raised by the courts for the benefit of a vendor of real estate, after he has parted with the title. (*Avery v. Clark*, 87 Cal. 619.)

284. A deed conveying land, and in express terms reserving to the grantor a lien to secure the payment of two promissory notes for a part of the price, creates an equitable mortgage upon the land. (*Dingley v. Bank of Ventura*, 57 Cal. 467.)

285. A vendor's lien is a simple equity or privilege, purely personal, and does not depend for life upon the agreement of the parties, and a consideration is not necessary in order to support a waiver of it; and the vendor is estopped from claiming that the release of his lien was without consideration, when his promise to release it was the moving consideration of a subsequent purchase of the land by another purchaser, who would not have bought the land without it. (*Claiborne v. Castle*, 98 Cal. 30.)

286. Where vendor has not conveyed the

title his position is analogous to that of a mortgagee. (*Salmon v. Hoffman*, 2 Cal. 138.) Cited 22 Cal. 761; 59 Cal. 591.

287. A vendor's lien, after absolute conveyance, is not a specific absolute charge upon the property, but only an equitable right of the vendor to resort to it in case the purchase money is not paid. (*Williams v. Young*, 21 Cal. 227.) Cited 74 Cal. 91.

Vendor's lien is not a specific charge, but merely a personal privilege. See post, 294.

Vendor's lien under bond for title. See ante, VII.

288. A vendor has a lien on the land sold, for the purchase money, unless he has taken security for its payment, though he has executed the conveyance. (*Salmon v. Hoffman*, 2 Cal. 138.) Cited 6 Cal. 226; 32 Cal. 59; 74 Cal. 91.

289. The vendor of real estate has a lien on the same for the unpaid purchase money, and such lien attaches to the land equally, whether it has been conveyed to the vendee or is only contracted to be conveyed. (*Hill v. Grigsby*, 32 Cal. 55.) Cited 74 Cal. 91.

290. The lien which the vendor of real property retains, after an absolute conveyance for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. (*Sparks v. Hess*, 15 Cal. 186.) Cited 32 Cal. 58; 35 Cal. 206; 72 Cal. 484; 74 Cal. 91; 89 Cal. 92.

291. The distinction between the lien of a vendor after absolute conveyance and the lien of a vendor when the contract of sale is unexecuted, stated. In the latter case the vendor holds the legal estate as security for the purchase money, and can assign his contract with the conveyance of the title, and in that event his assignee acquires the same rights and is subject to the same liabilities as himself. In the former case the vendor retains a mere equity, which, to become of any force or effect, must be established by the decree of the court. (*Baum v. Grigsby*, 21 Cal. 172.) Cited 97 Cal. 71; 18 Col. 15.

292. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the purchase money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative force or effect until established by the decree of the court. In the former case the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that, if the purchaser will not accept a conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining after the application of the

proceeds arising upon such sale. (*Sparks v. Hess*, 15 Cal. 186.)

Vendor's lien, nature of. See *Homesteads*, 171.

Mortgage for price, priority of. See *Mortgages*, 283, 284.

b. Assignment of; Execution Against.

293. The equitable lien which a vendor of real estate, after an absolute conveyance, retains upon the property for the unpaid purchase money is not assignable. (*Baum v. Grigsby*, 21 Cal. 172, cited 21 Cal. 189, 228, 35 Cal. 204, 36 Cal. 321, 72 Cal. 484, 74 Cal. 91, 584, 87 Cal. 624, 89 Cal. 92, 96, 97 Cal. 71; *Lewis v. Covillaud*, 21 Cal. 178, cited 36 Cal. 321; *Williams v. Young*, 21 Cal. 227, cited 36 Cal. 321, 74 Cal. 584.)

294. This lien is not a specific absolute charge upon the property, but merely a personal privilege of the vendor, and does not pass by a transfer of his claim for the purchase money. (*Baum v. Grigsby*, 21 Cal. 172.)

Cited 23 Cal. 636; 32 Cal. 59; 35 Cal. 204, 206; 97 Cal. 71; 18 Col. 15.

295. The equitable lien held by the vendor of real estate after an absolute conveyance thereof is not subject to levy and sale on execution, nor is it the subject of private transfer. (*Ross v. Heintzen*, 36 Cal. 313.) Cited 74 Cal. 584.

296. The express lien of a vendor who retains the title is capable of assignment and enforcement by his assignee: but the implied lien raised by equity, in favor of a vendor who has parted with the title, is a privilege purely personal to the vendor, and is not assignable even by express contract, nor does it pass to the assignee of the vendee's obligation for the purchase money. (*Avery v. Clark*, 87 Cal. 619.) Cited 89 Cal. 93; 97 Cal. 71; 98 Cal. 33, 34.

297. The indebtedness for the purchase price of real estate is the subject of an execution or attachment, levy, and sale, or of a private transfer; but the equitable interest that attaches to the property conveyed by virtue of the indebtedness in the hands of the vendor is extinguished by a transfer of the indebtedness. (*Ross v. Heintzen*, 36 Cal. 313.)

Cited 44 Cal. 362; 73 Cal. 392.

298. Where deed reserves a lien to secure the payment, such lien is more than a vendor's lien, and is not lost by the assignment of the promissory notes. (*Dingley v. Bank of Ventura*, 57 Cal. 467.) Cited 89 Cal. 93.

299. Where, by the terms of a contract for the sale of real estate, the vendor retains the title until payment of the purchase money, an assignment of the contract by the vendor, accompanied with a conveyance by him of the legal title to the assignee, vests in the latter the right to enforce against the property the lien of the vendor for the unpaid purchase money. (*Taylor v. McKinney*, 20 Cal. 618.)

Cited 21 Cal. 178; 32 Cal. 59; 87 Cal. 625.

Assignee of vendor, rights of. See ante, 291.

300. The assignment by a vendor of real property, after the commencement of an action to foreclose his vendor's lien for the balance of the purchase money, of all his right, title, and interest in any judgment that he might recover in the action, is not a transfer of the cause of action, and does not extinguish his lien. Such assignment can, at most, operate only as an agreement to assign or transfer the judgment to be recovered. (*Woolley v. Wickerd*, 97 Cal. 70.)

Assignment by vendee, effect of on lien. See post, 312.

c. Waiver of.

301. A contract for the sale of land, by the terms of which the vendor is to retain title to the land until the payment of the entire purchase money, does not establish the relation of mortgagor and mortgagee, and there is no statutory prohibition upon the right of the vendor to a personal action to recover the purchase money when it becomes due. (*Samuel v. Allen*, 98 Cal. 406.)

302. Acts and conduct of vendor of real property indicating waiver of his lien may be shown by parol evidence. (*Claiborne v. Castle*, 98 Cal. 30.)

303. Any conduct which shows an intention on the part of a vendor of real estate to give up his lien for the purchase money will be a bar to its assertion, and the acceptance of collateral security raises the presumption of such intention, though this presumption may be rebutted by evidence. (*Griffin v. Blanchar*, 17 Cal. 70.)

304. Verbal agreement by vendee to reconvey the land to vendor if he does not pay the purchase price does not prevent the enforcement of a vendor's lien. (*Gallagher v. Mars*, 50 Cal. 23.)

305. Acceptance of distinct and separate security for the purchase money is prima facie a waiver of the vendor's lien, but it is only prima facie, and may be rebutted. In this case the plaintiff manifested throughout an intention to rely upon the land as security for the purchase money, and his vendor's lien was therefore not waived. *Sharpstein, J.*, concurring. (*Remington v. Higgins*, 54 Cal. 620.)

Cited 74 Cal. 92.

306. Although it is competent for the vendor to take security for the payment of the purchase price of the land which he has conveyed, and by express agreement not lose the right to resort to his implied lien, yet his taking such security is prima facie a waiver of the lien, and, in the absence of some agreement to the contrary, the vendee will hold the land discharged from the vendor's lien. (*Avery v. Clark*, 87 Cal. 619.)

307. Equitable lien of vendor is waived by the acceptance of the personal security of the vendee for the payment of the debt. (*Griffin v. Blanchar*, 17 Cal. 70, 74.)

308. Plaintiff conveyed to Mrs. B., with the consent of her husband, a tract of land in trust for certain children of Mrs. B. by a former marriage. The conveyance acknowledged the payment of a consideration of

twelve thousand dollars, but no part of this sum was actually paid. To secure its payment, together with other indebtedness, Mrs. B. and her husband executed their promissory notes, and a mortgage upon other property also held by her in trust for her children. By a subsequent arrangement between the parties these securities were given up and canceled, and other notes of the same character executed, with a mortgage upon both pieces of property to secure their payment. Plaintiff seeks to enforce a lien against the property for the amount of these notes. Held, that as the plaintiff had actual notice of the trust, no equity was created in his favor by the execution of the mortgage, and that the mortgage as such was void. (*Griffin v. Blanchar*, 17 Cal. 70.)

309. After plaintiff has obtained judgment on the notes in this case he may subject the property to its payment. A court of equity would hold the property as that of Blanchar and wife, responsible for their debts before it goes as a mere donation to the children. *Baldwin, J.* (*Griffin v. Blanchar*, 17 Cal. 70.)

310. The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. (*Walker v. Sedgwick*, 8 Cal. 398.)

311. The vendor does not waive his lien by taking as security a non-negotiable due bill for the amount of the unpaid purchase money from a third person, who appends to his signature the designation of himself as agent of the purchaser. Parol evidence is competent to show how such due bill was received, and who was intended to be bound by it; and a finding that it was made by the purchaser will be presumed to have been supported by the evidence. (*Burgess v. Fairbanks*, 83 Cal. 215.)

312. Taking a note for the purchase money does not affect the lien; and, if part be paid, the lien is good for the residue, and the vendee becomes a trustee for all that remains unpaid. So the lien attaching to the land, an assignment, with or without notice, cannot affect the rights of the vendor. (*Truebody v. Jacobson*, 2 Cal. 269.)

Cited 8 Cal. 403.

313. The lien of the vendor is not waived, in the absence of express agreement to that effect, by the taking of the note or other personal security of the vendee for the purchase money; but it is waived by the taking of a distinct and independent security, unless there is at the time an express agreement for its retention. (*Baum v. Grigsby*, 21 Cal. 172.)

Cited 25 Cal. 328; 56 Cal. 344; 87 Cal. 624.

314. Under section 3047 of the Civil Code the indorsement and transfer by a vendor of land of a promissory note given him by the vendee in payment of the purchase price does not operate to destroy the lien of the vendor, if he is subsequently compelled to take up the note by reason of its nonpayment by the vendee. In such a case the lien of the vendor

is merely suspended, and revives when he takes up the note. (*Bancroft v. Cosby*, 74 Cal. 583.)

315. The equitable lien which a vendor of real estate, after an absolute conveyance, has for the unpaid purchase money is waived by the taking of a mortgage to secure the same, although the mortgage is void and cannot be enforced. (*Camden v. Vail*, 23 Cal. 633.) Cited 56 Cal. 344; 74 Cal. 92; 87 Cal. 624; 3 Or. 417.

316. A vendor's lien is waived by taking a mortgage. (*Wells v. Harter*, 56 Cal. 342.)

317. A vendor's lien does not exist in this state where a mortgage security is taken for the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land. (*Hunt v. Waterman*, 12 Cal. 301.) Cited 74 Cal. 92; 87 Cal. 624; 3 Or. 419.

318. The fact that such mortgage is defective does not revive the lien, as it is the intention of the vendor which controls, and this is as well shown by an informal act as one properly done. (*Hunt v. Waterman*, 12 Cal. 301.)

319. A general averment in the complaint—to enforce the vendor's lien—that the mortgage is defective as a security is not sufficient to withdraw the case from the general rules above stated. (*Hunt v. Waterman*, 12 Cal. 301.)

320. The fact that a mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase money of the land conveyed does not prevent a waiver of the vendor's lien, nor can it have the effect to extend the mortgage lien by relation to the date of the contract of sale. (*Avery v. Clark*, 87 Cal. 619.)

321. The lien of a vendor of land for the unpaid purchase price is not a specific and absolute charge upon the land, but a mere equitable right to resort to it upon failure of payment by the vendee, and can be enforced only by a suit in equity. Such a lien is waived by the vendor's proceeding against the vendee in an action at law, and by the recovery therein of an ordinary money judgment for the purchase price. (*Fitzell v. Leaky*, 72 Cal. 477.)

d. Enforcement of; Joinder of Legal and Equitable Actions; Purchasers Under Judgment.

322. A vendor's lien for the unpaid purchase price of land may be enforced against the vendee and his grantees who have notice of the vendor's equities. (*Pell v. McElroy*, 36 Cal. 268.)

323. A vendor of real estate has a lien on the same in the hands of the administrator of the purchaser for the unpaid purchase money. (*Cahoon v. Robinson*, 6 Cal. 225.) Cited 28 Cal. 638; 18 Nev. 129.

324. A complaint which avers that the plaintiff sold land to one of the defendants for a certain sum, of which sum said defend-

ant paid part, leaving a balance due and unpaid, and that at the time of sale, for reasons known to such defendant, and at his request, a conveyance of the land was made by plaintiff with the name of another defendant inserted therein, who knew all of the facts of the transaction, is sufficient to warrant the enforcement of a vendor's lien against such other defendant for the balance of the unpaid purchase money. (*Burgess v. Fairbanks*, 83 Cal. 215.)

325. In 1854 Weber sold certain lands in San Joaquin county to Meroux, who paid part of the purchase price and gave his note for the balance. In 1858 Meroux died intestate, leaving a widow and two sons, aged three and five years respectively. The estate was never administered upon. A year afterwards Weber, in an action against the widow and the children, the latter appearing by their guardian ad litem, obtained a decree of the district court enforcing a vendor's lien upon the land, in pursuance of which the land was subsequently sold to Weber. Held, that the decree, so far as it affected the title of the children by succession, was valid, and they could not, after attaining majority, maintain ejectment for the land. (*Meroux v. Weber*, 53 Cal. 129.)

326. If one sells land to another, and executes an absolute conveyance, and does not receive payment, the grantee holds the land in trust for the grantor to the extent of the purchase money, which trust descends to the representatives and heirs of the grantee, against whom a lien for the purchase money will be enforced. (*Burt v. Wilson*, 28 Cal. 632.)

Cited 76 Cal. 471; 18 Nev. 129.

Enforcement of lien against assignee of vendee. See post, XII.

327. A bill in equity to enforce a vendor's lien for a balance of unpaid purchase money will lie, though plaintiff's remedies at law have not been exhausted. (*Burgess v. Fairbanks*, 83 Cal. 215.)

328. The equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. (*Sparks v. Hess*, 15 Cal. 186.)

Cited 83 Cal. 216.

329. Where a vendor of land has taken the notes of the purchaser in payment, and brings his action thereon at law, he should, in that action, if at all, unite his equitable claim for a foreclosure of his lien, the same tribunal administering both law and equity. (*Walker v. Sedgwick*, 8 Cal. 398.)

330. But in a case where the party brought his separate actions, first at law on the notes, and then in equity for a foreclosure, before the adoption of this rule, held, that he be allowed both his legal and equitable remedies.

on payment of the costs of the latter suit. (*Walker v. Sedgwick*, 8 Cal. 398.)

331. And if the defendant has a legal offset to the notes, held, that he may plead it in the latter suit. (*Walker v. Sedgwick*, 8 Cal. 398.) Cited 23 Cal. 627.

332. The objection that the proceedings may become too complex by permitting different questions of law and equity to be settled in one suit is not sufficiently strong to overcome the plain provisions of the statute, and the substantial dictates of justice. (*Walker v. Sedgwick*, 8 Cal. 398.)

333. If the vendor sells and conveys land, with a verbal agreement that the vendee shall pay the purchase price when demanded, the bringing of an action to enforce a vendor's lien is a sufficient demand, and the plaintiff is entitled to have his lien enforced. (*Galagher v. Mars*, 50 Cal. 23.)

334. Where a party purchases a bridge, toll-house, stables, and outhouses appurtenant, with the right and privilege of his vendor in and to a "dug road" made on each side of the bridge, neither the purchaser, nor those claiming under him with notice, can object to a decree enforcing the vendor's lien against the premises, that the "dug road" is public land, and that therefore nothing would pass under a sale upon the decree. (*Sparks v. Hess*, 15 Cal. 186.)

Cited 21 Cal. 177; 28 Cal. 638; 89 Cal. 92, 95-97; distinguished 20 Cal. 620.

335. In a bill in equity to enforce the lien it is not necessary to allege the issuance of execution, under a judgment at law, previously obtained by the vendor against the purchaser for the amount due, and return of nulla bona to sustain the allegation of insolvency. (*Walker v. Sedgwick*, 8 Cal. 398.)

336. In an action to foreclose the vendor's lien the answer of a defendant, who is the grantee of the defendant to whom the land was reconveyed, denying that the plaintiff ever owned the land, entitles such grantee to show that the deed to the plaintiff was a mortgage, and did not convey the title. (*Wenzel v. Schultz*, 100 Cal. 250.)

337. In case of an unexecuted conveyance the vendor may ask either a decree directing performance, and, in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to take a mere foreclosure of the vendor's right to a deed. (*Sparks v. Hess*, 15 Cal. 186.)

338. Where the lien attached to property before it acquired its character of homestead, the title to the property cannot be acquired by a sale under execution on a judgment at law for the purchase money in the usual form, because such a sale is not an enforcement of the lien. The title, which comes from an enforcement of the lien, can only inure after chancery proceedings to settle the sum due and have the lien declared and a sale decreed. (*Williams v. Young*, 17 Cal. 403.) Cited 74 Cal. 584.

339. A conveyed to B, and allowed part of

the purchase money to remain unpaid; B afterwards sold part of the land to C, who had no notice of A's lien as vendor, and gave a mortgage to B for part of the purchase money. A obtained judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land. Held, that the purchaser at sheriff's sale did not acquire title to the mortgage debt due from C to B. (*Bryan v. Sharp*, 4 Cal. 349.)

340. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third party, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser, at the previous sale, obtained an injunction to stay the sale, which was afterwards dissolved by the court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee. Held, that this judgment of the court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. (*Allen v. Phelps*, 4 Cal. 256.)

Cited 73 Cal. 392.

Lien enforceable against purchaser with notice, when. See *Covenants*, 38.

Vendor's lien, defense of bona fide purchaser, what necessary to. See *Bona Fide Purchasers*, 7.

Suit to foreclose vendor's lien, venue of. See *Venue*, 31.

Lien, effect of removal of building on. See *Buildings*.

Homestead, whether subject to vendor's lien. See *Homesteads*, X, 5.

e. Lien of Purchaser for His Deposit.

341. The purchaser has a lien upon the property for the amount of the deposit, in case of failure of the vendor to make good his part of the contract, unless the vendee is himself first in default. (*Benson v. Shotwell*, 87 Cal. 49.)

5. Actions for Price.

a. Parties.

342. Where a vendor of land contracts with the vendee that he will pay off a mortgage previously executed by him upon the property the mortgagee is not a necessary party to a suit for the purchase money brought by the vendor before the mortgage is discharged. A judgment, in such case, retaining the purchase money under the control of the court until the mortgage is satisfied, is sufficiently favorable to the defendant. (*Leese v. Sherwood*, 21 Cal. 151.)

b. Jurisdiction Over; Venue.

343. Fact that vendor of land is not within jurisdiction of court is no defense to an action, in his name, for the purchase money,

although the vendee has not yet received his deed, and is not entitled to it, by the terms of the sale, until all the purchase money is paid. (*Rourke v. McLaughlin*, 38 Cal. 196.)

Jurisdiction of superior court of action to recover back purchase price. See post, 362.

344. An action to recover the purchase money for land sold is not a local action, and may be brought in a different county from that in which the land is situated. (*Samuel v. Allen*, 98 Cal. 406.)

c. Limitation of; Tender of Deed, Necessity of to Right to Sue.

Limitation of actions between vendor and vendee. See Statute of Limitations, VI, 3, b.

345. An action upon an independent covenant to pay the purchase money for land is barred in four years from the expiration of the time fixed for payment, without regard to the time of execution or tender of a conveyance. The covenant for purchase money is independent of the conveyance, when the day of payment is to happen or may happen before the conveyance is to be executed, or when a time is fixed for payment, and no time is fixed for the conveyance. (*Donovan v. Judson*, 81 Cal. 334.)

346. If, in a contract for the sale of land, the purchase money is to be paid by installments, and a deed is not to be given until the whole price is to be paid, the promises of the vendee are independent, and the vendor may sue upon all of them, except the last, without averring a willingness to perform on his part, or tendering a deed. (*Rourke v. McLaughlin*, 38 Cal. 196.)

347. Where the purchase money is payable in installments, and the conveyance is to be executed on the last day of payment, or on the payment of the whole price, or at any previous day, the covenants to pay the installments fall due before the time for the execution of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey. (*Hill v. Grigsby*, 35 Cal. 656.)

348. Where, by the terms of the contract for the sale and conveyance of land, the purchase price is made payable in installments, and a conveyance is to be made upon payment of the last installment, the obligations as to prior installments will be regarded as independent, and the vendor may sue for a prior installment before the time has arrived for payment of the last installment without the execution or tender of a conveyance; but if a recovery of a prior installment is not sought until the time for the payment or collection of the last installment has accrued, the right of action for the several installments is merged in the entire obligation, and the whole of the obligations of the parties to the agreement become dependent and concurrent, and the vendor cannot recover any part of the purchase money unless he makes or tenders a conveyance of the premises. (*McCroskey v. Ladd*, 96 Cal. 455.) Cited 7 Wash. 301, 598.

349. In an action by a vendor after all the installments have fallen due he can only re-

cover on delivery or tender of delivery of a deed. (*Hill v. Grigsby*, 35 Cal. 656.)

350. The covenants to pay the installments falling due on or after the day appointed for the conveyance are dependent covenants; and the vendor, in his suit to recover the same, whether he sues for those alone, or joins installments that became due before the time, must show a conveyance or offer to convey. (*Hill v. Grigsby*, 35 Cal. 656.)

351. Where, by an agreement for the sale or purchase of land, the price is payable in installments, for which the purchaser executes his notes payable at certain times, and the vendor agrees to convey on payment of the last installment, and suit is brought on the notes after all the installments have become due, the tender of a conveyance by the vendor is a condition precedent to the right to sue, and the purchaser may insist on the want of such tender against an indorsee, after maturity. (*Folsom v. Bartlett*, 2 Cal. 163.) Cited 35 Cal. 662; 38 Cal. 200.

352. Where the seller contracts that, upon the payment of the purchase money he will execute and deliver to the buyer a deed for the land sold he cannot maintain an action for the purchase money without first tendering a deed and demanding payment. (*Kelly v. Mack*, 45 Cal. 303.)

353. A party who agrees to convey land upon payment of the purchase money, cannot recover the purchase money due upon the contract until he tenders a deed, if all the installments became due before the action was brought. (*Bohall v. Diller*, 41 Cal. 532.) Cited 45 Cal. 304; 84 Cal. 319; 90 Cal. 492, 493; 7 Wash. 301.

Payment of price and delivery of deed are mutual and dependent covenants. See ante, X, 5.

354. In such a case the complaint must allege a tender of a conveyance. (*Bohall v. Diller*, 41 Cal. 532.)

355. In an action by a vendor of land upon promissory notes given for the last two installments of purchase money, where the complaint does not allude to the contract nor allege a tender of a deed before bringing the suit, an answer setting forth the contract and averring that the execution of the contract and the making of the notes were part of the same transaction, and that the contract was the only consideration of the notes, from which it appeared that the covenants of the vendor and purchaser were mutual and dependent, and that neither could put the other in default without tendering a performance on his part, discloses a defense to the action, and shows that the complaint is defective in not alleging the tender of a deed by the plaintiff before suit. (*Naftzger v. Gregg*, 99 Cal. 83.)

356. An averment in the answer that the plaintiff has not executed a deed as provided in the contract, and the finding of the court that that averment is true, is immaterial, as defendant on his part could not insist upon such execution, or put plaintiff in default without a tender of purchase money by him, though the complaint should allege the ten-

der of such deed in order to put the defendant in default for nonpayment of the purchase money. (*Naftzger v. Gregg*, 99 Cal. 83.)

357. In an action by a vendor for the recovery of money due upon a contract for the sale of land, where issue was joined as to an offer of the plaintiff to perform, and refusal to perform upon the part of the defendant, proof that the plaintiff had prepared a deed and was ready to deliver it, and that he had been told that the defendant, who was a resident of another state had no residence in this state, is not sufficient to sustain a finding for the plaintiff, where it is not shown that the defendant was actually out of the state at the time of the alleged offer, or that he did not have a place of business within this state, or that plaintiff had used any diligence in finding the defendant within the state, or to ascertain whether he had a place of business therein. (*Samuel v. Allen*, 98 Cal. 406.)

358. Where a note is given in lieu of an independent installment of purchase money, the vendor, by deferring action thereon until after the time when the entire purchase money has matured, waives the right to treat the note as an independent obligation, and cannot recover in the action, if it is neither alleged nor found that he made any tender of a conveyance before suit. (*McCroskey v. Ladd*, 96 Cal. 455.)

Cited 7 Wash. 301, 598.

d. Evidence; Failure of Consideration as a Defense.

Books of vendor, whether admissible in favor of vendee. See Evidence, 170.

Account books, admissibility to prove non-payment of price. See Evidence, 164.

Certified copy of recorded contract between as evidence. See Evidence, 100.

359. Partial failure of consideration cannot be pleaded in bar of an action upon a note given for the purchase money of land. (*Reese v. Gordon*, 19 Cal. 147.)
Cited 5 Or. 311.

360. If there be fraud in the sale of the land, or a warranty of title, or if the consideration be divisible or capable of apportionment, a partial failure of consideration may sometimes be given in evidence in reduction of damages; but even then the matters relied on by defendant must constitute such an affirmative right of action as would maintain a separate suit. (*Reese v. Gordon*, 19 Cal. 147.)

361. The fact that "water certificates" of a water company, forming part of the property sold, are invalid, does not constitute a partial failure of the consideration of a note and mortgage given for the purchase money, if the water company has not failed or refused to furnish the water in conformity with the certificates, and is ready and willing to perform its obligation. (*Williams v. Mitchell*, 87 Cal. 532.)

Vendee remaining in possession is liable although title defective. See ante, IX, 2, c.

Failure of title as defense in action for purchase price. See ante, VIII, 9.

Defense on the ground of fraud. See ante, III.

6. Action by Purchaser to Recover Back Money Paid.

362. An action by a vendee to a contract for the sale of land to recover a part payment made on the purchase price, because of a defect in the title of the vendor, involves the title of real property, within the meaning of article IV, section 5, of the constitution, so as to vest original jurisdiction in the superior court, although the amount in controversy is less than three hundred dollars. (*Copertini v. Oppermann*, 76 Cal. 181.)

363. An attempt to recover part of the purchase money paid under the contract of sale is an attempt to undermine an executed contract, and the purchaser cannot invoke, in favor of such action, principles which apply to actions for the enforcement of executory contracts. (*Scott v. Glenn*, 87 Cal. 221.)

364. No eviction is necessary to enable a vendee to recover back the purchase money of real estate, where the sale was void under the statute of frauds. (*Reynolds v. Harris*, 9 Cal. 338.)

365. A vendee cannot maintain an action to recover his purchase money from a vendor, who has failed to perform his contract, until he has been evicted, or has surrendered or offered to surrender the possession. (*Haynes v. White*, 55 Cal. 38.)
Cited 70 Cal. 45; 83 Cal. 55.

Vendee in possession cannot reclaim purchase money. See ante, IX, 2, c.

366. The purchaser can maintain no action upon a contract of sale which he is not entitled to rescind, without full performance on his part prior to the default of the vendor; and not having alleged or proved such performance, he cannot maintain an action to recover purchase money paid in part performance of his contract, while it is still in existence and uncompleted. (*Easton v. Montgomery*, 90 Cal. 307.)

367. If a party pay a sum as part of the purchase money for land, under an agreement that the sum paid shall be retained by the vendor in case he shall convey a good title to the vendee, the latter, in order to maintain an action to recover the amount paid, must aver in his complaint a tender of the unpaid portion of the purchase money, or give some sufficient excuse for the omission to tender it. (*Englander v. Rogers*, 41 Cal. 420.)
Cited 90 Cal. 492, 493; 92 Cal. 41; 95 Cal. 337, 575; 97 Cal. 150; 99 Cal. 186; 18 Col. 418.

368. In such a case an averment that the plaintiff has been ready and willing, and has offered to accept a conveyance according to the agreement, and to pay the balance of the purchase money, is not an averment that he tendered the purchase money. (*Englander v. Rogers*, 41 Cal. 420.)
Cited 72 Cal. 220; 84 Cal. 319.

369. A complaint by a purchaser to recover money paid upon a contract for the purchase of land, which alleges that by the terms of the contract the sum sued for was to be paid down, and the remainder of the purchase money was to be paid in installments, and that upon the payment of the last installment the vendor was to execute a deed of the land;

that time was made the essence of the contract by express terms; and that at the maturity of the contract the vendors failed and refused to execute a deed; but which does not allege a payment of any deferred installments, or a tender of performance, or an excuse for a failure to make the tender, or any rescission of the contract, does not state a cause of action. (Townsend v. Tufts, 95 Cal. 257.) Cited 98 Cal. 171.

370. The mere neglect of both parties to such contract to perform the contract on the day fixed for its performance could not, without any thing more, operate as a rescission thereof; and when the complaint shows a first breach of the contract on the part of the purchaser, by failure to pay the first deferred payment a full year before the vendors were required to convey, a full tender on his part of the remainder of the purchase money due, and a demand for a deed, is essential to a recovery of the purchase money paid, and it is not enough to allege a refusal of the vendors to make and tender a deed at the date fixed for conveyance. (Townsend v. Tufts, 95 Cal. 257.)

371. It is incumbent upon the purchaser to offer to perform on his part, or to show that at the time performance was due on the part of the vendors they could not furnish a good title to the land. (Joyce v. Shafer, 97 Cal. 335.)

Cited 98 Cal. 171; 99 Cal. 261.

372. A complaint, in an action to recover purchase money paid under a contract for the purchase of land, need not allege a tender of the residue of the purchase money, and a demand for a deed, if it shows a sufficient excuse for the omission, and where such complaint alleges that by the terms of the contract the deed to the land was placed in escrow, to be held until the final payments should be made, and that the vendor withdrew the deed from the holder thereof, and denied the right of the plaintiff to purchase under the contract, with intent to rescind the contract, it sufficiently shows that a tender of the balance of the purchase money and a demand for the deed would have been of no avail, and entitles the plaintiff to the relief sought, as against a general demurrer. (Merrill v. Merrill, 95 Cal. 334.)

373. No demand before suit is necessary to be made or alleged in the complaint in an action to recover purchase money paid under a contract of sale which the defendants have elected to rescind. (Drew v. Pedlar, 87 Cal. 443.)

Cited 95 Cal. 259, 260, 338, 575, et seq; 96 Cal. 105; 97 Cal. 337; 99 Cal. 261, 683.

374. When a deed of property given by a vendor describes town lots in a different block from those purchased by the vendee, and, upon discovery of that fact, the vendee declines to go on with the trade, and does not take the deed, the fact that it had been actually placed in his hands does not constitute delivery of a deed for the property purchased, and the deed vested no title in the purchaser. He is not therefore bound to tender a reconveyance of the lots described in the deed before suing to recover the purchase money paid

for the property purchased to which no title was received from the vendor. (Fenton v. Alsip, 79 Cal. 402.)

375. Where a contract for the sale of land provided for a forfeiture of all right to a conveyance, and that the purchase money paid should be as liquidated damages, in case of nonfulfillment of the terms of future payment by the purchaser, and it appears that full payment of the residue of the purchase money was tendered and a deed demanded ten months after maturity, and that the vendors refused to accept the tender, or to return the purchase money paid, and elected to rescind the agreement, the purchaser may maintain an action to recover from the vendors the installment of purchase money paid. (Drew v. Pedlar, 87 Cal. 443.) Cited 90 Cal. 179.

376. Where the vendor, on tender of the balance of the purchase price, refuses or neglects to convey, his default authorizes the vendee to treat the contract as at an end, and to recover the money which has been paid; and it is not necessary, in an action to recover the purchase money, to allege or show that plaintiff gave defendants notice of rescission, or that he demanded a return of the amount already paid. (Chatfield v. Williams, 85 Cal. 518.)

377. When contract is abandoned or rescinded by parties the vendee, though in default, may recover back installments of the purchase money paid, less the actual damage to the vendor occasioned by his breach of the contract. (Phelps v. Brown, 95 Cal. 572.) Cited 96 Cal. 105; 97 Cal. 337; 99 Cal. 261, 683; 100 Cal. 78.

378. W. entered into a contract in writing with S., agreeing to convey to him a lot of land, and in the contract warranted the title to be "indisputable and satisfactory, or no sale." S., at the same time, let W. have a sum of money on account of the purchase. Held, that, if the title was good and valid, W. could not recover back the money from S. (Winter v. Stock, 29 Cal. 407.) Cited 94 Cal. 290.

Recovery back of purchase price where title defective. See ante, VIII, 9.

379. A purchaser under an executory contract for the sale and purchase of land is not entitled, after his default in the payment of installments of the purchase price due, to recover back the money paid thereon, merely because his vendors have conveyed the land to a third party. (Joyce v. Shafer, 97 Cal. 335.)

380. A conveyance to third parties by a vendor of land contracted to be sold to a purchaser does not of itself constitute a rescission or abandonment of the contract by the vendor, or a breach of his contract; and a complaint in an action to recover back purchase money paid, alleging a rescission of the contract merely by reason of sales by the vendor to third parties, who took possession as owners thereof, and made large and lasting improvements thereon does not state a cause of action; but the defect in the complaint is supplied where the answer avers that the defendant treated the contract as rescinded and

sold the land to other parties. (*Shively v. Semi Tropic Land and Water Co.*, 99 Cal. 259.)

381. A common law count for money had and received is proper in an action to recover a deposit of money wrongfully obtained from the plaintiff by the defendants, and which they wrongfully refused to pay the plaintiff upon demand. (*Dashaway Assn. v. Rogers*, 79 Cal. 211.)

382. The contract having come to an end by the mutual failure of both parties to perform, the money so paid "as a forfeit" remains in the hands of the vendor as money had and received to the use of the purchaser, subject to be recovered by him, less the amount of damages which the vendor may recoup for the failure of the purchaser to complete the purchase. (*Cleary v. Folger*, 84 Cal. 316.)

Cited 95 Cal. 575, 576; 96 Cal. 105; 97 Cal. 337; 99 Cal. 261, 683.

383. An action to recover back purchase money paid under an executory contract for the sale of land is based upon the theory that the contract has ceased to exist, and that the money paid may be recovered for the use of the person who paid it, and does not arise under the contract of sale; and it seems that an assignment by the purchaser of the contract of sale does not carry with it the right to maintain an action to recover back money paid thereon by the assignor on the ground of an abandonment or rescission of the contract. (*Joyce v. Shafer*, 97 Cal. 335.)

Cited 99 Cal. 261.

384. When a vendor assumes to convey land of which he represents himself the owner, but of which he has no title, and receives a deposit of the purchase money for the joint benefit of himself and another person for whom he acted as agent, and who received a share of the deposit, both are jointly liable as principals in an action to recover back the deposit, and it is immaterial that plaintiff did not know of the connection of the other person with the transaction at the time the contract was made. A complaint against such persons jointly to recover the money is not demurrable for misjoinder of causes of action or of parties defendant. (*Dashaway Assn. v. Rogers*, 79 Cal. 211.)

385. In an action to recover money paid under a contract of defendants to cause certain land to be conveyed to the plaintiff, where the complaint alleged that the plaintiff, at the time named in the contract, tendered to defendants the purchase money due, with interest, and demanded that defendants cause the lands to be conveyed to him, but that they refused to convey the same or return to plaintiff the money paid by him, and the answer failed properly to deny the allegation of tender, whereupon plaintiff moved for judgment upon the pleadings, defendants should be permitted to amend their answer by denying that any tender was made, and it is error to refuse to allow such amendment, where it appeared that the case was ready for trial nearly five months after the answer was filed, that no demurrer or motion to strike out was filed, and no notice that judgment on the pleadings would be asked was given until the parties announced themselves ready for

trial, and there was an attempt to deny the allegation as to tender, and there is nothing in the record to show that the application to amend the answer was not made in good faith. (*Chatfield v. Williams*, 85 Cal. 518.)

386. If the vendors do not deny the allegation of the complaint that they elected to rescind the contract upon the breach thereof by the plaintiff, and do not seek to recoup any actual damages for the breach from the amount of the purchase money received, or deny any material averments of the complaint, the plaintiff is entitled to judgment on the pleadings for the recovery of the sum paid to the vendors. (*Drew v. Pedlar*, 87 Cal. 443.)

387. In an action by the vendee to recover back a deposit made under a contract for the purchase and sale of land, by the terms of which the vendor was to convey the land as soon as he received a deed, and, in case of a defective title, to return the deposit made, where the complaint alleged a demand by the plaintiff for a conveyance, and a refusal by the defendant to convey, on the ground of an alleged defective title, an answer denying such allegations, and alleging that the defendant expects to be and will be able soon to obtain the legal title, raises material issues, which the defendant is entitled to have tried, and a judgment on the pleadings in favor of the plaintiff is erroneous. (*Widmer v. Martin*, 87 Cal. 88.)

388. In an action to recover back the money under a contract for the sale of land which has come to an end by the mutual failure of both parties to perform, a judgment rendered upon a cross-complaint for a specific performance of the contract, against the defendant's right to compel such performance, by reason of the mutual failure of the parties to perform dependent covenants, is not competent evidence in favor of the plaintiff, as it does not tend to determine the question as to what was to become of the money designated in the contract "as a forfeit." (*Cleary v. Folger*, 84 Cal. 316.)

389. In order for a vendor to recoup damages for vendee's failure to perform, they must be specially pleaded in the action to recover the money received. (*Cleary v. Folger*, 84 Cal. 316.)

Cited 87 Cal. 450.

Recovery back of deposit. See ante, 274, 275.

Recovery of deposit where offer withdrawn before acceptance. See ante, I, 2.

Vendee cannot recover amount paid because contract signed by vendor only. See ante, I, 1.

Lien of purchaser for deposit. See ante, XI, 4, e.

Action for deposit, jurisdiction over. See *Justices of the Peace*, IV, 5, e.

Real estate agent, liability of for deposit. See *Agency*, VI, 1.

Installments, recovery back of on rescission. See *Rescission of Contracts*, 139, et seq.

XII. Subsequent Purchasers from Vendor; Rights of Assignees of Vendee.

390. Until payments are made title is in grantor, and would pass to a subsequent pur-

chaser after the time fixed for the payments. (*Brannan v. Mesick*, 10 Cal. 95.)

391. When a deed contains a clause that the grantee shall reconvey a portion of the premises to the grantor within one year, to be selected by the grantor, and the grantor then conveys to a third party his interest in the land, the right of the grantor to make the selection and to receive the deed is gone, and passes to the purchaser from him. (*Hearst v. Pujol*, 44 Cal. 230.)

392. A subsequent purchaser from the vendor, with notice of the agreement on the part of his grantor to convey the title, holds the same in trust for the vendee, and is bound to convey it to him upon payment of the balance of the purchase money due by the agreement. (*Day v. Cohn*, 65 Cal. 508.)

393. Notice to a second vendee of land before his payment for the land, that his vendor had not fully paid the original vendor, is equivalent to a notice before purchase, and he is affected pro tanto as to the amount remaining unpaid by his vendor, and if he pays such amount he can enforce repayment from his vendor by deducting it from the purchase price or valuation of the land sold to him. (*Combination Land Co. v. Morgan*, 95 Cal. 548.)

394. One taking land with actual notice that the grantor had executed a contract of exchange, takes it charged with all the rights, liabilities, and duties which at that time rested upon his grantor. (*Gilbert v. Sleeper*, 71 Cal. 290, 294.)

395. Where one contracting for the purchase of land received the possession with a bond for a deed upon payment of the purchase money, and containing a stipulation that the purchaser was in possession and entitled to the rents and profits, held, in an action of ejectment against the vendee remaining in possession by a subsequent purchaser from the vendor with notice, that the defendant should prevail without reference to the payment or nonpayment of the purchase money. (*Willis v. Wozencraft*, 22 Cal. 607.)

Cited 32 Cal. 59; 59 Cal. 589; 64 Cal. 18; 65 Cal. 509; 79 Cal. 438.

396. The Central Pacific Railroad Company issued and distributed a circular, inviting people to settle and make improvements upon its lands, and promising those that should do so that they should be preferred as purchasers when the lands should be offered for sale. The defendant settled upon the land in controversy, and filed his application to purchase the same in the office of the company, as directed by the circular, and made valuable improvements thereon. The company, without notifying the defendant that the price of the lands had been fixed, and without giving him the option to purchase, sold the land to the plaintiff, who took with notice of the defendant's equities. Held, in an action of ejectment, wherein the defendant filed a cross-complaint, setting up the above facts, and praying that the plaintiff be compelled to convey to him, that the offer of the company, and the acceptance by the defendant, created a valid contract, and that the plaintiff took

the legal title impressed with a trust in favor of the defendant, and should be compelled to convey the same to him. (*Boyd v. Brinckin*, 55 Cal. 427.)

Cited 70 Cal. 485; 8 Mont. 207; distinguished 67 Cal. 620; 74 Cal. 560.

397. The action was brought by the plaintiffs, suing as husband and wife, to compel the defendant Davis to assign a contract for the purchase of certain land owned by the Central Pacific Railroad Company, and to require the company to convey the land to them. The plaintiffs claimed to have a prior right to purchase the land under an alleged contract entered into by the company with the wife, which contract was founded upon an alleged acceptance of and compliance with the conditions of a circular issued by the company. The court found that the company had issued a circular in which it invited persons to settle upon and improve its lands, and promised that those so doing, and who should file applications therefor, should be preferred purchasers. The court further found that no application to purchase had been filed by the wife, and that she never settled upon or improved the land, as required by the circular. Held, that the findings were sustained by the evidence. (*Taylor v. Central Pac. R. R. Co.*, 67 Cal. 615.)

Distinguished 74 Cal. 564.

398. On the trial of the action, the plaintiffs offered to prove certain declarations made by the officers of the company in reference to a sale of the land. It did not appear from the offer whether the declarations were made before or after the execution of the contract for the purchase by the defendant Davis, nor was he shown to have been present at or to have had any knowledge of the declarations. Held, that the evidence was properly rejected. (*Taylor v. Central Pac. R. R. Co.*, 67 Cal. 615.)

399. The defendant Davis testified that at the time of his contract to purchase he had no knowledge that any portion of the land had been inclosed by the plaintiffs, or that they had made any application for the purchase thereof. Held, that the evidence was admissible as tending to show that the defendant had no notice of the alleged equities of the plaintiffs. (*Taylor v. Central Pac. R. R. Co.*, 67 Cal. 615.)

400. The company having failed to answer, its default was entered, and findings and a judgment were subsequently rendered in favor of the defendant Davis. Held, that the company was a trustee, holding the legal title to the land for him, and that if the plaintiffs were not entitled to relief as against him, they could not enforce a deed from his trustee. (*Taylor v. Central Pac. R. R. Co.*, 67 Cal. 615.)

Conveyance to third person before time to convey to purchaser, effect of. See ante, VIII, 4.

401. There is no privity between the vendor and the assignee of the vendee, unless it be by express stipulation. (*Truebody v. Jacobson*, 2 Cal. 269.)

402. The vendor or his assignee is not bound to know every assignee of the vendee, however many. (*Truebody v. Jacobson*, 2 Cal. 269.)

403. An assignee where there is a lien cannot hold possession of the land against the vendor; he must pay or lose the possession; he cannot hold the land and money both. (*Truebody v. Jacobson*, 2 Cal. 269.) Cited 8 Cal. 403; 55 Cal. 41.

Conveyance by vendee of land does not carry action for deceit. See ante, 40.

Subcontractor from vendee, rights where vendor procures release from vendee. See Vendor and Vendee, XI, 3.

Purchaser from vendee, enforcement of lien against. See ante, XI, 4, d.

Assignee of contract of purchase, right of to recover back money paid by assignor. See ante, XI, 6.

Provision against assignment, what does not violate. See Rescission of Contracts, 141.

Deed by vendee of executory interest. See Deeds, 258.

Title obtained by subsequent assignee will not support ejectment, when. See Ejectment, 60.

Creditors of vendee, subrogation of to rights of. See Subrogation, 6.

Lien, assignment, effect on. See ante, XI, 4, b.

XIII. Death of Vendor Before Completion of Contract.

404. If the owner of land contracts to sell the same to another upon the payment of a fixed sum in installments, and the owner dies before the last installment falls due, and the purchaser petitions the probate court for an order requiring his executor to make a conveyance of the land, and the court decrees such conveyance on the payment of the last installment and the expenses of procuring the decree and making the deed, the purchaser must pay such expenses before he can claim a deed. (*Smith v. George*, 52 Cal. 341.)

Death of vendee, and presentation of claim. See ante, 170.

VENIRE.

Special. See Jury and Jurors, IV, 2.

Special, of grand jurors. See Jury and Jurors, XVII, 1.

VENTURA COUNTY.

Under the act of March 16, 1889 (Stats. 1889, p. 232), amendatory to section 162 of the act of March 14, 1883, providing for the division of counties in classes, the county of Ventura, having a population of five thousand and seventy-three, is a county of the forty-first class, and the county assessor of that county is entitled only to the salary provided for assessors in that class of counties, and not to the salary provided for assessors in counties of the class numbered thirty-nine and one-half. (*Donlon v. Jewett*, 88 Cal. 530.)

VENUE.

I. Place of Trial.

1. *Constitution Does not Apply to Pending Actions.*
2. *Right to may be Waived.*
3. *Particular Actions.*

- a. *Distinction Between Transitory and Local Actions.*
- b. *Actions Against Private or Municipal Corporations, or Unincorporated Associations.*
- c. *Actions to Reform Contract or for Breach of Contract.*
- d. *Actions to Dissolve Mining Partnership.*
- e. *Actions to Quiet Title.*
- f. *Actions to Restrain Dumping of Debris, Threatened Injury to Property, or for Diversion of Water.*
- g. *Actions to Abate Nuisance.*
- h. *Actions for Settlement of Trust.*
- i. *Actions to Set Aside Fraudulent Conveyance, or Fraudulent Probate Sale.*
- j. *Actions to Foreclose Lien, Redeem Mortgage, or Declare Deed a Mortgage.*
- k. *Actions to Condemn Land.*
- l. *Miscellaneous Actions.*

II. Change of Venue.

1. *Power of Courts to Change.*
2. *Construction of Code; Duty and Discretion of Judge.*
3. *In Criminal Cases; Consent of Defendant; Special Act Authorizing.*
4. *Events at Commencement of Action Determine Right.*
5. *Where Complaint States Two Causes of Action.*
6. *Grounds of.*
 - a. *Want of Fair and Impartial Trial.*
 - b. *Prejudice or Disqualification of Judge.*
 - c. *Residence of Defendant; Convenience of Witnesses as Ground of Granting or Refusing.*
7. *Practice on Motion.*
 - a. *Application for Change, Duty to Make, Time of Making and How Made.*
 - b. *Who to Join in.*
 - c. *Demand and Notice.*
 - d. *Affidavits in Motion.*
 - e. *Evidence Outside Record.*
 - f. *Disqualification of Judge or Jurisdiction of Court to Which Transfer Made.*
 - g. *Postponing Hearing.*
 - h. *Judgment or Order on; Conclusiveness of; Renewing Motion; Review on Mandamus; Appeal.*
 - i. *Transmission of Papers; Costs of Motion.*
 - j. *Power of Court to Whom Transfer Made; Trial; Certifying Result Back.*
 - k. *Second Change of Venue.*

Removal of causes. See Removal of Causes. Acknowledgments, showing venue in. See Acknowledgments, III, 2.

Instructions as to. See Criminal Law XVIII, 18, n.

Motion to change, remedy by appeal is not plain and speedy remedy. See Prohibition, 24.

Indictment or information, venue in. See Criminal Law, XIV, 7, d.
Evidence as to place of crime. See Criminal Law, XVIII, 14, k.
Embezzlement, where committed. See Criminal Law, XXI, 19, b.

I. Place of Trial.

1. Constitution Does not Apply to Pending Actions.

1. The provision of the constitution of 1879, requiring all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate to be commenced in the county in which the real estate is situated, does not apply to actions pending when the constitution went into effect. (*Watt v. Wright*, 66 Cal. 202.)

2. Right to may be Waived.

2. The right to have a cause tried in a particular county is one which a party may waive, either expressly or by implication. (*Pearkes v. Freer*, 9 Cal. 642.)

Cited 28 Cal. 246; 61 Cal. 75; 3 Nev. 406; 8 Nev. 186.

3. The right to try particular cases in particular counties is mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed, by motion to change the venue, at the proper time and place. (*Watts v. White*, 13 Cal. 321.) Cited 2 Col. App. 105; 9 Utah, 445.

Waiver, what constitutes. See post, 116, 133, 147.

3. Particular Actions.

a. Distinction Between Transitory and Local Actions.

4. In the United States generally and particularly in this state, the distinction between transitory and local actions, so far as any consequence attends it, depends entirely upon statutory law, and does not coincide with or depend upon the distinction between actions in rem and actions in personam. (*Fresno Nat. Bank v. Superior Court*, 83 Cal. 491.)

b. Actions Against Private or Municipal Corporations, or Unincorporated Associations.

5. Although the provisions of the constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise, yet the express words of section 16 of article XII providing where a corporation "may be sued" make that section merely permissive, and not mandatory. The constitution must be construed in harmony with itself; and it is only by construing that section as permissive, and not mandatory or exclusive, that it can be held not to conflict with section 5 of article VI, regulating the venue of real actions and the jurisdiction of the superior courts. (*Fresno Nat. Bank v. Superior Court*, 83 Cal. 491.)

6. Section 16 of article XII of the state constitution is not in conflict with any provision of the fourteenth amendment of the constitution of the United States. (*Lewis v. Southern Pac. Coast R. R. Co.*, 66 Cal. 209.)

7. The principal place of business of a corporation is its residence within the meaning of that term as used in section 20 of the Practice Act, fixing the place of trial. (*Jenkins v. California Stage Co.*, 22 Cal. 537.) Cited 65 Cal. 601, 602; 71 Cal. 489-91; 83 Cal. 497.

8. The principal place of business of a corporation is not its residence within the meaning of section 395 of the Code of Civil Procedure regulating the place of trials of actions. (*California etc. R. R. Co. v. Southern Pac. R. R. Co.*, 65 Cal. 394.) Cited 71 Cal. 490; 83 Cal. 497.

9. The place of residence of a corporation is in the county where its principal place of business is situated, and that is the proper county, within the meaning of section 395 of the Civil Code, where an action against the corporation for an accounting, and a recovery of shares of its capital stock, alleged to have been illegally sold for delinquent assessments, must be tried, subject, however, to the other grounds of this and the following section, and the provisions of section 16 of article XII of the constitution, and to the power of the court to change the place of trial as provided in the code. (*McSherry v. Pennsylvania etc. G. Min. Co.*, 97 Cal. 637.)

Affidavits as to residence of corporations. See post, 98.

Sham allegations in complaint as to residence. See post, 98.

10. Action against railroad corporation to recover damages for injuries sustained may be tried in the county where the injury was inflicted, and the defendant corporation has no right to have the place of trial changed to the county where it has its principal place of business. (*Lewis v. South Pac. Coast R. R. Co.*, 66 Cal. 209.) Cited 83 Cal. 497.

11. Corporation may be sued in county where its breach of obligation occurred, as well as in the county where it has its principal place of business; and where a railroad company is sued for damages resulting from its wrongful refusal to carry the plaintiff's lumber to market, and there is nothing in the body of the complaint to show where the breach of the obligation occurred, the action is presumptively brought in the proper county, and it devolves upon the railroad company to show that the breach did not occur in that county, to entitle it to a change of venue to the county where it has its principal place of business. (*Chase v. South Pac. Coast R. R. Co.*, 83 Cal. 468.)

12. Action against insurance corporation organized under laws of this state may be brought and tried in the county where the contract of insurance was completed, and the corporation defendant is not entitled to a change of the place of trial to the county where it has its principal place of business, if the contract was not completed therein, although the policy was there issued. (*Yore v. Bankers' etc. Life Assn.*, 88 Cal. 609.)

Action against corporation to condemn land. See post, I, 3, k.

Action against corporation to redeem from

deed absolute intended as mortgage. See post, I, 3, j.

13. Foreign corporation doing business here has no residence within the state, and an action against it may be tried in any county designated by the plaintiff in his complaint. (*Thomas v. Placerville G. Q. Min. Co.*, 65 Cal. 600.)

14. Under section 16 of article XII of the constitution an association of persons organized for a particular purpose, although not formally a corporation, may be sued for negligence in the county where its liability arose. (*Kendrick v. Diamond Creek Consolidated Gold Min. Co.*, 94 Cal. 137.)

15. A municipal corporation is a resident of the county wherein its territory lies and all its constituents reside; and it has a right, when an action which should have been brought against it in the county of its residence is brought outside of the county, to demand a transfer of the cause to the county of its residence. (*Buck v. Eureka*, 97 Cal. 135.)

16. It is the settled law of this state that a domestic trading corporation resides in the county where it has its principal place of business; and a municipal corporation, though not capable of having a residence in the restricted sense of the word, occupies a position in regard to residence as favorable as an ordinary trading corporation. (*Buck v. Eureka*, 97 Cal. 135.)

17. Section 16 of article XII of the constitution, which provides for the place of trial of actions against corporations, relates exclusively to private corporations, and has no application to a suit against a public municipal corporation. (*Buck v. Eureka*, 97 Cal. 135.)

Corporations, venue of actions against. See Corporations, XI, 1.

Action against corporation. See Prohibition, 53.

c. Actions to Reform Contract or for Breach of Contract.

18. An action for the reformation of a contract of sale of land must be tried in the county where the land is situated, and cannot be changed therefrom to the place of the defendant's residence. Under section 392 of the Code of Civil Procedure, an action for the determination in any form of a right or interest in real estate must be tried in the county where the land is situated. (*Franklin v. Dutton*, 79 Cal. 605.)

19. Action in justice's court to recover damages for breach of contract may be brought either in the township or city where the contract was to be performed, or in which the defendant resides. If brought in the former place, the summons may be served in the county in which the defendant resides. (*Cole v. Fisher*, 66 Cal. 441.)

d. Actions to Dissolve Mining Partnership.

20. Section 392 of the Code of Civil Procedure does not require that the place of trial of an action to dissolve a mining copartnership, and for an accounting between the partners,

should be the county in which the mining claims are situated, when the determination of the respective estates or interests of the partners in such realty is not involved in the action. (*Clark v. Brown*, 83 Cal. 181.)

Actions concerning mining claims. See Mines and Mining, X, 2.

e. Actions to Quiet Title.

21. Where one of the purposes of an action is to quiet an adverse claim to real estate, the action must be originally brought in the county where the land is situated; and where the action is brought in a court outside of such county, the court has no jurisdiction over the case, and this is an objection which cannot be waived, but the action should be dismissed for want of jurisdiction. (*Fritts v. Camp*, 94 Cal. 393.)

22. An action to quiet title or to determine an adverse claim to an easement in the waters of a spring situated upon the lands of the defendant, and to a right of way over the defendant's land for the purpose of conducting such waters to the premises of the plaintiff, and to obtain an injunction against interference with plaintiff's pipes from such spring, is a real action, which must be brought in the county where the subject matter of the action is situated, and a demurrer to the complaint in such action, when brought in another county, upon the ground that the court has no jurisdiction of the subject matter of the action, should be sustained and the action dismissed. (*Pacific Yacht Club v. Sausalito Bay Water Co.*, 98 Cal. 487.)

Action to restrain dumping of mining debris is in effect suit to quiet title. See post, I, 3, f.

f. Actions to Restrain Dumping of Debris, Threatened Injury to Property, or for Diversion of Water.

23. Action to enjoin defendants from dumping mining debris into a creek above the plaintiff's land, to his injury, under an adverse claim of an easement to flow and deposit the debris upon the plaintiff's premises, which the complaint alleges to be without right, and which the answer seeks to justify, is in effect an action to quiet the plaintiff's title as against the defendant's claim of the easement, within the meaning of section 5 of article VI of the constitution, requiring actions to quiet title to real estate to be commenced in the county in which the real estate, or any part thereof affected by the action, is situated. (*Fritts v. Camp*, 94 Cal. 393.)

24. An action to restrain a threatened injury to real estate is an action for "an injury to real property," within the meaning of subdivision 1 of section 392 of the Code of Civil Procedure, and must be tried in the county where the real estate is situated. (*Drinkhouse v. Spring Valley W. W.*, 80 Cal. 306.)

25. Appeal from order denying defendant's motion for change of place of trial. The action was for the diversion of water from the plaintiff's ditch, and was commenced in Tulare county. The defendant's principal and only place of business was in Fresno county.

The plaintiff's ditch is situated partly in Fresno and partly in Tulare county, the head of the ditch and the point of diversion of the water by the defendant being in the former county. Held, the order denying the motion was correct. The right of the plaintiff, as stated in the complaint, to have the water flow in the river to the head of its ditch is an incorporeal hereditament appurtenant to the ditch, and is coextensive with plaintiff's right to the ditch itself. The subject of the action is, therefore, situated in both counties, and the action might have been brought in either. The injury is not confined to that part of the ditch in Fresno county. (*Lower Kings River Water Ditch Co. v. Kings River and Fresno Canal Co.*, 60 Cal. 408.) Cited 77 Cal. 403; 91 Cal. 398; 1 Wash. 590.

g. Actions to Abate Nuisance.

26. An action to abate a nuisance which causes injury to real property must be tried in the county where the property injured by the nuisance is situated, subject to the power of the court to change the place of trial; and whether the change should be made depends upon the facts of the case. (*City of Marysville v. North Bloomfield Gravel Min. Co.*, 66 Cal. 343.)

h. Actions for Settlement of Trust.

27. The provisions of section 5, article IV, of the constitution have no application to an action for the settlement of a trust in relation to real and personal property. Such an action is not required to be brought in the county where the real property is situated. (*Le Breton v. Superior Court*, 66 Cal. 27.) Cited 88 Cal. 578; 100 Cal. 16; distinguished 73 Cal. 185.

i. Actions to Set Aside Fraudulent Conveyance, or Fraudulent Probate Sale.

28. The provision of the constitution requiring actions for the enforcement of liens upon real estate to be commenced in the county where the real estate is situated does not apply to an action in the nature of a creditor's bill, brought to set aside a conveyance made by an execution debtor on the ground of fraud. (*Beach v. Hodgdon*, 66 Cal. 187.)

29. An action to set aside a fraudulent sale of land by an administrator, and to annul the order of sale, for want of jurisdiction, and to enjoin the disposition of the proceeds of the sale, involves the determination of a right or interest in real property, and is to be tried where the real property is situated, rather than where the defendants, or some of them, reside at the commencement of the action, although the order of sale was made in the county of the defendant's residence. (*Sloss v. De Toro*, 77 Cal. 129.)

j. Actions to Foreclose Lien, Redeem Mortgage, or Declare Deed a Mortgage.

30. The superior court of a county in which it is sought to foreclose a lien upon real property situated in another county has no jurisdiction over the case, and no authority to enter judgment therein, and a judgment enforcing the lien will be reversed upon appeal,

for want of jurisdiction. (*Urton v. Woolsey*, 87 Cal. 38.) Cited 94 Cal. 398.

31. An action to foreclose a vendor's lien must be commenced in the county in which the land, or some part thereof, is situated. (*Urton v. Woolsey*, 87 Cal. 38.)

32. In actions to enforce lien of tax, the county where the property on which the lien exists is situated is the place of trial, rather than that where the defendant resides. (*People v. Plumas Eureka Min. Co.*, 51 Cal. 566.)

33. An action to declare a conveyance absolute upon its face a mortgage, to compel a reconveyance of the real and personal property included therein, and for an accounting and personal judgment thereon, must be tried in the county in which the defendant resides, and he is entitled to have the place of trial changed to such county, although a portion of the property sought to be reconveyed, and in respect to which the accounting is sought, is land situated in the county in which the suit was brought. (*Smith v. Smith*, 88 Cal. 572.)

Cited 100 Cal. 16.

34. Under section 392 of the Code of Civil Procedure, an action against a corporation to have a deed absolute on its face declared to be a mortgage, and to redeem the same, is an action to determine a right or interest in real estate, and is properly brought in the county in which the real estate is situated. (*Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182.) Cited 88 Cal. 578.

35. In an action against a corporation to redeem a mortgage the liability or obligation of the corporation to grant a redemption will be deemed to have arisen, within the meaning of section 16 of article XII of the constitution, in the county in which the mortgaged premises are situated, when the only allegation in the pleadings as to the residence of the mortgagors or the place where the mortgage was made is a recital in the mortgage that the mortgagors were residents of that county, and a certificate of a notary of that county annexed to the mortgage that the same was acknowledged before him. (*Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182.)

Foreclosure suit, venue of. See Mortgages, XIX, 6.

k. Actions to Condemn Land.

36. In an action against corporation to condemn lands for the use of a railroad the county in which the lands are situated is the proper county for the commencement and trial of the action. (*California etc. R. R. Co. v. Southern Pac. R. R. Co.*, 65 Cal. 409.)

37. The principal place of business of a corporation is not its residence, within the meaning of section 395 of the Code of Civil Procedure, regulating the place of trial of actions. There is no law defining its residence, and in an action against a corporation to condemn lands, under the provisions of the code relating to eminent domain, the place of trial is the county where the lands sought to be condemned are situated. (*California etc. R. R. Co. v. Southern Pac. R. R. Co.*, 65 Cal. 394.) Cited 71 Cal. 490; 83 Cal. 497.

1. Miscellaneous Actions.

Libel, construction of constitution in reference thereto. See Criminal Law, 2481.

Actions against public officers. See Mandamus, 166.

In action for false imprisonment. See False Imprisonment, 4.

Mandamus to compel execution of sheriff's deed. See Mandamus, 166.

Action for purchase price of land, venue of. See Vendor and Vendee, XI, 5, b.

Action for divorce, venue in. See Marriage and Divorce, III, 4, d.

Change of venue on motion for new trial. See New Trial, IX, 2.

II. Change of Venue.

1. Power of Court to Change.

38. Causes may be removed from one district or county to another county or district, in the manner provided by statute. (Reyes v. Sanford, 5 Cal. 117.)

39. The probate court of a county has jurisdiction to change the place of trial of an issue of fact to the probate court of another county. (People ex rel. Burdell v. Almy, 46 Cal. 245.)

2. Construction of Code; Duty and Discretion of Judge.

40. The provisions of section 396 of the Code of Civil Procedure, relating to change of the place of trial, should be liberally construed, and a substantial compliance with its terms is sufficient. (Buck v. Eureka, 97 Cal. 135.)

41. Peculiar condition of things in California is unfavorable to change of the place of trial, or delays in the administration of justice. These applications often result in a loss of all the rights involved. (Sloan v. Smith, 3 Cal. 410.)

42. An application to change the place of trial in a criminal case is addressed to the sound discretion of the court, and is to be disposed of in furtherance of substantial justice. (People v. Congleton, 44 Cal. 92.) Cited 53 Cal. 567; 76 Cal. 339; 80 Cal. 298.

43. The granting a change of venue is discretionary with the court below, subject to review only in cases of gross abuse. (Sloan v. Smith, 3 Cal. 410.) Cited 22 Cal. 131; 23 Cal. 378; 68 Cal. 479.

Appellate court will not interfere unless discretion abused. See post, 60.

44. Plaintiff may have place of trial changed upon proper showing made under the twenty-first section of the Practice Act, and it is error in the court to refuse it. (Grewell v. Walden, 23 Cal. 165.)

45. Court below may exercise its discretion on an application to change the place of trial on account of the convenience of witnesses, and, where there is a conflict in the affidavits, its ruling will not be disturbed unless it appears that this discretion has been abused. (Hanchett v. Finch, 47 Cal. 192.) Cited 48 Cal. 461; 56 Cal. 592; 68 Cal. 479; 78 Cal. 269.

Discretion of judge on motion to change for convenience of witnesses, when abused. See post, 124.

46. A motion for a change of the place of trial, on the ground of the convenience of witnesses, and because a fair and impartial trial cannot be had in the county in which the action is brought, is addressed to the sound discretion of the court; and its action thereon will not be reversed on appeal, unless it appears that this discretion has been abused, or injustice has been done. (Avila v. Meherin, 68 Cal. 478.)

47. An application to change the venue in a criminal action, on the ground that a fair and impartial trial cannot be had in the county where the indictment is found, is addressed to the sound discretion of the court, and its decision on the motion will not be disturbed, if such discretion is not abused. (People v. Perdue, 49 Cal. 425.)

Change of venue because of popular prejudice or want of fair trial. See post, II, 6, a.

48. Where suit for real estate is brought in the wrong county, there is no discretion in the court, and the change of venue is a matter of right. (Watts v. White, 13 Cal. 321.) Cited 2 Col. App. 105; 9 Utah, 445.

49. Though the statute (Pen. Code, sec. 1035) requires that the court must be "satisfied" of the truth of the representation of the prisoner, the granting or refusing of the application is not a matter of mere discretion; the decision must find warrant in the facts disclosed by the record. (People v. Yoakum, 53 Cal. 566.)

Change of venue in criminal case. See post, II, 3.

Section authorizing change in criminal case without defendant's consent, construction and constitutionality. See post, II, 3.

Change of, on transfer of cause from justice's to superior court. See Justices of the Peace, 61.

Change of venue on appeal from justice's court to superior court. See Appeals, 3354, 3355.

3. In Criminal Cases; Consent of Defendant; Special Act Authorizing.

50. Jurisdiction to change place of trial of criminal case is special, and can be employed only in the case mentioned in section 1033 of the Penal Code, and must be based upon the application in writing, asking for the removal, on the ground that the defendant cannot have a fair and impartial trial in the county where the indictment or information is pending. Where the judge is disqualified, section 71 of the Code of Civil Procedure provides a mode of securing the attendance of another judge. Held, accordingly, that an order changing the place of trial in a criminal case, on the ground of the disqualification of the judge, was without jurisdiction, and void. (People v. McGarvey, 56 Cal. 327.) Distinguished 79 Cal. 155.

51. Subdivision 2 of section 1033 of the Penal Code, authorizing a change of the place of trial of a criminal action to another county, upon application of the district attorney, without the consent of the defendant, where no jury can be obtained for the trial of the defendant in the county where the action is

pending, is unconstitutional and void. (*People v. Powell*, 87 Cal. 348.)

52. The superior court of another county than that in which the crime was committed has no jurisdiction to try the case, where the venue was changed to such county upon application of the district attorney without the consent of the defendant. (*People v. Powell*, 87 Cal. 348.)

53. If it be conceded that subdivision 2 of section 1033 of the Penal Code is valid, it must be strictly construed and strictly pursued; and an application on the part of the district attorney showing merely that a fair and impartial jury cannot be obtained therein, and not showing that all legal means had been exhausted to procure a jury, and that no jury can be obtained therein, is insufficient. (*People v. Powell*, 87 Cal. 348.)

54. The legislature has the constitutional power to pass a special law directing a court to transfer an indictment for murder pending therein to another district for trial. (*People ex rel. Smith v. Judge of Twelfth District*, 17 Cal. 547.)

Cited 20 Or. 501.

55. The legislature, as representative of the state, who is party to the record, may consent to change of venue in a criminal case, upon the application of the accused. (*People ex rel. Smith v. Judge of Twelfth District*, 17 Cal. 547.)

Application is addressed to sound discretion of court. See ante, II, 2.

Change of venue because of bias or disqualification of judge. See post, II, 6, b.

Discretion where change asked because fair trial cannot be had. See ante, II, 2.

4. Events at Commencement of Action Determine Right.

56. Right to change of venue is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action. (*Remington Sewing Machine Co. v. Cole*, 62 Cal. 311, 318.)

Cited 79 Cal. 33; 82 Cal. 629; 11 Mont. 221.

Substituted defendant, right to move for change of venue. See post, 104.

5. Where Complaint States Two Causes of Action.

57. If a complaint states two causes of action, as to one of which the defendant has a right to a change of venue, but not as to the other, the case will be transferred. (*Ah Fong v. Stearns*, 79 Cal. 30.)

Cited 100 Cal. 16.

58. If the plaintiff frames his complaint with a double aspect, in one of which the defendant has a right to a change of venue, but not in the other, the complaint will be construed against the pleader, and the case will be transferred. (*Ah Fong v. Stearns*, 79 Cal. 30.)

59. An action must be wholly local in its nature, under the terms of section 392 of the Code of Civil Procedure, to entitle it to be tried in a county other than that of the residence of the defendant; and if real and personal actions are joined in the same complaint,

the case falls within section 395 of the same code, and must be tried in the county of the residence of the defendant. (*Smith v. Smith*, 88 Cal. 572.)

Cited 100 Cal. 16.

6. Grounds for.

a. Want of Fair and Impartial Trial.

60. It is ground for a change of the place of trial of a prisoner accused of homicide when, at the time of trial, the public mind is wrought into frenzy against the accused, and the public press sustains enraged citizens in unlawful attempts to overcome the officers of the law, whose superior force alone prevents mob execution. But where such fact existed only during a few days after the homicide, and the public excitement does not prevail at the time of the application for change of venue, the application is addressed to the sound discretion of the court; and the appellate court will not interfere unless the record shows a clear case of abuse of discretion. (*People v. Goldenson*, 76 Cal. 328.)

Cited 80 Cal. 298.

61. Where one hundred citizens united in employing counsel to prosecute the defendant, held, to be a sufficient ground for a change of venue. (*People v. Lee*, 5 Cal. 353.)

Cited 3 Nev. 434; criticised 6 Cal. 155; doubted 21 Cal. 265.

62. The fact that thirty or forty persons in the community, upon being solicited, have contributed small sums to defray the cost of employing a lawyer to assist the district attorney in the prosecution of a criminal action does not show such a general prejudice in the citizens of the county as to require the granting of a change of venue. (*People v. Graham*, 21 Cal. 261.)

63. When an issue of fact is joined in a probate court as to the competency of a testator to make a will, and three trials had at great expense, in which the juries disagreed, have shown that an impartial jury cannot be obtained, it is not error to change the venue. (*People ex rel. Burdell v. Almy*, 46 Cal. 245.)

64. The affidavit of the accused that he cannot have an impartial trial in the county where he is indicted is not alone sufficient to authorize a change of the place of trial. (*People v. Graham*, 21 Cal. 261.)

Cited 53 Cal. 568; 80 Cal. 298; 3 Nev. 462.

65. A court is not compelled to change the venue in a criminal case on the unsupported affidavit of defendant that he cannot have a fair and impartial trial because he is the victim of a general prejudice in the county. Nor does a failure to get a jury on the first day of trial, because of opinions formed, so confirm the affidavit of defendant as to make it error to refuse to change the venue upon a renewal of the application. The court is to exercise a reasonable discretion as to a change. (*People v. Mahoney*, 18 Cal. 180.)

Cited 53 Cal. 568; 80 Cal. 298; 3 Dak. 125; 5 Mont. 263; 8 Mont. 103; 1 S. Dak. 420.

66. The affidavit should state the facts in such a manner as to enable the court to draw its own inference, whether or not an impartial trial could be had in the particular

case. If it fail in this, it will not warrant the court in changing the venue. (*Sloan v. Smith*, 3 Cal. 410.)
Cited 5 Mont. 264.

67. The requisites of affidavits in support of an application to change the place of trial of a criminal action, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending, pointed out. (*People v. Yoakum*, 53 Cal. 566.)
Cited 65 Cal. 147; 76 Cal. 339; 3 Dak. 126; 5 Mont. 262; 8 Mont. 103.

68. Upon an application in a criminal case to change the place of trial, on the ground that a fair and impartial trial cannot be had in the county where the prisoner was indicted, it is insufficient to state in the affidavit that a jury cannot be selected from a certain portion of the county, who would give the prisoner a fair and impartial trial. (*People v. Baker*, 1 Cal. 403.)
Cited 3 Mont. 56.

69. In an application for a change of the place of trial in a criminal case, where the affidavits set forth merely that in the belief or opinion of the affiants the prisoner could not have a fair trial owing to the popular prejudice against him, and where there was no difficulty in obtaining a jury wholly free from bias or prejudice against the prisoner, it was no abuse of the discretion of the court to deny the motion. (*People v. Congleton*, 41 Cal. 92.)
Cited 3 Dak. 125; 5 Mont. 262; 8 Mont. 103.

70. Affidavits, on which a motion to change the place of trial in a criminal case is founded, must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had in the county in which the indictment was found; a statement, in general terms, that a fair and impartial trial cannot be had, or a statement that the deponent verily believes that a fair and impartial trial cannot be had, on account of popular excitement and false reports, is insufficient. (*People v. McCauley*, 1 Cal. 379.)
Cited 53 Cal. 569; 5 Mont. 263; 8 Mont. 103; 3 Dak. 125.

71. An affidavit for a change of venue in a criminal action made by defendant, which states that he is informed by his counsel and believes that the sheriff and his deputies are biased and prejudiced against him, is insufficient. (*People v. Shuler*, 28 Cal. 490.)
Cited 53 Cal. 567; 1 Ariz. 74; 3 Dak. 125; 5 Mont. 263; 8 Mont. 103.

72. An affidavit for a change of venue in a criminal case, which states upon information and belief that the people of the county are prejudiced against the defendant, is insufficient. (*People v. Shuler*, 28 Cal. 490.)

Application on ground that impartial trial cannot be had, showing required. See ante, 53.

73. An application to the court for subpoenas for witnesses to prove a charge of bias and prejudice as ground for a change of venue, if unsupported by affidavit and resting upon the mere oral statement of defendant's counsel as to what the witnesses have told him, is

not such a legal showing as the court is bound to act upon. Subpoenas need not be issued upon the order of court unless it appears that the clerk has refused to issue them upon application, or that the attendance of witnesses could not be procured; and a legal showing must be made under oath of the facts necessary to call for the action of the court. (*People v. Elliott*, 80 Cal. 296.)

Discretion of court where change asked because impartial trial cannot be had. See ante, II, 2.

b. Prejudice or Disqualification of Judge.

74. The exhibition by a judge of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper, and reprehensible, as calculated to throw suspicion upon the judgments of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground that the judge is disqualified from sitting. The law establishes a different rule for determining the qualification of judges from that applied to jurors. Terry, C. J. (*McCauley v. Weller*, 12 Cal. 500.)
Cited 24 Cal. 35; 69 Cal. 102; 83 Cal. 617; 11 Mont. 19.

75. The bias and prejudice of a judge against the defendant corporation and its president and resident manager is not a ground of disqualification, and will not entitle the defendant to a change of the place of trial. (*Bulwer C. M. Co. v. Standard C. M. Co.*, 83 Cal. 613.)
Cited 11 Mont. 19.

76. Bias or prejudice of the presiding judge is no legal ground for a change of the place of trial of a criminal action. (*People v. Shuler*, 28 Cal. 490.)
Cited 11 Mont. 19.

77. Bias or prejudice on the part of the judge constitutes no legal incapacity to sit on the trial of a cause, nor is it a sufficient ground to authorize a change of the place of trial. (*People v. Williams*, 24 Cal. 31.)
Cited 28 Cal. 495; 69 Cal. 102; 83 Cal. 617; 11 Mont. 19; 15 Nev. 455.

78. The fact alone that the judge, on a previous trial of the same cause, made an erroneous ruling, is no evidence of bias or prejudice in his mind. (*People v. Williams*, 24 Cal. 31.)

79. An affidavit made on application to change the place of trial, which states "that the judge, as the affiant is informed and verily believes, has frequently stated that he believed the affiant guilty of the crime charged in the indictment, and has frequently expressed himself against and adversely to the affiant in connection with said charge," does not merit consideration, as it contains a mere charge upon information and belief, and does not show how the information was obtained or upon what the belief was based. (*People v. Williams*, 24 Cal. 31.)

80. Defendant, indicted in the court of sessions of San Francisco for larceny, moved for a change of venue on his affidavit that the presiding judge of the court was, in 1856, an active member of the "Vigilance Committee,"

which had banished defendant from the state on grounds not connected with the present charge, and that hence he could not have a fair and impartial trial. Held, that the judge was not disqualified to sit on the trial. (*People v. Mahoney*, 18 Cal. 180.)

Cited 24 Cal. 35; 28 Cal. 495; 8 Mont. 103; 3 Nev. 434, 461; 19 Nev. 216; 1 S. Dak. 420.

81. Section 5, article VI, of the constitution does not provide that the actions referred to must be tried, but simply that they must be commenced, in the county in which the land is situated. Section 397 of the Code of Civil Procedure, therefore, which authorizes a change of place of trial when the judge of the court in which the action is brought is disqualified to try the case, is not unconstitutional. (*Hancock v. Burton*, 61 Cal. 70.) Cited 100 Cal. 15.

82. Under section 398 of the Code of Civil Procedure it is the duty of a judge before whom an action is pending, and who is disqualified from acting as such, to transfer the cause without delay to some other court where the like disqualification does not exist. (*Krumdick v. Crump*, 98 Cal. 117.)

83. Judge who is related to either of the parties to an action, within the third degree of consanguinity, is incompetent to try an action between them. (*De La Guerra v. Burton*, 23 Cal. 592.) Cited 24 Cal. 77.

84. If a judge is related to either of the parties to an action by consanguinity or affinity within the third degree, he is disqualified from acting in the case in any matter except in the arrangement of the calendar or regulation of the order of business. Even if no objection is made, he has no right to act, and ought of his own motion to decline to sit as judge. In such case, an order of the judge dismissing the action is void, on the ground of his incapacity to act. (*People ex rel. Carrillo v. De La Guerra*, 24 Cal. 73.) Cited 55 Cal. 72; 19 Nev. 364; 3 Wash. 695.

85. Where a justice is interested in the event of a suit, the statute requires that he should transfer the case before another justice. (*Larue v. Gaskins*, 5 Cal. 507.) Cited 22 Cal. 38.

86. A judge who is a party to an action pending in his court has no power to act in the case, except to make an order transferring it to another court, as prescribed by section 398 of the Code of Civil Procedure. (*Livermore v. Brundage*, 64 Cal. 299.) Cited 94 Cal. 28; 98 Cal. 119; distinguished 79 Cal. 155.

87. Where a motion for a change of venue, made upon the ground of disqualification of the judge because of his alleged interest in the result of the action, is denied by the judge, a statement in an affidavit used upon the motion, to the effect that the affiant was informed and believed that the judge had said he considered himself disqualified from trying any case in which the persons making the motion were parties, is not to be treated as an admission that the judge was not qualified to try the case, merely because the affidavit was not specifically answered or denied, but the action

of the judge in denying the motion must be presumed to be a denial that he was so interested. (*Southern Cal. M. R. Co. v. National Bank of San Bernardino*, 100 Cal. 316.)

88. Where the judge before whom a case is to be tried is not a party to the action nor related to any party thereto and has not been an attorney for either party, the fact that he has commenced an independent action against the plaintiffs upon an entirely different cause of action, it appearing that the judgment in one case would in no way be affected by the judgment in the other, does not show such interest in the action as to disqualify him from trying the cause, and he may properly deny a motion to change the place of trial for such alleged disqualification. (*Southern Cal. M. R. Co. v. National Bank of San Bernardino*, 100 Cal. 316.)

89. A probate judge who has a power of attorney from any of the persons claiming to be heirs of the deceased, authorizing him to receive for them any money or property to which they might be entitled from the estate, and also letters offering him a percentage upon said proceeds coming to said alleged heir, is interested in the estate, and cannot act as judge in any matter pertaining to such estate, except to arrange the calendar or change the venue. (*Estate of White*, 37 Cal. 190.) Cited 19 Nev. 364.

90. When the probate judge is interested in an estate, or in money coming to the heirs therefrom, he has no jurisdiction to act as judge therein, and should grant a change of venue. It is no excuse for refusing a change of venue in such case to say that the judge decided correctly upon the matter before him after refusing such change of venue. (*Estate of White*, 37 Cal. 190.)

91. Judge who has been attorney in a proceeding is disqualified to sit, and should grant a motion to change the place of trial. (*Barnhart v. Fulkerth*, 59 Cal. 130.) Cited 94 Cal. 28.

92. Where, pending the settlement of a statement on motion for a new trial, the term of office of the judge who tried the case expires and one of the attorneys in the action becomes his successor, the party moving for a new trial is entitled, under section 398 of the Code of Civil Procedure, to have the action transferred to an adjoining county, on the ground of the disqualification of the judge before whom the case is pending. (*Finn v. Spagnoli*, 67 Cal. 330.) Cited 94 Cal. 28.

93. A change of the place of trial may be had on the ground that the judge of the court in which the action was brought had received a general retainer from one of the parties. (*Kern Valley Water Co. v. McCord*, *Lux v. Stine Canal Co.*, *Miller v. McCord*, 70 Cal. 646.)

94. Though it is the duty of a superior judge who is disqualified to try an action for any cause to grant a motion to change the place of trial if he entertains the motion in the absence of any other superior judge who is qualified to act, yet if the superior judge who is holding the court at the time the mo-

tion is heard, and who calls it for hearing, is qualified to try the case, and is ready and willing to try it, having been called in for that purpose by the judge who is disqualified, the motion should be denied. (*Upton v. Upton*, 94 Cal. 26.) Cited 98 Cal. 119.

95. Where the uncontradicted affidavits in support of a motion to change the place of trial of an action, for disqualification of the judge, show that the judge had been the attorney for the opposing party in the action, it is the duty of the judge, who knows of his own disqualification, to grant the motion without delay and without entertaining any counter-motion calling for the exercise of judicial discretion, and he is not justified in refusing or neglecting to act on the motion merely because the opposing party files an affidavit tending to show that the convenience of witnesses requires the retention of the case and the calling in of another judge to try it; and, where the judge refuses or neglects to grant the motion, a peremptory writ of mandate will be issued by the appellate court commanding him to grant it. (*Krumdick v. Crump*, 98 Cal. 117.)

Order changing venue in criminal case because of disqualification of judge is void. See ante, 50.

Disqualification of judge. See Judges, I.

Prohibiting judge trying cause where he is disqualified. See Prohibition, 50.

c. Residence of Defendant; Convenience of Witnesses as Ground of Granting or Refusing.

96. Defendant has right to have action tried in county of his residence, except in certain cases specified in the statutes. Field, C. J. (*Loehr v. Latham*, 15 Cal. 418.) Cited 22 Cal. 131, 538; 48 Cal. 461; 61 Cal. 78.

97. Where the action is not one of those mentioned in sections 392 and 393 of the Code of Civil Procedure, and the defendant resides without the county where it has been commenced, it is the right of the defendant to have the place of trial changed, if, at the time he appears and answers or demurs, he files an affidavit of merits and demands in writing that the trial be held in the proper county. (*Watkins v. Degener*, 63 Cal. 500.) Cited 10 Mont. 311; 19 Nev. 443.

98. An allegation in a complaint against a corporation, by one who has been general manager, director, and owner of a majority of its capital stock, that "plaintiff is informed and believes" that the defendant corporation has its principal office in the county in which the action is brought, will be disregarded as a sham allegation, upon a motion to change the place of trial upon the ground that the action was brought in the wrong county, where the affidavit of merits by the president of the corporation, upon which the motion is based, shows that at the time of the commencement of the action, and afterward, the principal and only place of business of the corporation was in the county to which the action is sought to be removed, and no notice of such statement is taken by the plaintiff in his opposing affidavit; and such sham allegation of

the complaint does not raise a conflict of evidence upon the question as to the place of residence. (*McSherry v. Pennsylvania etc. G. Min. Co.*, 97 Cal. 637.)

Defendant sued in wrong county, right to change, what waives. See post, 133.

99. The act of 1858 authorizes suit to be brought in any county designated in the complaint when the residence of defendant is unknown. But to resist the application of defendant to change the place of trial, on the ground that he resides in a different county, plaintiff must show that he used all due diligence to ascertain the residence. (*Loehr v. Latham*, 15 Cal. 418.) Cited 61 Cal. 77.

100. Where one of the defendants resides in the county in which the action is commenced, the action may properly be tried there, and an order refusing to change the place of trial to the county in which other of the defendants reside, will not be disturbed. (*Hirschfeld v. Sevier*, 77 Cal. 448.)

101. The place of trial of an action for damages, commenced in a county in which none of the defendants reside, will be changed to the proper county on the application of the defendants who have been served with process. (*Rathgeb v. Tiscornia*, 66 Cal. 96.) Cited 97 Cal. 642.

102. The right of a defendant to have the place of trial changed to the county of his residence is not affected by the joinder of another defendant who is not a necessary party, and against whom no cause of action is stated. (*Sayward v. Houghton*, 82 Cal. 628.) Cited 10 Mont. 311.

103. By the original complaint in an action in the county of Santa Barbara it appeared that the defendant D. (a resident of San Francisco) was the only defendant against whom the facts alleged would justify judgment. Held, that he was entitled to a change in the place of trial, and that his right thereto could not be taken away by statements in an amended complaint (filed after his demand), setting up a cause of action against the other defendant. (*Buell v. Dodge*, 57 Cal. 645.) Cited 79 Cal. 33; 11 Mont. 221.

104. One who is involuntarily substituted as the sole defendant in an action, under section 386 of the Code of Civil Procedure, is entitled to a change of the place of trial to the county in which he resides, notwithstanding the failure of the original defendant to demand such a change. (*Howell v. Stetefeldt Furnace Co.*, 69 Cal. 153.)

Change of parties during trial, effect on right to change of venue. See post, 105.

105. If a complaint is brought against four defendants, two of whom reside in another county, a subsequent dismissal as to the others does not confer upon the defendants resident in another county the right to have a change of venue. (*Remington Sewing Machine Co. v. Cole*, 62 Cal. 311, 318.)

106. Upon a motion for change of place of trial, on the ground of the residence of the moving parties and the convenience of witnesses, all the defendants must join. (*Pieper v. Centinela L. Co.*, 56 Cal. 173.)

107. On application by defendant to change the place of trial on the ground of residence the plaintiff may resist by showing that the convenience of witnesses and the ends of justice will be promoted by the retention of the cause, and the court may, on a proper showing of such facts, refuse to change the venue. (*Jenkins v. California Stage Co.*, 22 Cal. 537.) Cited 48 Cal. 461; 61 Cal. 77, 78; disapproved 65 Cal. 394.

108. When a defendant moves to change the place of trial to the county where he resides the court should deny the motion, if it appears that the convenience of witnesses requires the cause to be tried in the county where it is pending. (*Hall v. Central Pac. R. R. Co.*, 49 Cal. 454.) Cited 56 Cal. 592.

109. Whether, if the motion of defendant for a change of venue is heard after he has answered, the claim on his part that the suit has been brought in the wrong county must or can be met by one on the part of the plaintiff (if the latter intends to assert such claim) that it will promote the convenience of witnesses and the ends of justice to retain the cause for trial where it is, is a question not necessary to be decided in this case. (*Cook v. Pendergast*, 61 Cal. 72.) Cited 97 Cal. 641; 2 Col. App. 105.

110. When the action is brought in a county other than that in which the defendant resides he has a prima facie right to have the venue changed to the county of his residence, but this right is subject to the power of the court to retain the cause for trial in the county in which it was brought if the convenience of witnesses and ends of justice require it. (*Hanchett v. Finch*, 47 Cal. 192.) Cited 61 Cal. 77.

111. The mere preponderance in number of witnesses on one side is not necessarily decisive of the application. (*Hanchett v. Finch*, 47 Cal. 192.)

112. In an action commenced in Lake county the defendant demurred to the complaint, and moved to change the place of trial to Sonoma county, where he resided. The plaintiff opposed the motion on the ground of the convenience of witnesses. No answer having been filed, held, that the motion could not be resisted on that ground. (*Armstrong v. Superior Court*, 63 Cal. 410.)

113. Where a motion for a change of the place of trial is made upon the filing of a demurrer to the complaint, without filing an answer, the plaintiff cannot, by cross-motion, demand the retention of the action in the county where it is pending on the ground of convenience of witnesses, and that an impartial trial cannot be had in the county to which the action is sought to be transferred. (*McSherry v. Pennsylvania etc. G. Min. Co.*, 97 Cal. 637.)

114. A defendant who demurs to a complaint without answering must demand a change of venue (if he claim it on the ground that the proper county is not designated) before or when he demurs. If his motion to change the place of trial is brought to a hearing before his answer the plaintiff cannot by

cross-motion demand the retention of the action in the county where it is pending, on the ground of the convenience of witnesses. (*Cook v. Pendergast*, 61 Cal. 72.) Cited 11 Mont. 221.

115. The only case in which it can ever be necessary or proper for plaintiff on cross-motion to ask that the action be retained for trial in the county where he has brought it (because of convenience of witnesses, etc.) is the case in which the motion of defendant is upon the ground that the county designated in the complaint is not the proper county. When the motion on part of defendant is made upon the ground that an impartial trial cannot be had, or that the change will promote the convenience of witnesses, or that the judge is disqualified, the plaintiff, without cross-motion, but in response to defendant's motion, may file counter-affidavits. (*Cook v. Pendergast*, 61 Cal. 72.) Cited 63 Cal. 411; 65 Cal. 322, 601.

116. Where a change of venue is asked by defendant on the ground of his residence, if the convenience of witnesses requires that the action should be retained for trial in the court where it was commenced the plaintiff should present that fact in opposition to the motion, and if he neglects to do so it is doubtful whether he can afterward apply to the court to which it has thus been removed to have it sent back again. (*Pierson v. McCall*, 22 Cal. 127.) Cited 61 Cal. 77.

117. If the action is brought in a county other than that in which the defendant resides, and he moves for a change of venue on this ground, the plaintiff, if he wishes to have the action tried in the county where the action was brought on account of the convenience of witnesses, must make a counter-motion to have it retained. He cannot permit the venue to be changed, and then move to return the case to another county. (*Edwards v. Southern Pac. R. R. Co.*, 48 Cal. 460.) Cited 49 Cal. 454; 61 Cal. 77.

118. On motion by defendant to change the place of trial, on the ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses the evidence as to the convenience should be as full and particular as that which is required upon an application, for this cause, to transfer the trial to another county. The affidavit must state the names of the witnesses. (*Loehr v. Latham*, 15 Cal. 418.)

119. As matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist by a counter-motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter-motion, may simply resist the motion of defendant, but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. (*Loehr v. Latham*, 15 Cal. 418.)

120. The practice upon this subject being

unsettled, the parties, on the return of the cause, should have an opportunity of fully presenting the merits of the motion. (*Loehr v. Latham*, 15 Cal. 418.)

Discretion of court where change asked on ground of convenience of witnesses. See ante, II, 2.

121. It will operate against the application for a change of venue where the affidavit of the party shows that all the witnesses of his adversary reside in the place from whence he applies to remove the trial. (*Sloan v. Smith*, 3 Cal. 410.)

122. Where motion is based on convenience of witnesses, the mere preponderance in the number of witnesses which either party expects to produce does not necessarily determine the order to be made; this is a matter within the discretion of the court. (*Reavis v. Cowell*, 56 Cal. 588.)

123. In a motion to change the venue for the convenience of witnesses, if the plaintiff's evidence is in the county where the suit is brought, and the defendant fails to show that his evidence is not accessible in said county, the motion should be denied. (*People v. Plumas Eureka Min. Co.*, 51 Cal. 566; *Hanchett v. Finch*, 47 Cal. 192.)

124. In an action to foreclose a mortgage upon lands situated partly in two counties, where the affidavits on the part of the defendants established clearly that the convenience of witnesses would be promoted by a change of the place of trial to the other county in which the suit might properly have been brought, and the record discloses no reason or sufficient showing to the contrary, an order denying the motion of the defendants for such change cannot be justified upon the ground that the granting of such orders is in the discretion of the court, and it will be reversed upon appeal. (*Thompson v. Brandt*, 98 Cal. 155.)

125. Neither party to an action can move for a change of the place of trial on the ground of the convenience of witnesses until after answer. (*Thomas v. Placerville G. Q. Min. Co.*, 65 Cal. 600, cited 11 Mont. 221; *Howell v. Stetefeldt Furnace Co.*, 69 Cal. 153.)

126. In an affidavit upon a motion to change the place of trial, stating the names of the witnesses, and that they are material, and stating that they reside in the county, it is not necessary to state that affiant expects to be able to procure their attendance at the trial. (*Reavis v. Cowell*, 56 Cal. 588.)

Change of to place of residence of defendant. See Marriage and Divorce, 121, 122.

7. Practice on Motion.

a. Application for Change, Duty to Make, Time of Making, and How Made.

127. Court is not bound of its own motion to change the venue. (*Watts v. White*, 13 Cal. 321.)

128. After party has appeared and answered to merits causes will not be removed from one district or county to another county or district. (*Reyes v. Sanford*, 5 Cal. 117.) Cited 9 Cal. 643; 61 Cal. 75; 3 Nev. 406; 8 Nev. 186.

129. An affidavit of merits and an application for a change of the place of trial of an action must be filed when the defendant appears and answers or demurs. An affidavit and demand filed before such appearance are of no avail. (*Nicholl v. Nicholl*, 66 Cal. 36.) Cited 92 Cal. 201.

130. A motion for a change of the place of trial to the county of the defendant's residence is properly denied where no demand for the change was made in writing at the time of appearing and demurring to the complaint, as required by section 396 of the Code of Civil Procedure. (*Pennie v. Visser*, 94 Cal. 323.)

131. An objection to the venue, if made on grounds appearing in the complaint, must be made at or before the time of filing the demurrer, or it will be deemed waived. (*Pearce v. Freer*, 9 Cal. 642.)

132. The right to move for a change of place of trial is not waived if the notice of the motion is given at the same time at which the answer and demurrer are filed and served. (*Mahe v. Reynolds*, 38 Cal. 560.) Cited 61 Cal. 75.

133. If a defendant, sued in a county where he does not reside, demurs to the complaint, and the demurrer is sustained, and he then demurs to an amended complaint before giving notice of a motion for change of venue, he waives the right to have the case tried in the county where he resides. (*Jones v. Frost*, 28 Cal. 245.) Cited 61 Cal. 75.

134. Where a motion was made to change the venue on the ground that neither of the parties resided in the district, where no objection was made in the answer, and after nearly six months had elapsed before the objection was taken, held, that the motion came too late, and was properly rejected. (*Tooms v. Randall*, 3 Cal. 438.) Cited 9 Cal. 643; 61 Cal. 75; 3 Nev. 406.)

135. After twelve competent trial jurors have been obtained in a criminal case it is too late for the defendant to ask for time to prepare affidavits as the basis of an application for a change of venue on the ground that the defendant cannot have a fair and impartial trial before the jurors passed upon and received. (*People v. Cotta*, 49 Cal. 166.)

136. Whether, in a foreclosure suit in the seventh district as to land situate in Contra Costa county, a party can appear and contest the case in San Francisco before the judge of the seventh district, under a stipulation and without exception as to the place of trial, and afterward assign that fact as error, query? (*De Leon v. Higuera*, 15 Cal. 483.)

Time of making application to change or refuse change where motion is based on convenience of witnesses. See ante, II, 6, c.

137. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. (*Watts v. White*, 13 Cal. 321.)

b. Who to Join in.

138. It is not necessary that all defendants in action should join in a demand for a change

of venue. (*McSherry v. Pennsylvania etc. G. Min. Co.*, 97 Cal. 637.)

139. An affidavit of merits, used at the hearing of a motion for a change of venue, in behalf of each and all the defendants, made by one of the defendants therein, which recites that the affiant makes it for each and all of the defendants and at their request, and that the affiant and the other defendants have fully and fairly stated the facts of the case to their attorneys, who, upon such statement, advised each and all of them that they had a good and substantial defense upon the merits of the action, which each and all of them believed to be true, is in all respects sufficient, and is not objectionable because made by one of the defendants only. (*McSherry v. Pennsylvania etc. G. Min. Co.*, 97 Cal. 637.)

140. In action to determine rights to real estate against several parties, under the provisions of title IV, part II, of the Code of Civil Procedure, each defendant is entitled as a matter of right to have the action tried in the county in which the real estate is situated, and it is not necessary that all the defendants should join in claiming such rights. (*O'Neil v. O'Neil*, 54 Cal. 187.)
Cited 66 Cal. 175; 100 Cal. 16; 5 Dak. 277.

141. Upon motion to change place of trial, in action against sheriff and his sureties, on the ground that the action was not brought in the proper county where an affidavit of merits was filed by the sheriff, it is not necessary for affidavits to be filed by the other defendants. (*Rowland v. Coyne*, 55 Cal. 1.)
Cited 66 Cal. 236; 92 Cal. 202; 97 Cal. 642.

142. Where several defendants are sued as sureties on a bond, an affidavit of merits in support of a motion for a change of the place of trial need not be made by more than one of them. (*People ex rel. State Board of Harbor Commrs. v. Larue*, 66 Cal. 235.)
Cited 92 Cal. 201.

Who to join or move for where several defendants. See ante, II, 6, c.

Where several defendants, change to residence of one. See ante, II, 6, c.

c. Demand and Notice.

Demand, necessity of. See ante, 130.

143. Demand for change may be signed by an attorney simultaneously with his appearance. (*People ex rel. State Board of Harbor Commrs. v. Larue*, 66 Cal. 235.)
Cited 97 Cal. 642.

144. A written demand for the change of place of trial of an action is not insufficient because the attorneys of the defendant, describing themselves as such, say that they demand, instead of saying that defendant demands, the change. (*Buck v. Eureka*, 97 Cal. 135.)

145. A notice of a motion to change the place of trial is not a demand. (*Byrne v. Byrne*, 57 Cal. 348.)
Cited 94 Cal. 326; 100 Cal. 17; 19 Nev. 443.

146. To entitle a defendant sued in the wrong county to a change of place of trial demand in writing must be made, as required by the Code of Civil Procedure, section 396. Notice of a motion to change the place of trial

is not such a demand. (*Estrada v. Orefia*, 54 Cal. 407.)

Cited 57 Cal. 348; 94 Cal. 326; 100 Cal. 17; 19 Nev. 443.

d. Affidavits on Motion.

147. In an action to quiet title to land, upon the supposition that it is proper to move for a change of venue on the ground that the land is situated outside of the county in which the action is brought, it is incumbent upon the court to transfer the cause to the proper county upon a mere suggestion, and no affidavit of merits is necessary; nor does a failure to appeal from a first order denying a motion for such change, for want of an affidavit of merits, constitute a waiver of right to move again for the transfer of the cause to the proper county. (*Fritts v. Camp*, 94 Cal. 393.)

148. An affidavit of merits, upon a motion for a change of venue made by a defendant, is not insufficient because of the omission of the names of the defendants from the title of the action, where the notice of motion states that the motion will be made "upon the affidavit and demand of defendant to change the place of trial, annexed and served with said notice, and upon said notice and all the papers and pleadings on file in said action," and both the notice and demand were duly entitled in the action, and the affidavit was filed with the notice. (*Watt v. Bradley*, 95 Cal. 415.)

149. The affidavit read: "I have fully and fairly stated the case in this action to my attorney and counsel," etc. Held, sufficient. (*Watkins v. Degener*, 63 Cal. 500.)
Cited 66 Cal. 236.

150. An affidavit of merits which recites that the affiant "has fully and fairly stated his case and the facts constituting his defense in the action" to his attorney is insufficient; the affiant should aver that he has fully and fairly stated the case to his attorney. (*People ex rel. State Board of Harbor Commrs. v. Larue*, 66 Cal. 235.)
Cited 97 Cal. 642.

151. Affidavit stating that affiant has a personal knowledge of the matters in issue, that he has fully and fairly stated the facts to his counsel, that they inform him that he has a good and valid defense upon the merits, which he verily believes to be true, is sufficient. (*Rowland v. Coyne*, 55 Cal. 1, 4.)
Cited 97 Cal. 642.

152. In the affidavit upon which the defendant moved for an order changing the place of trial, he says that he has fully and fairly stated "the case" in this action to E. S. Pillsbury, one of his counsel, and that after such statement he is advised by his said counsel, and verily believes that he has a good and substantial defense on the merits. Held, sufficient as an affidavit of merits. (*Buell v. Dodge*, 63 Cal. 553.)

153. There is no essential difference between an affidavit of merits which states that the defendant "has fully and fairly stated the case in this action," and one which states that he "has fully and fairly stated the facts of the said case." (*Rathgeb v. Tiscornia*, 66 Cal. 96.)

154. An affidavit of merits upon a motion for a change of venue which alleges that the affiant fully and fairly stated all the facts relating to the action to his counsel, and that he is advised by him that he has a good, substantial, and complete defense on the merits of the action, is not defective because of failing to allege that the affiant believed the advice of his counsel. (*Watt v. Bradley*, 95 Cal. 415.)

155. An affidavit of merits upon a motion to change the place of trial, stating merely that the affiant had fully and fairly stated to the attorney all the facts constituting the defense of the defendants, etc., instead of the facts of the case, is insufficient. (*Palmer v. Barclay*, 92 Cal. 199.) Cited 97 Cal. 642.

156. An affidavit of merits on a motion for a change of the place of trial may be made by the attorney of the party applying for the change, where it shows a sufficient reason for its not being made by the party himself. (*Nicholl v. Nicholl*, 66 Cal. 36.) Cited 92 Cal. 201.

157. Under section 473 of the Code of Civil Procedure, which is to be liberally construed with a view to promote justice, the trial court has power, in the exercise of its discretion, to allow an insufficient affidavit of merits, which has been filed in due time upon a motion to change the place of trial of an action, to be amended after the time for filing the original affidavit has expired, and the filing of the amended affidavit relates back to the time of the filing of the original affidavit. (*Palmer v. Barclay*, 92 Cal. 199.)

158. Upon an application by a defendant in a criminal case for a change of the place of trial, counter-affidavits may be filed by the prosecution controverting defendant's statements. (*People v. Majors*, 65 Cal. 138.)

Allegations in affidavit as to place of residence, when sham. See ante, 98.

Affidavits in support of motion for change because fair and impartial trial cannot be had. See ante, II, 6, a.

Affidavit on motion to retain case because of convenience of witnesses. See ante, 118.

Affidavit for removal because of prejudice or disqualification of judge. See ante, II, 6, b.

Affidavit on information and belief. See ante, 70-72, 79.

Affidavit, want of statement of venue in. See Affidavits.

e. Evidence Outside Record.

159. The court has discretion, on the hearing of a motion, to consider evidence outside of the papers on file when notice of the motion was given, if necessary to aid in arriving at its proper determination. (*Younglove v. Steinman*, 80 Cal. 375.)

f. Disqualification of Judge, or Jurisdiction of Court to which Transfer Made.

160. The disqualification of the judge of the proper county in no way affects the right of a defendant to a change of the place of trial. (*Rathgeb v. Tiscornia*, 66 Cal. 96.)

161. In an action commenced in S. county a motion was made to transfer the case to M.

county, on the ground that the defendants were all residents of the latter county, and was resisted on the ground that the judge thereof was disqualified. Held, the motion was properly granted. (*Paige v. Carroll*, 61 Cal. 215.)

Cited 94 Cal. 28; 98 Cal. 119.

162. The judge actually holding the court is "the judge thereof," within the meaning of section 398 of the Code of Civil Procedure, and would not be justified in changing the place of trial because the judge of the superior court of the county is disqualified. (*Paige v. Carroll*, 61 Cal. 215.)

163. When the place of trial of an action is changed it is not necessary to the validity of a notice of a motion that the court to which the trial is changed should have jurisdiction of the cause by the previous filing of the papers. It is enough that the court had jurisdiction when the motion was made, and that the notice was sufficient as to time. The notice of a motion is not a proceeding in court. (*Younglove v. Steinman*, 80 Cal. 375.)

g. Postponing Hearing.

164. Where the defendant, at the time he demurs, demands that the trial be had in the county of his residence, his motion for a change of the place of trial cannot be postponed by the court until the answer is filed and leave granted to the plaintiff to make a cross-motion to retain the case on the ground of convenience of witnesses. (*Heald v. Hendy*, 65 Cal. 321.)

Cited 79 Cal. 33; 97 Cal. 641; 2 Col. App. 105; 11 Mont. 221.

165. It is not error in court, on trial for murder, to postpone consideration of a motion on the part of the defendant for a change of venue until an attempt is made to impanel a jury. (*People v. Plummer*, 9 Cal. 298.) Cited 76 Cal. 340; 3 Nev. 461.

166. Where a motion is thus postponed, and counsel for prisoner afterward declines, on the intimation of the court, to renew the motion, he cannot take advantage, on appeal, of the failure of the court to order a change of venue. (*People v. Plummer*, 9 Cal. 298.)

Ruling on demurrer pending motion for change of. See Pleading and Practice, X, 12.

Trial of cause pending motion for change. See Prohibition, 57.

h. Judgment or Order on; Conclusiveness of; Renewing Motion; Review on Mandamus; Appeal.

167. Although the affidavit upon which the application to change the venue of an action is made may not show any legal cause for such change, still, if the court grants the application, it has acted judicially upon a matter within its cognizance and where it was clothed with a discretion, and by the order the place of trial becomes changed. (*People ex rel. Meminger v. Sexton*, 24 Cal. 78.)

168. When two motions are pending in an action at the same time, one to change the venue and one to dismiss, an entry of a judgment of dismissal, without any formal order denying the motion to change the venue, is a

virtual denial of the same. (*People v. De La Guerra*, 24 Cal. 73.)

169. The court in which the action was commenced made an order for the transfer of the cause for trial to the county in which the defendant resided, on condition that the defendant pay certain costs. The order did not specify any time within which the costs should be paid. Fourteen days afterward the court, on an ex parte application, set aside the order of transfer for the reason that the costs had not been paid, although the defendant then and there offered to pay the same. Held, that the order setting aside the order of transfer was properly made. (*Estep v. Armstrong*, 69 Cal. 536.)

170. If a motion for change of venue on the ground that a fair and impartial trial cannot be had is denied conditionally or temporarily, with leave to renew the application, and a jury is not impeached until after the lapse of a time during which great changes might occur in public opinion touching the guilt of the defendant, it is the duty of the defense to renew the application at the time suggested by the court, and, if it is not renewed, the order denying the application will not be disturbed. (*People v. Goldenson*, 76 Cal. 328.)

Failure to renew motion where hearing postponed. See ante, II, 7, g.

Second change of venue. See post, II, 7, k.

171. The superior court in which an action was brought, after making an order granting a change of the place of trial, has jurisdiction to set aside the order on the ground that it was inadvertently made. (*Baker v. Fireman's Fund Ins. Co.*, 73 Cal. 182.)

172. When a case is transferred because of the disqualification of the judge the determination of what court is the nearest to which the transfer should be made under the statute is within the jurisdiction of the judge, and the selection of a county seat most readily accessible, though not the nearest in distance, whether erroneous or not, will not render the final judgment in the case void upon collateral attack. (*Gage v. Downey*, 79 Cal. 140.) Cited 9 Utah, 445.

173. In a criminal case in a justice's court, upon the affidavit of the defendant that he cannot have a fair and impartial trial in the township in which the action or proceeding is brought, it is not the imperative duty of the court to transfer the case to another township for trial, as it is for the court to determine, from the facts stated in the affidavit, whether the reasons given support the opinion of the defendant that he cannot have a fair and impartial trial, and for any abuse of discretion there is a speedy and adequate remedy by appeal to the superior court; and, there being no want of jurisdiction, an action will not lie to annul and set aside the judgment for refusal to grant such change of the place of trial. (*Lowrey v. Hogue*, 85 Cal. 600.)

174. Mandamus will not lie to compel a court to proceed with the trial of an action after an order has been made changing the place of trial. The remedy, if an injury is sustained, is by an appeal from the final judgment. (*People ex rel. Meminger v. Sexton*, 24 Cal. 78.)

Cited 28 Cal. 169, 641; 29 Cal. 309; 35 Cal. 214; 57 Cal. 634.

175. When a motion to change the place of trial of an action is overruled without delay, an appeal from the order affords a complete remedy, and mandamus will not lie to compel the court to change the place of trial. Mandamus is only proper when the court unreasonably delays to decide the motion. (*County of San Joaquin v. Superior Court of San Joaquin County*, 98 Cal. 602.)

176. The action of a justice's court in granting or refusing a change of venue cannot be reviewed in an application for a mandamus. By this writ the justice may, in case of his refusal, be compelled to act, but his erroneous action cannot be thus corrected. The remedy is by appeal. (*People ex rel. Flagley v. Hubbard*, 22 Cal. 34.)

Cited 28 Cal. 641; 37 Cal. 534.

Mandamus to compel judge to grant motion. See ante, 95.

Improper change of, going to trial does not waive. See Jurisdiction, 41.

Improper change of, effect of determination of jurisdiction. See Jurisdiction, 56.

Appealability of, orders on motion for change of. See Appeals, II, 19.

Appeal, review of order on motion for change. See Appeals, XI, 13, e.

Appeal, sufficiency of evidence to prove venue, how presented on. See Appeals, VII, 29.

Review, orders on motion, how presented for. See Appeals, VII, 6.

Authentication and identification of orders changing. See Appeals, VI, 6, d, D.

Stay bond on appeal from order changing. See Appeals, 1785.

Presumption in favor of transfer from one department to another. See Appeals, 2821.

Order changing, presumption in favor of. See Appeals, 2823.

Presumption as to proper exercise of discretion. See Appeals, 2822.

Review of order. See ante, II, 2; 60.

Reversal of order refusing change of, effect on judgments. See Appeals, 3092.

Change of venue on appeal from justice's court. See Appeals, 3354, 3355.

Failure to appeal, effect on second motion. See ante, 147.

i. Transmission of Papers; Costs of Motion.

177. Under section 1036 of the Penal Code, where the place of trial of a criminal action is changed to a county other than that in which the action is brought, neither a bill of exceptions taken on a former trial of the case for purposes of an appeal to the supreme court, or the instructions given to the jury on the former trial, need be transmitted to the court to which the action is removed. (*People v. Bush*, 71 Cal. 602.)

178. If defendant procures change, plaintiff may pay costs and transmit papers to the county fixed as the place of trial, and have the case placed on the calendar and tried. (*Brooks v. Douglass*, 32 Cal. 208.)

Costs on change of venue. See Costs, II, 2.

Order for expenses of witness on change of venue. See Witnesses, 434.

j. Power of Court to Whom Transfer Made; Trial; Certifying Result Back.

179. If a justice, upon an affidavit required by the statute for that purpose, makes an order changing the place of trial of an action pending before him to another justice, the order, ipso facto, vests jurisdiction in the justice to whom the action is transferred, and puts an end to the jurisdiction of the justice by whom the order was made; and, if he proceeds afterward to try the case and render judgment, he is liable for the damages thereby sustained. (*Hatch v. Galvin*, 50 Cal. 441.)

If defendant procures change, plaintiff may set cause and have it tried. See ante, II, 7, i.

180. When place of trial of issue of fact in probate court is changed to another county, the clerk of the court to which the case is sent can certify a transcript of the proceedings and result of the trial back, and the court from which the case was sent can enter the appropriate judgment. (*People ex rel. Burdell v. Almy*, 46 Cal. 245.)

Jurisdiction on transfer of cause. See Jurisdiction, III.

k. Second Change of Venue.

181. Justice's court to which case has been transferred from another similar court may again, for cause shown, change the venue. (*People ex rel. Flagley v. Hubbard*, 22 Cal. 34.) Cited 11 Mont. 17.

Failure to appeal from denial is not waiver of right to make second motion. See ante, 147.

Renewal of motion. See ante, II, 7, h.

VERDICT.

I. Power of Court to Direct.

II. Verdict Must Conform to, and be Within Issues and Pleadings.

III. Certainty or Uncertainty.

IV. Form of; Mistakes or Defects in; Objections and Waiver of.

V. Amendment of; Directing Jury to Amend.

VI. Construction of.

VII. Where Several Parties Joined, or Separate Defenses Plead.

VIII. Conclusiveness of; Verdict Based on Admissions.

IX. Chance Verdicts, and Verdicts Obtained by Averaging.

X. Submitting Special Issues; Special Verdict; Conflict Between General and Special Verdict.

XI. Verdict in Gold Coin or Legal Tender Notes.

XII. Sealed Verdict.

XIII. Polling Jury; Assent to or Dissent from Verdict.

XIV. Announcing and Recording of Verdict; Entry of Judgment on.

Equity, verdict in. See Equity, IV, 4.
Coroner's jury, verdict of as evidence. See Evidence, III, 9, d.

For less offense. See Criminal Law, XVIII, 19, a, C.

Verdict in particular action. See particular title.

In particular offense. See Criminal Law, Particular Offense.

Effect of on nature of cause of action. See Torts.

Error in instruction not cured by. See Instructions, 194.

Defective allegations, verdict, whether cures. See Pleading and Practice, VII, 12.

Variance, effect of verdict on. See Variance, II.

Remission of excessive verdict. See Watercourses, 440, 441.

Against law, new trial for. See New Trial, IV, 14.

Instructions, jury does not violate, when. See Bankruptcy and Insolvency, 70.

Appeal, insufficiency of evidence to sustain verdict, how presented on. See Appeals, VII, 10.

Presumption of correctness of. See Appeals, XI, 24, o.

Assignment of, effect on costs. See Costs, IV.

Objection taken to juror after verdict. See Jury and Jurors, VII, 8.

Disclosure of verdict. See Jury and Jurors, XVI, 4.

I. Power of Court to Direct.

1. Practice Act confers express authority upon the courts below to direct a special verdict. (*Burritt v. Gibson*, 3 Cal. 396.)

2. Where the evidence is clear in favor of either party, and there is no conflict, it is not error for the court to direct a verdict in his favor. (*Page v. Tucker*, 54 Cal. 121.) Cited 69 Cal. 132.

3. The court has power to direct a verdict when there is no conflict in the evidence. (*Martin v. Ward*, 69 Cal. 129.)

4. Where answer contains no good ground of defense the court may instruct the jury to find for the defendant. (*Corwin v. Patch*, 4 Cal. 204.) Cited 55 Cal. 339.

Directing verdict. See Instructions, XI.
Instruction as to amount of. See Instructions, 132.

Misleading instruction as to amount of. See Instructions, 98.

II. Verdict Must Conform to, and be Within Issues and Pleadings.

5. The verdict must conform to the issues. And if the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment and go beyond the verdict, it is error. (*Ross v. Austill*, 2 Cal. 183.)

6. The acceptance by the plaintiff of a special verdict, which gives defendant part of the property in dispute without a finding on the other issues, is a withdrawal from the consideration of the court of all that property in relation to which there is no finding. (*Gonzales v. Leon*, 31 Cal. 98.)

Special verdict not covering all the issues, construction of. See post, VI.

7. The jury have no right to find a fact in favor of a party which is contrary to or inconsistent with the pleadings. (*Tevis v. Hicks*, 41 Cal. 123.)
Cited 56 Cal. 496, 497; 2 Mont. 590.

8. When jury found the only issues involved in controversy, an exception to the verdict that no verdict was found upon the issues presented by the pleadings will not be sustained. (*Burritt v. Gibson*, 3 Cal. 396.)

9. Verdict must be confined to matters put in issue by the pleadings. (*Benedict v. Bray*, 2 Cal. 251.)

10. If the verdict of a jury goes beyond the issues raised by the pleadings and passes upon an extraneous fact not embraced therein, it is void pro tanto, and the surplus matter may be disregarded in entering the judgment. (*Marquard v. Wheeler*, 52 Cal. 445.)

Evidence on insufficient defense will not support. See Evidence, 458.

Evidence, verdict against. See Boundaries, II, 8, e; Fraud, 155.

Against evidence, new trial for. See New Trial, IV, 15, a.

Against presumptions, validity. See Fraud, 155.

Presumption of sufficiency of evidence to sustain verdict. See Appeals, XI, 24, g.

Verdict must be on issues as joined. See Agistors, 7.

Verdict cannot go beyond the issues. See Judgments, 37.

III. Certainty or Uncertainty.

11. Verdict for recovery of money must be certain as to the amount. (*Watson v. Damon*, 54 Cal. 278.)

12. The verdict of a jury which finds the plaintiff to be entitled to a certain amount of money is not void for uncertainty; it is equivalent to saying that they find the issues in favor of the plaintiff, and assess his damages at that sum. (*Mendelsohn v. Anaheim Lighter Co.*, 40 Cal. 657.)
Cited 68 Cal. 533; 86 Cal. 303.

13. The question submitted to the jury was as follows: "Did the said Ellen Cahill, at the time of signing the instrument offered for probate, sign or execute the same under undue influence of either James H. Nolan or of Annie Nolan, or of any other person?" To which the jury answered, "Yes." Held, that the verdict was not so uncertain as to render it impossible to know what the jury meant by their verdict; and that inasmuch as it responded to the issue, and the counsel had stipulated as to the issue, the verdict should not have been set aside. (*Estate of Cahill*, 74 Cal. 52.)

In action for diversion, uncertainty. See Watercourses, 439.

IV. Form of; Mistakes or Defects in; Objections and Waiver of.

14. The court should direct the jury to return their verdict in proper form. (*People v. Ah Gow*, 53 Cal. 627.)
Cited 62 Cal. 522; 73 Cal. 346.

15. Where the form of the verdict agreed upon in open court, by the respective counsel,

was a general verdict as to the whole property, after the jury has found such a verdict for the defendant it is too late for the plaintiff to insist upon a verdict in a different form, or to assert a right to a portion of the property upon principles not applicable alike to all the property. (*Sexey v. Adkison*, 40 Cal. 408.)

Oral stipulation as to form of verdict. See Wills, 271.

Form of, validity of. See Criminal Law, XVIII, 19, a, A.

Informality, consent waives. See Appeals, 1943.

Handing forms of verdict to jury. See Jury and Jurors, XVI, 1.

Objection to form of verdict, when to be taken. See Appeals, XI, 14, p.

Appeal, objection to verdict first raised on. See Appeals, XI, 14, p.

Name of defendant. See Criminal Law, 1017, et seq.

16. Mere fact that a verdict is entitled in the name of the plaintiff and one of the defendants is immaterial. It need not be entitled at all. (*McGarritty v. Byington*, 12 Cal. 426.)

17. Where the indictment was against James B. Boggs for murder, and the verdict pronounced "the defendant J. M. Boggs" guilty of manslaughter, held, that the error in the initial of the middle name of defendant in the verdict was immaterial. (*People v. Boggs*, 20 Cal. 432.)
Cited 56 Cal. 444.

18. A general objection to the form of a verdict, without any specification of the particulars in which it is alleged to be defective, will not be considered. (*Mahoney v. Van Winkle*, 21 Cal. 552.)
Cited 62 Cal. 521.

19. Objections to the form of a verdict, or that excessive damages were thereby awarded, can only be made available on motion for a new trial, or on appeal from an order denying a new trial. (*Campbell v. Jones*, 41 Cal. 515.)
Cited 87 Cal. 347.

20. If a verdict be so defective that it cannot serve as the basis of a judgment, the waiver of the defect by the other party, and consent that a certain construction thereof should be taken as the verdict, is as irregular and ineffectual as the verdict itself. (*Campbell v. Jones*, 38 Cal. 507.)

21. If a verdict be fatally informal, but before the jury are discharged the party against whom it was given agreed to such an interpretation thereof as would sustain a judgment; such agreement should be held to cure the defects in the verdict. (*Sawyer, C. J.*, and *Rhodes, J.* (*Campbell v. Jones*, 38 Cal. 507.)

Signature to special verdict. See post, 62.

Amendment of verdict. See post, V.

Informal verdict, directing jury to amend. See post, V.

Correcting by reference to reporter's notes. See Replevin, 106.

V. Amendment of; Directing Jury to Amend.

Amendment of verdict. See Criminal Law, 2212, 2213.

22. The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of the parties. (*Perkins v. Wilson*, 3 Cal. 137.) Cited 1 Idaho, N. S., 784.

23. Where there were two defendants, and each answered separately, one denying any connection with the contract declared upon or liability under it, the other confessing and avoiding it and claiming damages against the plaintiff, and the jury found against the plaintiff and in favor of the defendants, and the pleadings and evidence both show that but one defendant was entitled to recover, held, that the court below did not err in amending the verdict so as to render it conformable to the case. (*Perkins v. Wilson*, 3 Cal. 137.)

24. It is the duty of a court to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records of the court, and for that purpose the court can, at any time while the jury is before it, and under its control, see that the verdict is amended in form so as to meet the requirements of the law. (*People v. Jenkins*, 56 Cal. 4.) Cited 94 Cal. 385.

25. Where the verdict returned by the jury is informal, it is the duty of the court to explain to them its defects, and direct them to put it in proper form. (*People v. Dick*, 34 Cal. 663.)

26. Where there is enough in the verdict to ascertain the intention of the jury the court may instruct the jury to amend it as to form, not affecting the substance, so as to make it good in law, and it is error in the court not to give effect to the verdict where such intention can be ascertained. (*Truebody v. Jacobson*, 2 Cal. 269.)

Appealability of orders arresting, vacating, or modifying. See Appeals, II, 22.

VI. Construction of.

27. We must look solely to the material facts put in issue by the pleadings, and not to the form of the action, under our code of practice, to ascertain what was in fact determined by the findings or verdict. (*McLaughlin v. Kelly*, 22 Cal. 211.)

28. Mere fact that pleader has used terms of expression in stating his case which were under the old system of practice used in particular kinds of action will not necessarily give character to, or determine the effect or meaning of, the verdict. (*McLaughlin v. Kelly*, 22 Cal. 211.)

29. A special verdict of a jury upon various questions submitted to them should be read together; and, if the finding upon a particular question be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning. Findings should be so construed as to avoid a contradiction if it can be reasonably done. (*Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598.)

30. A special verdict that defendants are

entitled to all of a quartz ledge between their notices, being three hundred and fifty feet, more or less, gives defendants all between the notices, if more than three hundred and fifty feet. (*Gonzales v. Leon*, 31 Cal. 98.)

31. In an action to recover a quartz ledge, when the defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only of the ledge, a special verdict awarding defendants that portion of the ledge they claim without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs. (*Gonzales v. Leon*, 31 Cal. 98.) Cited 68 Cal. 533.

General verdict, what imports. See post, XI.

Consenting to certain construction of defective verdict. See ante, 20.

Construction of. See Criminal Law, XVIII, 19, a, A.

VII. Where Several Parties Joined or Separate Defenses Pleaded.

32. If two defendants answer, and a third makes default, the verdict is properly confined to those who answer, and should not include the one as to whom there is no issue. (*Golden Gate Mill etc. Co. v. Joshua Hendy Machine Works*, 82 Cal. 184.)

33. When several persons whose possessions are not joint, but separate, are joined as defendants in an action to recover land, and no demand is made at the close of the trial for separate verdicts, and no objection or exception is taken to the verdict on that ground in time to afford an opportunity to correct it, the defendants cannot afterward object to a joint verdict and judgment. (*Hicks v. Coleman*, 25 Cal. 122.) Cited 1 Idaho, N. S., 784.

34. When no damages are claimed in an action to recover real estate, no injury can result from a joint verdict. (*Hicks v. Coleman*, 25 Cal. 122.)

35. In an action against two defendants, the jury returned a general verdict for the defendant, and a judgment for costs was entered thereon in favor of both defendants. The court subsequently vacated the judgment because of the defect in the verdict. Held, that the defect was immaterial, and that the court erred in vacating the judgment. (*Willard v. Archer*, 63 Cal. 33.)

36. A joint verdict against the defendants answering and a defaulting defendant is conclusive against all the defendants when a separate verdict has not been demanded. (*Anderson v. Parker*, 6 Cal. 197.)

Amendment of verdict in action against two defendants answering separately. See ante, V.

37. Where there are several separate defenses, each of which is sufficient to defeat the action, and these defenses are submitted to the jury with evidence in support of each, and the verdict is general for the defendants, it cannot be set aside if it be right as to any one issue, though wrong as to all the others. (*Kidd v. Laird*, 15 Cal. 161.) Cited 22 Cal. 681.

38. Where several defenses are pleaded, either of which is good in law, and the verdict is for the defendants, and the court errs in its instructions to the jury as to one of the defenses, the judgment will be reversed, unless it is made to appear that the verdict was rendered on one of the defenses in relation to which no error was committed. (*Wiseman v. McNulty*, 25 Cal. 230.)

Several verdicts in joint tort. See *Malicious Prosecution*, 80.

VIII. Conclusiveness of; Verdict Based on Admissions.

39. A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title. (*Kidd v. Laird*, 15 Cal. 161.)

40. The fact or title must be material and relevant, must be distinctly in issue, must be tried by the jury and constitute the basis of their verdict, and, unless specially found, must have been necessarily passed upon by the jury. (*Kidd v. Laird*, 15 Cal. 161.)

41. Where a verdict is general, its effect will be limited to such issues as necessarily controlled the action of the jury. (*Kidd v. Laird*, 15 Cal. 161.)

Cited 15 Cal. 148; 22 Cal. 222; 23 Cal. 375; 28 Cal. 516.

42. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues. (*McDonald v. Bear River etc. Co.*, 15 Cal. 145.)

Cited 14 Or. 573.

42 a. Where there has been a fair trial of an issue of fact, courts usually give the verdict and judgment a final and conclusive effect, and will not permit the parties, or those claiming under them, to relitigate the same matter in another suit. (*McLaughlin v. Kelly*, 22 Cal. 211, 222.)

43. The finding of a jury, based upon an admission of the parties by the pleadings or otherwise, is not less an assessment of damages than if the findings were made upon conflicting evidence. (*Patterson v. Ely*, 19 Cal. 28.)

Conclusiveness of verdict where several defendants joined. See ante, 36.

Conclusiveness on court. See *Eminent Domain*, 60.

Conclusiveness of verdict on cross complaint to quiet title in ejectment. See *Cross Complaint*, III.

Appeal, conclusiveness of verdict on. See *Appeals*, XI, 22, a.

Issue as to insanity, conclusiveness of verdict. See *Insanity*, VII.

IX. Chance Verdicts, and Verdicts Obtained by Averaging.

44. Verdict to which assent of any juror was obtained by resort to chance will be set aside. (*Donner v. Palmer*, 23 Cal. 40.)

Cited 25 Cal. 477.

45. To induce a portion of the jurors to assent to a verdict of fifteen hundred dollars in-

stead of one thousand dollars, by drawing lots, is misconduct on the part of the jury, for which the verdict should be set aside. (*Levy v. Brannan*, 39 Cal. 485.)

46. Verdicts obtained by averaging are regarded in the same light as gambling verdicts. (*Wilson v. Berryman*, 5 Cal. 44.)

Cited 13 Mont. 393.

47. A verdict of a jury arrived at by dividing the sum of the various amounts at which each juror would fix the verdict by twelve and taking the quotient as the verdict, the calculation being made in pursuance of a prior agreement that the result should be the verdict, without further consideration of the jury, and without a further determination that such amount formed a just and proper verdict, is a "chance" verdict and should be set aside. (*Dixon v. Plums*, 98 Cal. 384, cited 13 Mont. 394; *Wilson v. Berryman*, 5 Cal. 44, cited 23 Cal. 48, 25 Cal. 400, 80 Cal. 120, 13 Mont. 393, 1 Wash. (Ter.) N. S., 330.)

48. If such means be adopted merely to arrive at a proper result for the purpose of determining what the verdict shall be, without any being bound thereby, and afterward the jury agree upon such sum as their verdict, it will not be disturbed. (*Wilson v. Berryman*, 5 Cal. 44.)

49. A verdict which is arrived at by each one of the jurymen marking such sum as he thinks proper, and then adding the several sums together and dividing the total by twelve, and making the quotient the verdict, is not a chance verdict within the meaning of the second subdivision of section 193 of the Practice Act. (*Boyce v. California Stage Co.*, 25 Cal. 460.)

Cited 15 Col. 182.

50. The jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiffs were justly entitled to recover, and that the several sums thus marked should be added together, and the total amount divided by twelve, and that the quotient, whatever it might be, should be their verdict, without further consultation or discussion. Held, that this was not a chance verdict, within the meaning of the second subdivision of the one hundred and ninety-third section of the Practice Act. Held, further, that such verdict was vicious, and should be set aside if the facts were proved by competent testimony. (*Turner v. Tuolumne County Water Co.*, 25 Cal. 397.)

Cited 25 Cal. 473; 13 Mont. 391, 394; 10 Nev. 153.

51. An affidavit of a juror stating that it was agreed among the jurymen that each one should mark down the sum that he thought proper to find in favor of the plaintiff and against the defendant, and then divide the total amount of those sums by twelve, and that the result should be their verdict, does not state facts which make the verdict a chance verdict within the meaning of subdivision 2 of section 657 of the Code of Civil Procedure, and is inadmissible to impeach the verdict. The effect of such affidavit, if admissible, is met and overcome by counter-affidavits of two jurors, one of whom

is the foreman, showing that when they agreed to divide the aggregate amounts by twelve, it was understood that they were not to be bound by the result, and that after the amount was so ascertained, the jurors unanimously agreed to adopt it as the sum to be returned. (*Hunt v. Elliott*, 77 Cal. 588.)

X. Submitting Special Issues; Special Verdict; Conflict Between General and Special Verdict.

52. Where special issues were submitted to a jury, they should include all questions of fact raised by the pleadings, and necessary to determine the case, and should be separately and distinctly stated so that each question should relate to only one fact. (*Phoenix Water Co. v. Fletcher*, 23 Cal. 482.)

53. It is province of court to determine as to what particular facts jury shall find specially, and neither party has the right to dictate the terms of any particular question to be submitted to the jury. (*American Co. v. Bradford*, 27 Cal. 360.) Cited 11 Cal. 534.

54. Where special issues are submitted to a jury, and they announce that they cannot agree upon the special issues, but can agree upon a general verdict, and by consent of counsel on both sides the special issues are withdrawn and a general verdict received by the court, no error is committed. (*Mitchell v. Hockett*, 25 Cal. 539.)

55. A special verdict must, under section 174 of the Practice Act, find the facts expressly and specially, and not generally or impliedly. (*Breeze v. Doyle*, 19 Cal. 101.) Cited 30 Cal. 286.

56. Where the findings were, (1) that the material allegations in plaintiffs' complaint and replication are true, (2) that the material allegations in defendants' answer are not true, held, that the findings are insufficient because not referring distinctly to those allegations deemed material, and hence requiring a preliminary examination to determine what allegations are material, instead of leaving nothing for the court except to draw from the facts as found "conclusions of law." (*Breeze v. Doyle*, 19 Cal. 101.) Cited 47 Cal. 382; 51 Cal. 278.

57. A special verdict settles the facts, and the court by its judgment pronounces the conclusions of law upon the facts found. If the court errs in this respect, the error may be reviewed without any motion for a new trial. (*People ex rel. Allen v. Hill*, 16 Cal. 113.)

Dissent of jury from special verdict; acceptance of general verdict. See post, XIII. Special verdict covering part of property in dispute. See ante, 6.

Special verdict not finding on all the issues, construction of. See ante, VI.

Special verdict, how construed. See ante, V.

58. When a jury renders a general verdict, and also special findings, the latter will control the former if there is any inconsistency between them; and the court will direct judgment to be entered in accordance with the special findings. (*Leese v. Clark*, 20 Cal.

387; *Aguirre v. Alexander*, 58 Cal. 21, 29; *Cox v. Delmas*, 99 Cal. 104.)

59. In an action against a railroad company for death of one of its employees, special findings by the jury that the railroad company exercised ordinary care and prudence in selecting the servants in charge of the train, and that the accident was not proximately caused by the negligence of any of its servants, are in conflict with a general verdict for the plaintiff, which cannot stand, though the complaint charges negligence in constructing and maintaining the road, as well as in the running of the train and in the selection of employees, since there is nothing left of the complaint and evidence to warrant the general verdict, in view of the circumstances. (*Vaughn v. California Central Ry. Co.*, 83 Cal. 18.)

60. Where the jury have specially found that the whole amount of money collected by the attorney upon the claims purchased by him, less the amount of purchase money paid therefor, with legal interest, was the property of the client, and have also specially found that plaintiff is entitled to ten thousand dollars less than said sum allowed by the jury by way of compromise, and have rendered a general verdict for the compromise sum specially found, the special findings are not inconsistent with each other, and the first special finding must control the judgment. (*Cox v. Delmas*, 99 Cal. 104.)

61. The special findings of the jury against the fraudulent intent of the parties to the transfer will control a general verdict in favor of the assignee of the insolvent debtor, and it is error for the court to refuse to grant a motion of the defendants for judgment in their favor because the general verdict was not supported by the special findings, under section 625 of the Code of Civil Procedure. (*Haas v. Whittier*, 97 Cal. 411.)

62. The findings of the jury on special issues submitted to them are ineffective for any purpose, and cannot control the general verdict unless they are signed either by the jury as a whole, or by their foreman; and the failure of the party against whom the special issues are found to object to the findings being received is not a waiver of the defect. (*Greenberg v. Hoff*, 80 Cal. 81.)

Issues in suit to quiet title, verdict on. See *Quieting Title*, III, 9.

Special, presumption of waiver. See *Appeals*, 2879.

Special, power to disregard. See *Injunctions*, 157.

Advisory verdict, disregarding. See *Gifts*, 28.

Special, motion for judgment on. See *Insurance*, 101, 102.

Verdict on contest of account is advisory only. See *Executors and Administrators*, 456.

Allowance inconsistent with special findings. See *Eminent Domain*, 263.

General, in equity. See *Equity*, 98, et seq.

Verdict in equity, conclusiveness. See *Equity*, IV, 4.

General finding on special instructions, validity. See *Negligence*, 188, 189.

General or special verdict in larceny. See *Criminal Law*, 2443.

General, not supported by findings on the special issues. See *Wills*, 171.

General and special, entry of judgment on. See *Judgments*, 98, et seq.

XI. Verdict in Gold Coin or Legal Tender Notes.

63. A general verdict in favor of the plaintiff imports a finding in his favor upon all the allegations of the complaint material to his recovery; but it does not import a finding in his favor upon an issue as to whether money sued for was payable in gold coin. (*Merritt v. Wilcox*, 52 Cal. 238.)

64. In action for money had and received, where it appeared that defendant received the sums demanded in gold coin and gold-dust, all of which he entered in his account-book as "cash," a verdict for plaintiff for said sum "in gold coin" will not be set aside as contrary to the evidence. (*Wendt v. Ross*, 33 Cal. 650.)

65. In action to recover damages for injury to the person, a verdict for the plaintiff payable in gold coin is not warranted, and if such verdict is rendered the court should disregard the gold coin part as surplus. (*Patochi v. Central Pac. R. R. Co.*, 52 Cal. 90.)

66. In an action to recover the value of services rendered, when no price has been agreed upon by the parties, if the jury adopt treasury notes, made by act of Congress a legal tender in the payment of debts, as the standard of value, the verdict will not be set aside on that ground. (*Spencer v. Prindle*, 28 Cal. 276.)

Cited 30 Cal. 181; 31 Cal. 80; 35 Cal. 357.

XII. Sealed Verdict.

67. An order of the court, in a criminal case, made by consent of the defendant, authorizing the sheriff to receive from the jury a sealed verdict, and upon its receipt to allow the jury to separate until the session of court upon the following morning, is not an error of which the defendant can complain. (*People v. Kelly*, 48 Cal. 356.)

68. Where the jury are instructed to bring in a sealed verdict, and they retire, and, after agreeing upon the verdict, seal it up and give it to the officer in charge of them—the clerk being absent—and request him to give it to the clerk, which is done, and, after the meeting of the court the following morning, the verdict is opened, in the presence of the jury, and read by the clerk, without exception, held, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the court itself as if it had been directly delivered to the clerk. (*Paige v. O'Neal*, 12 Cal. 483.)

Cited 23 Cal. 337.

69. Nor will it make any difference when the names of the jurors were not called and they were not asked whether they had agreed upon their verdict, where the parties were present and took no exception at the time, and where it is not pretended that the verdict entered differs from the one sealed up, or that the result is in any respect affected by the omission. (*Paige v. O'Neal*, 12 Cal. 483.)

XIII. Polling Jury; Assent to or Dissent from Verdict.

70. It is not matter of right which either party may claim to have a jury polled in a civil action. Before the verdict is recorded it is a matter resting in the discretion of the court to allow the proceeding; it will generally be allowed where circumstances of suspicion attend the delivery of the verdict. After the verdict is recorded, the proceeding is never allowed. With the assent of the jury to the verdict as recorded, their functions with respect to the case cease, and the trial is closed. (*Blum v. Pate*, 20 Cal. 69.)

71. Assent to recorded verdict, expressed by foreman, is conclusive upon all the jury, unless a disagreement is expressed at the time. (*Blum v. Pate*, 20 Cal. 69.)

Cited 94 Cal. 385; 9 Col. 377.

Consenting to certain construction of defective verdict. See ante, 20.

72. Although a juror may, at the last moment, dissent from a verdict rendered, yet that dissent must be founded on the question of fact presented by the verdict, and not upon information received from the court, as to what is the legal effect of the verdict as found. (*Fitzpatrick v. Himmelmann*, 48 Cal. 588.)

73. If the jury have special issues submitted to them, and find on these issues, and also find a general verdict for the plaintiff, and when the verdict is read the court declares that on the findings the defendant must have judgment, and some of the jury then dissent from the special verdict, and the court sends them out for further deliberation, and they then return with general verdict, but are unable to agree on the special verdict, the court should not accept the general verdict. (*Fitzpatrick v. Himmelmann*, 48 Cal. 588.)

XIV. Announcing and Recording of Verdict; Entry of Judgment on.

74. Before verdict is recorded it should be declared by the foreman of the jury, or, if sealed, read by the clerk, so that the parties may be distinctly informed of its purport. It is irregular to record the verdict before it is thus announced, but the irregularity must be objected to at the time, or it will not be noticed on appeal. (*Blum v. Pate*, 20 Cal. 69.)

75. The court should direct the verdict of a jury to be recorded as rendered by it. That will be treated as the verdict which the jury actually brings in. (*Moody v. McDonald*, 4 Cal. 297.)

76. The verdict was transcribed by the clerk upon a sheet of paper which constituted a portion of the minutes of the trial; and was then read to the jury, who were asked if that was their verdict, and answered that it was; but the verdict was not transcribed into the bound minute and order book until after the jury had been discharged. Held, the proceedings were in all respects strictly in conformity to the requirements of the statute. (*People v. Smith*, 59 Cal. 601.)

Recording of verdict, effect of. See ante, XIII.

77. A verdict will not be set aside for a failure to enter judgment thereon within twenty-four hours after its rendition. (*Waters v. Dumas*, 75 Cal. 563.)

78. A judgment for one cent damages entered upon a special verdict in favor of the plaintiff for "nominal damages," if in other respects proper, will not be set aside for uncertainty in the verdict. (*Davidson v. Devine*, 70 Cal. 518.)

79. Where the court, upon hearing evidence after a jury has passed upon some of the vital issues, makes findings upon all of the issues, contrary to the verdict, such action is in effect a setting aside and vacating of the verdict, and it is the duty of the court to order a new trial by jury, and it has no power to proceed to determine the cause without a jury. (*Montgomery v. Sayre*, 91 Cal. 206.)

80. In an action at law the defendant is entitled to have the issues made tried by a jury, and the court cannot enter a verdict contrary to the will of the jury, or substitute its judgment for theirs and assume the power to decide issues of fact once submitted to the jury, or render a judgment contrary to the verdict. (*Montgomery v. Sayre*, 91 Cal. 206.)

Attempting to correct verdict by judgment. See ante, II.

Entry of judgment on. See Judgments, II, 8, f.

Receiving, reading, and recording. See Criminal Law, XVIII, 19, a, B.

Failure to enter judgment on, effect of. See Justices of the Peace, 77, 78.

Entry of judgment on special verdict. See Mandamus, 77.

Verdict in cross-complaint for specific performance is merely advisory. See Cross-complaint, 42.

Judgment non obstante veredicto. See Judgments, 100.

VERIFICATION.

What sufficient. See Offices and Officers, 265; Taxation, 433.

Schedule and inventory, verification of. See Bankruptcy and Insolvency, VI, 4.

Petition in insolvency, verification of. See Bankruptcy and Insolvency, VI, 3, c.

Petition in insolvency by firm, verification of. See Partnership, 285.

Complaint, swearing to. See Criminal Law, VII.

Claim, verification of. See Estates of Deceased Persons, VI, 3, d.

Claims against county, verification of. See Counties, VIII, 6, a.

Denial where complaint verified. See Pleading and Practice, IX, 11.

Pleadings, verification of. See Pleading and Practice, VII, 14.

Statement by bank commissioners, verification of. See Banks and Banking, 106.

Guardian's account, who may make. See Guardian and Ward, 94.

VESSELS.

See Shipping.

Towage. See Towage.

VESTED RIGHTS.

Statutes divesting one of. See Statutes, VIII, 19.

Laws impairing. See Constitutional Law, VIII, 8, f.

Right of riparian owner of access to the water. See Watercourses, XIV, 1, b.

Right of riparian owner to natural flow. See Watercourses, XIV, 1, c.

Impairing obligation of contract by change of by-law. See Unincorporated Associations, II.

Action for interference with, what must be shown. See Ferries, 35.

In public lands, Congress cannot divest. See Public Lands, 617.

Right accruing under a policy on a loss. See Insurance, 74.

One suing for breach of must comply with the law. See Ferries, 35.

VETO POWER.

Mayor, veto power of. See Water Companies, 33.

Statutes, veto of. See Statutes, I, 2.

VEXATIOUS LITIGATION.

See Equity, III, 3, b.

VIEW.

Commissioners to assess land, view of. See Swamp and Overflowed Lands, XVII, 3, k, B.

Jury, view by. See Criminal Law, XVIII, 12; Pleading and Practice, XX, 10.

Jury, view of land by. See Jury and Jurors, XII.

In prosecution for receiving stolen goods. See Criminal Law, 2472.

VIEWERS.

Appointment, duty and report of viewers. See Highways, I, 3, g.

VISITORS.

Duty toward. See Negligence, III, 1.

VITICULTURAL COMMISSIONERS.

Delegation of legislative powers to. See Constitutional Law, 176.

VOID PROCEEDINGS.

Curative acts. See Constitutional Law, VIII, 17; Statutes, VIII, 22.

To improve street, legalizing. See Streets, XII, 8.

VOLUNTARY CONVEYANCES.

See Fraudulent Conveyances, II, 2.

VOLUNTARY NONSUIT.

See Nonsuit, II.

VOLUNTARY PAYMENT.

Recovery of. See Payment, VIII, 2.

VOLUNTEERS.

Bounty to. See Military Companies, 2.

VOTERS.

Right to vote and qualification of voters. See Elections, VI.

VOUCHERS.

Accounting, vouchers on. See Executors and Administrators, VIII, 5.

VULGAR LANGUAGE.

See Criminal Law, XXI, 46

WAGERS.

See Gaming.

Gambling. See Criminal Law, XXI, 30.

WAIVER.

1. The people of a county, in their quasi corporate capacity, may waive a strict compliance with the letter of a statute passed for the benefit of the county, provided there has been a substantial compliance with its terms. (*Calaveras County v. Brockway*, 30 Cal. 325.)

2. A party may, by agreement, waive a right created by statute for his benefit. (*Bowen v. Aubrey*, 22 Cal. 566.)

Statutory provisions may be waived. See *New Trial*, 334.

Statutory right to fence may be waived. See *Railroads*, 162.

3. A party may waive a right created by the statute for his benefit. (*People v. Robinson*, 46 Cal. 94.)

4. Constitutional rights may be waived. (*Meredith v. Santa Clara Min. Assn.*, 60 Cal. 617, 620.)

Constitutional rights, waiver of. See *Appeals*, 786; *Constitutional Law*, IX.

Constitutional provision, waiver of. See *Mortgages*, 204.

5. It is not essential to a waiver that the claim of right waived should be enforceable, but there may be a waiver or relinquishment of a claim to something without right. (*Anglo-Nevada Assur. Corp. v. Nadeau*, 90 Cal. 393.)

Abatement, waiver of defense in by failure to plead. See *Estates of Deceased Persons*, 237.

Affidavits, failure to file in time, waiver of. See *New Trial*, 381.

Amendment as waiver of error in striking out. See *Pleading and Practice*, 143.

Amendment, waiver of objection to. See *Pleading and Practice*, XI, 19.

Answering, waiver by. See *Injunctions*, III, 6.

Appeal, signature to bill of exceptions, waiver of. See *Appeals*, 1188.

Appeal, statement, waiver of failure to make in time. See *Appeals*, 843.

Appeal, sureties on appeal, waiver of justification of. See *Appeals*, 727, 728.

Appeal, transcript, waiver of technical objections to. See *Appeals*, 1052.

Appeal, defective notice of, waiver of. See *Appeals*, V, 5, e, F.

Appeal, record on, waiver of objection to. See *Appeals*, 1253.

Appeal, undertaking on, waiver of. See *Appeals*, V, 6, i.

Appeal, waiver of right of. See *Appeals*, III, 8.

Appearance or answer as waiver of service of summons or defect in. See *Summons*, IV, 8.

Appearing and contesting waives notice. See *Pleading and Practice*, 685.

Arbitrators, errors and misconduct of, waiver of. See *Arbitration and Award*, V, 6, a.

Arraignment and plea, waiver of. See *Criminal Law*, 336.

Attorney, waiver of notice of change of. See *Attorney and Client*, 146, 147.

Breach of warranty, waiver of. See *Sales*, VII, 4, b.

Breach of covenant, waiver of. See *Landlord and Tenant*, IV, 7.

By-law against transfer until lien paid, waiver of. See *Corporations*, 197.

Change of judges, waiver of objection to. See *Criminal Law*, 503.

Check, waiver of notice of dishonor of. See *Banks and Banking*, 55.

Conditions, authority of agent to waive. See *Insurance*, I, 5, c.

Conditions, waiver of. See *Insurance*, I, 5, c.

Conditions, breach of and waiver of. See *Vendor and Vendee*, X, 6.

Consent waives error. See *Criminal Law*, 2203.

Consular exemption, waiver of. See *Consuls*, 4.

Continuance, waiver of right to. See *Continuance*, II.

Contract, breach of, waiver of. See *Contracts*, V, 1.

Contracts, performance of, waiver of. See *Contracts*, IV, 1.

Counterclaim, waiver of by failure to plead. See *Counterclaim*, V, 2.

Default, waiver of. See *Defaults*, III.

Demand, protest, and notice, waiver of. See *Bills and Notes*, XII.

Demand, waiver of not implied. See *Landlord and Tenant*, 224.

Demurrer, ruling on, waiver of. See *Pleading and Practice*, X, 11.

Demurrer, filing of answer as waiver of ruling on. See *Pleading and Practice*, X, 16.

Demurrer, error in sustaining, waiver of. See *Joinder and Severance of Actions*, 69.

Demurrer, failure to demur, waiver by. See *Pleading and Practice*, X, 7.

Deposition, waiver of objection to. See *Depositions*, 57.

Deposition, waiver of objection to answer in. See *Depositions*, 70.

Election, right of, waiver of. See *Mortgages*, 226, et seq.

Error, waiver of by failure to object. See *Jury and Jurors*, 72.

Exemption, waiver of. See *Exemptions*, III.

Failure to present points, waiver by. See *Appeals*, 1882, et seq.

Findings, waiver of. See *Findings*, IX, 6.

Forfeiture, waiver of. See *Forfeiture; Unincorporated Associations*, IV; *Vendor and Vendee*, XI, 2.

Forfeiture of policy, waiver of. See *Insurance*, I, 14.

Former judgment, estoppel by, waiver of. See *Judgments*, X, 9, n, C.

Fraud, waiver of. See *Fraud*, III.

Homestead right, waiver of. See *Homesteads*, 453.

Homestead, widow, right of to, what does not waive. See Homesteads, 452.

Invalidity of sale, waiver of. See Executions, IX, 5, i.

Irregularities or nonperformance, waiver of. See Corporations, IV, 2, f, C.

Judgment of appellate court, waiver of right to enforce, what is not. See Appeals, 3202.

Jurisdiction of justice, waiver of objection to. See Justices of the Peace, IV, 5, f.

Jury trial, waiver of. See Jury and Jurors, I, 2.

Lien for freight, waiver of. See Shipping, 54, 55.

Lien, parol evidence of waiver of. See Vendor and Vendee, 302.

Marshaling of assets, waiver of right to. See Marshaling of Assets.

Misjoinder, waiver of. See Joinder and Severance of Actions, I, 3, c.

Motion to strike out, waiver of by delay. See Pleading and Practice, 139.

New trial, notice of motion for, waiver of. See New Trial, V, 3, b.

New trial, objections to statement on motion for, waiver of. See New Trial, V, 7, f.

Nonsuit, waiver of. See Nonsuit, V.

Notice of decision, waiver of. See New Trial, 317, 318.

Nonresidence of witness, waiver of evidence of. See Depositions, 64.

Order of trial, waiver of by acquiescence. See Ejectment, 304.

Parties, defect of, waiver of. See Parties, VII, 5.

Payment, delay in, waiver of. See Specific Performance, 160.

Performance, waiver of. See Attorney and Client, VII, 4.

Pleading, insufficiency of, waiver of. See Fraud, 121, et seq.

Preliminary examination, waiver of. See Criminal Law, 84.

Presentation of claim, waiver of. See Estates of Deceased Persons, VI, 3, f.

Presumptions, one cannot be presumed to waive right where he had no notice. See Executions, 29.

Privilege, waiver of. See Privileged Communications, VI.

Process, waiver of by appearance. See Appearance, III, 4.

Proofs, waiver of objection to form of by failure to specify. See Insurance, 231.

Question of fact, waiver is. See Insurance, 88.

Redemption, waiver of production of papers on. See Executions, 326.

Rent, nonpayment, waiver. See Landlord and Tenant, IX, 3.

Rescission, right to, waiver of. See Rescission of Contracts, IV.

Security, waiver of. See Mortgages, XIX, 2.

Separate trials, error in refusing, what waives. See Mechanics' Liens, 359.

Setoff, neglect to assert. See Setoff, IV.

Statute of frauds, waiver of. See Statute of Frauds, VII.

Statute of limitations, waiver of defense of. See Statute of Limitations, X, 3.

Stockholder's liability, release of. See Corporations, V, 7, e.

Tender, insufficient, waiver by failure to object. See Tender, 6, 7.

Time of tender of deed, waiver of. See Vendor and Vendee, 202.

Tort of factor, waiver of. See Factors, 16, 17.

Tort, waiving to sue in assumpsit. See Assumpsit, IV.

Variance, objection for, waiver of. See Variance, II.

Vendor cannot waive right of vendee. See Executions, 191.

Vendor's lien, waiver of. See Vendor and Vendee, XI, 4, c.

Verdict, objections to and waiver of. See Verdict, IV.

Venue, waiver of. See Venue, I, 2.

Warehouseman's lien, what amounts to waiver of. See Warehousemen.

Witness, objection to husband or wife as, waiver of. See Witnesses, V, 2.

Witness, privilege of, waiver of. See Witnesses, VI, 2.

Written charge to jury, waiver of. See Criminal Law, 891.

WALLS.

See Party Walls.

Overhanging, as nuisances. See Nuisances, II, 2.

WANT OF PROSECUTION.

Dismissal for. See Dismissal, IV, 2.

WARDS.

See Guardian and Ward.

WAR.

Creation of state debt in case of. See Constitutional Law, 155, 156.

Power to determine existence of. See Constitutional Law, 155, 186.

Aid to railroad during. See Railroads, 8.

WAREHOUSEMEN.

1. In an action against a warehouseman for negligence to recover damages for loss by fire of goods stored with him, evidence which tends to show the condition of the building at the time of the fire, and all the facts and circumstances connected with the fire, are admissible. (*Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 164.)

Throwing bales in passageway of, failure to guard entrance. See Negligence, 14, et seq.

2. A prima facie case of negligence is made out against a warehouseman who refuses to deliver property stored with him, upon proof of demand and refusal. Such evidence alone is sufficient to show a conversion by him. But if it appear that the property, when demanded, was consumed by fire, the burden of proof is then on the bailor to show that the fire was the result of the negligence of the warehouseman. (*Wilson v. Southern Pac. R. R. Co.*, 62 Cal. 164.)

3. Where the defendants, warehousemen, deliver wheat to third persons, who bought from a broker for his own debt, on the ground that they held the storage receipt of defendants to one S., who had loaned money to E. & H. on the wheat as collateral, and had indorsed the receipt, "deliver to bearer,

or E. & H.," the defendants knowing at the time of said delivery that E. & H. claimed the wheat as their property, they are liable to E. & H. for a conversion. (*Hanna v. Flint*, 14 Cal. 73.)

4. Whether defendant could have refused to deliver the wheat to E. & H. while the storage receipt to S. was outstanding, query? (*Hanna v. Flint*, 14 Cal. 73.)

5. But when they gave the wheat to the wrong claimant they became responsible for its value to the right one. (*Hanna v. Flint*, 14 Cal. 73.)

6. The plaintiff intrusted certain property to the Ten Cent Parcel Company, a corporation, to be stored. The company stored the property with warehousemen—to whose rights and duties the defendants succeeded—taking a receipt therefor. The defendants had notice that the plaintiff was the owner of the property. She tendered them the amount of the storage charges, seventy-eight dollars, and demanded the property, but did not present the warehouse receipt. Defendants refused to deliver it on the sole ground that it had been sold for the storage charges, but offered to deliver it for two hundred dollars. The court found that the property had not been sold, but was at the time of the tender and refusal in the possession of defendants. Held, that the refusal amounted to a conversion, and that the failure to produce the receipt constituted no defense, as the refusal was placed on the mere ground that the property had been sold. (*Briggs v. Haycock*, 63 Cal. 343.)

Conversion by warehousemen, action by mortgagee for. See Mortgages, 1003.

Person buying from, when guilty of receiving stolen goods. See Criminal Law, 2461.

7. When a warehouseman, who has goods in charge, states to one who is about to take possession of the same by a legal process that he has no charges on the goods, this is a waiver of the warehouseman's lien for charges, if any he had. (*Blackman v. Pierce*, 23 Cal. 508.)

8. The transfer of a warehouse receipt in good faith, and in the ordinary course of business, operates to transfer to the holder the title to the goods covered by the receipt. (*Davis v. Russell*, 52 Cal. 611.)

9. There is no difference between a warehouse receipt and a bill of lading in this respect. (*Davis v. Russell*, 52 Cal. 611.)

10. Under the act of 1878 a warehouse receipt is negotiable, unless it is marked non-negotiable across its face, and the indorsement thereof by the party to whose order it is issued passes the absolute title to the property mentioned therein to the indorsee. (*Bishop v. Fulkerth*, 68 Cal. 607.)

11. Under the facts of this case the refusal of the following instruction held to be error: "The possession of the instrument in writing produced in evidence, dated August 18, 1875, and called a warehouse receipt, covering this wheat in controversy, together with the plaintiff's indorsement thereon, is of itself presumptive evidence of the ownership of the grain, by the person having such possession

of such receipt so indorsed." (*Davis v. Russell*, 52 Cal. 611.)

12. Warehousemen who give their receipt for goods on storage are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them by the holder of the receipt for a conversion of the goods by a seizure in an action against a vendor of the plaintiff. (*Goodwin v. Scannell*, 6 Cal. 541.)

13. And this although the warehousemen are the attaching creditors, and although the sheriff making the seizure was not liable by reason of there being no segregation. (*Goodwin v. Scannell*, 6 Cal. 541.)

14. James Hogan, being indebted to the estate of one Lowrie, for whom one John Munson assumed to be the agent, deposited certain cans of fruit in a warehouse, and directed the warehouseman to give him a receipt as if deposited by Munson. A receipt was accordingly given to Hogan as follows: "Received in Niles warehouse from John Munson, etc., for account and risk of — (not transferable or negotiable)," etc. Hogan had previously informed Munson that he would deposit fruit in the warehouse sufficient to secure his indebtedness. He never gave the receipt to Munson, but borrowed money on it from the defendants, to whom, upon the surrender of the receipt, a new one was given by the defendants. The defendants afterward assigned their security, and the fruit was sold by their assignee. The plaintiffs, the executors of the will of Lowrie, thereupon brought this action for the conversion of the fruit. Held, that the first receipt and deposit, not having been made for the account of Munson, did not give him possession or constructive possession of the fruit, and that as he could not, without a delivery of the receipt to him, have recovered the property, the plaintiffs for whom he was assuming to act were in no better condition. (*Lowrie v. Salz*, 75 Cal. 349.)

15. On the trial the warehouseman was asked whom he understood to be the depositor of the fruit. Held, that the question was improper, as calling for the opinion of the witness. (*Lowrie v. Salz*, 75 Cal. 349.)

16. When the evidence shows conclusively that the owners of a warehouse are liable for the negligence of the servants employed therein, the fact that it was a bonded warehouse, and that the usual government agent was on the premises to look after the duties, is immaterial; and, as the court might have instructed the jury that the defendants were liable for any negligence that occurred, any error in stating certain conditions under which they, and not the government agent, were liable, is immaterial. (*O'Callaghan v. Bode*, 84 Cal. 439.)

Storage in warehouse. See Common Carriers, 111, 6.

Delivery of goods in warehouse. See Mortgages, 977.

Change of possession on sale of goods in warehouse. See Sales, IV, 4.

Common carriers, when liable as. See Common Carriers, 33.

Replevin against, complaint in. See Replevin, 53.

Arbitrary assessment of goods in warehouse. See Taxation, 204, 373.

Goods not assessable to warehouseman. See Taxation, 283.

Property in warehouse, assessment of. See Taxation, 204.

WARRANTS.

See Sacramento, 10, 12.

Arrest, warrant of. See Criminal Law, IX; Extradition, 16.

Search warrants. See Criminal Law, VIII.

Location of state land warrants. See Public Lands, XIV, 14.

Military land warrants, location of. See Public Lands, VII.

Street assessments, warrants for. See Streets, XVI, 21.

School. See Schools, X.

Drawing warrants. See Controllers, III.

Compelling supervisors to issue warrants. See Mandamus, II, 13, a.

Mandamus to compel issuance. See Mandamus, II, 12, d.

Form of and validity. See Counties, IX, 1.

Registry, priority and order of payment. See Counties, IX, 3.

Assignability and negotiability. See Counties, IX, 2.

Assignor, liability of. See Counties, IX, 5.

Evidence of payment. See Counties, IX, 4.

Stolen, rights of holders of bonds issued for. See Bonds, II, 4.

Presumption of genuineness of warrants. See Treasurers, 10.

Order for requisition for school warrant, forging. See Criminal Laws, 1609.

Liability of superintendent for warrants forged by deputy. See Schools, X.

Finding that warrant was fraudulent. See Treasurers, 13.

Illegal, money paid for cannot be recovered. See Payment, 104.

Loss of. See Treasurers, 11.

Mandamus to compel payment of. See Mandamus, II, 12, e.

Payment of, enjoining. See Injunctions, 204.

Duty of treasurer to pay. See Treasurers, 8.

Controller's may be assigned. See Assignments of Contracts, 8.

Assignee of may maintain replevin. See Replevin, 9.

Whether payment can be made in. See San Francisco, 293.

WARRANTY.

Covenant of. See Covenants, I, 1.

Covenant of warranty is mere personal obligation. See Vendor and Vendee, 98.

General covenant of, what relates to. See Deeds, 376.

Sales by sample. See Sales, VIII.

Manufactured articles, warranty on sale of. See Sales, VII, 3, b.

Implied. See Sales, VII, 2.

Sales, warranties on. See Sales, VII.

Executory contracts, warranties in. See Sales, VII, 2.

Fitness, warranty of. See Sales, VII, 3, b.

Title, warranty of. See Auctions, III, Sales, VII, 3, a.

Title, warranty of by pledgor. See Pledges, VII, 1.

Title, implied warranty of. See Vendor and Vendee, VIII, 1.

Title, limitation of action for breach of warranty of. See Statute of Limitations, VI, 4, b.

Quality, warranty of. See Sales, VII, 3, c.

Merchantable condition, warranty of. See Sales, VII, 3, c.

Growing crops, warranty on sale of. See Growing Crops.

Insurance policy, warranties in. See Insurance, I, 6.

Breach of. See Sales, VII, 4.

Breach of, time and place of. See Sales, IV, 4, a.

Waiver of breach of warranty. See Sales, VII, 4, b.

Against worthlessness on transfer of note. See Bills and Notes, 115.

On sale of bonds. See Bonds, 50, et seq.

Vendor with warranty of title is not competent witness. See Witnesses, 151, 152.

WASTE.

See Mortgages, X, 2.

1. At common law there was no forfeiture of an estate for years for the commission of waste. (*Chipman v. Emeric*, 3 Cal. 273.)

2. By the Statute of Gloucester, 6 Ed. I., the remedy of forfeiture was given for waste, and it was expressly confined to the place wherein the waste was committed. (*Chipman v. Emeric*, 3 Cal. 273.)

3. Statute of California confines remedy for waste or for nonpayment of rent to the recovery of treble damages. (*Chipman v. Emeric*, 3 Cal. 273.)

Enjoining. See Injunctions, II, 6.

Enjoining pending ejectment. See Ejectment, XII.

Bond to stay pending appeal. See Appeals, 1773.

Cutting timber. See Growing Trees, 5.

Percentage for on lease for lumbering purposes. See Landlord and Tenant, 206.

By tenant in common. See Cotenancy, II, 9.

Action by reversioner for injury to freehold. See Reversions, 2.

Trustee may sue for. See Trusts and Trustees, 117.

Executor may sue in replevin for timber cut. See Executors and Administrators, 268.

Liability of vendee in possession for. See Vendor and Vendee, 158.

Damages for. See Forcible Entry and Unlawful Detainer, 288, et seq.

WATCHMAN.

Provisions as to. See Insurance, II, 3.

WATER COMMISSIONERS.

See Watercourses, IX.

WATER COMPANIES.

Relates to companies for the furnishing of water in municipalities. For questions relating to other water, canal, or ditch companies, see Watercourses.

- I. Creation, Organization, and Nature of; Acquiring Property.**
- II. Supplying or Shutting off Water; Duty to Supply Water Free to Municipalities.**
- III. Water Rates; Contracts for the Supply of Water.**
- IV. Contract Between Flume and Water Companies; Lease of Water-works.**
- V. Injuries from Leakage.**

Act authorizing purchase of water-works. See Bonds, 35.

Assessment of franchise of. See Taxation, 149.

Mandamus to compel payment of warrants. See Mandamus, 138.

I. Creation, Organization, and Nature of; Acquiring Property.

1. By section 1 of article XIV of the constitution, the use of all water heretofore or hereafter appropriated for sale, rental, or distribution is expressly declared to be a public use, and it is not now left to the legislature, as formerly, to say whether it shall be a public use or not. The constitution itself declares it to be such, and then makes the use subject to the regulation and control of the state; that is to say, of the legislature, in the manner to be prescribed by statute, subject, however, to certain enumerated provisions contained in the constitution itself, and among them to the provisions in respect to the rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city and county, or city or town, or the inhabitants thereof. (*People v. Stephens*, 62 Cal. 209.)

2. By the constitution the right to collect the water rates or compensation established is declared to be a franchise, and cannot be exercised except by authority and in the manner prescribed by statute. (*People v. Stephens*, 62 Cal. 209.)

3. Provisions of constitution of 1879 in reference to supplying of municipalities with fresh water, made many changes from the pre-existing condition of things. (*People v. Stephens*, 62 Cal. 209.)

4. Prior to the adoption of the constitution of 1879 the right of laying pipes in the streets of any incorporated city or town in this state for the purpose of supplying the inhabitants of such city or town with fresh water lay only in grant from the legislature. (*People v. Stephens*, 62 Cal. 209.)

5. Private corporations to supply a city with water cannot be created by special act, nor can the power to supply a city with water be conferred on a private corporation by special act. (*San Francisco v. Spring Valley W. W.*, 48 Cal. 493.)

Cited 52 Cal. 118, 119, 123, 126.

6. A water company need not be incorporated as provided by the statutes of 1872; but it is sufficient if it is organized as provided by the Civil Code, which applies to all corporations. (*West v. Crawford*, 80 Cal. 19.)

7. The power to charge tolls or rates for

water is a franchise conferred on corporations formed under general laws for the formation of water companies, and can be exercised by a corporation only in the manner provided for in those laws. (*Spring Valley W. W. v. Bryant*, 52 Cal. 133.)

Cited 83 Cal. 413.

8. Where an act authorized the incorporation of a water company, and also provided that three thousand feet of water-pipe should be laid down within one year, held, that the laying of the pipe within the period mentioned was not a condition of the existence of the corporation, nor was proof of it necessary to enable the corporation to maintain an action or proceeding after the expiration of the year. (*Spring Valley W. W. v. San Francisco*, 22 Cal. 434.)

9. View of premises required to be made by commissioners in condemning lands under the Water Company Act of 1858 may be made by them at any time before submitting their estimate and report. It is proper that the view should be had before hearing the evidence. (*Spring Valley W. W. v. San Francisco*, 22 Cal. 434.)

10. In *San Francisco v. Spring Valley W. W.*, 48 Cal. 493, it was decided that the Spring Valley Water Works was formed under the general law of 1858, and that its rights, duties, and obligations were derived solely from that law. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

Cited 94 Cal. 369.

11. A company organized under the Incorporation Act of 1853, for the purpose of introducing into the city of San Francisco pure fresh water and supplying its inhabitants and public buildings with the same, and for the transaction of such other business relating thereto as might be necessary or proper, is a corporation within the act of 1853, providing for the formation of "corporations for manufacturing, mining, mechanical, wharfing and dockage, or chemical purposes, or for the purpose of engaging in any species of trade or commerce, foreign or domestic." (*People ex rel. Heyneman v. Blake*, 19 Cal. 579.)

12. Where the evidence shows that the waters of a creek from which a water company receives its supply are insufficient in quantity to supply the wants of the inhabitants of a city to which the company furnishes the water, during the summer months, and a portion of them are also inferior in quality, and that the population of the city is steadily increasing, and that the waters of the stream sought to be condemned by the city are excellent in quality, and abundant in quantity, and of sufficient elevation, the fact that the stream sought to be taken is further from the city than the streams from which the water company take their supply, although a matter to be considered, is not controlling upon the question of necessity, and where the instructions of the court as to the power to condemn, and the necessity claimed to exist, are correct, it is not error to refuse instructions predicated controllingly upon the question of distances and upon the power of the city to condemn the waters owned

by the water company. (*City of Santa Cruz v. Enright*, 95 Cal. 105.)

13. An act for the incorporation of water companies, approved April 22, 1858, provided that the mode of proceeding for the appropriation of lands should be the same as that prescribed in sections 27 to 29 of the act of April 23, 1853, for the incorporation of railroad companies. In 1861 an entirely new act for the incorporation of railroad companies was passed, not following the order or number of sections of the act of 1853, which it entirely repealed, and containing new provisions as to their appropriation of lands. In a proceeding to condemn lands, instituted in 1862 by the plaintiff, a water company incorporated under the act of 1858, held, that the course of procedure prescribed by sections 27 to 29 of the Railroad Act of 1853 should be followed, and not those of the new act of 1861; that those sections were substantially incorporated in the Water Company Act of 1858, and remained a part of the latter, notwithstanding the repeal of the original act. (*Spring Valley W. W. v. San Francisco*, 22 Cal. 434.)

Cited 48 Cal. 520; 70 Cal. 506.

Ditch and water companies to furnish water. See *Watercourses*, XIII.

Taking of private property for. See *Eminent Domain*, IV, 3, b.

Proceedings to condemn water supplies are special cases. See *Jurisdiction*, 170.

Right to lay pipes and collect rates is franchise. See *Franchises*, 4, 5.

Valuation of franchise of. See *Taxation*, 423, 424.

II. Supplying or Shutting off Water; Duty to Supply Water Free to Municipalities.

14. Primarily, it is duty of Spring Valley Water Works to furnish to all inhabitants—the men, women, and children—of the city and county (the rates fixed according to law being paid) water for family uses, being water for drinking, lavation, for domestic animals, and for other like domestic uses. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

Cited 59 Cal. 520; 61 Cal. 23, 45; 94 Cal. 369.

15. A water company has the right to shut off the water from its consumer when the consumer refuses to pay for the water supplied. (*Sheward v. Citizens' Water Co.*, 90 Cal. 635.)

16. No cause of action is stated for compelling a water company to continue its supply of water to the plaintiff, or to enjoin it from cutting off such supply, where it is admitted by the plaintiff, upon demurrer to the answer, that an ordinance fixing meter rates was properly adopted; that a meter was applied to the water service of plaintiff's premises, with his knowledge and consent, which accurately measured the water used; that the use of water by plaintiff was large, unusual, and wasteful; that the sums demanded of the plaintiff for water consumed by him were the ordinary meter charges of the company, without discrimination against the plaintiff, and less than the rates fixed by the ordinance; and that plaintiff had refused to pay said

sums. (*Sheward v. Citizens' Water Co.*, 90 Cal. 635.)

17. A person engaged in furnishing water to the inhabitants of a city, under a franchise permitting him to lay pipes through the streets for that purpose and to sell the water, cannot without reasonable cause shut off the water from one of such inhabitants who is using the same at a fixed rate. The use of water appropriated for sale, rental, or distribution is a public use, and the right to collect rates or compensation for the use of water furnished to the inhabitants of a city is a franchise which can only be exercised by authority of and in the manner prescribed by law. (*McCrary v. Beaudry*, 67 Cal. 120.) Cited 21 Or. 422.

18. In *San Francisco v. Spring Valley W. W.*, 48 Cal. 493, it was decided that, by reason of the provisions of the general law of 1858, there are purposes for which water is furnished by the Spring Valley Water Works for which the city and county is bound to pay the legal rates. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

19. Also, that the Spring Valley Water Works is bound to furnish water to the city and county free of charge "in case of fire or other great necessity." (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

20. For water furnished for such "family uses" to those of the inhabitants to whom it is the duty of the city and county to provide all or some of the necessities of life—as prisoners and the occupants of charitable and educational institutions—the city and county is bound to pay the rates established in accordance with law. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

21. The Spring Valley Water Works are not bound to furnish water for any other purposes, unless the obligation is imposed upon that company by the clause of the statute which requires water companies to furnish water to the city and county, "in case of fire or other great necessity, free of charge." (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

22. It is the duty of the company to furnish water free of charge for fires, and this includes the furnishing of water free for engines and engine houses. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.) Cited 61 Cal. 36.

23. The water is to be furnished to the inhabitants for family uses on payment of rates; to the city and county government free for all purposes for which it may be necessary and proper in the exercise of its police and governmental functions, being for other purposes than the "family uses" of individuals to whom the city and county is under obligations to furnish water. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

24. The word "great" in the statute does not qualify the word "necessity," so as to limit the furnishing of water free to cases of rare and casual demands. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)

25. Since, by the terms of the statute, the corporation is entitled to charge only for

water supplied for "family uses," there is no hardship in compelling it to furnish the city and county "to the extent of its means," free of charge, all water necessary for watering streets, public squares, and parks, for flushing sewers, and for all like purposes beneficial to the public, and in aid of the health and good government of the people of the city and county. (*Spring Valley W. W. v. San Francisco*, 52 Cal. 111.)
Cited 61 Cal. 30; 94 Cal. 369.

26. The construction placed on the provisions of the new constitution in relation to water, in the case of *Spring Valley W. W. v. Board of Supervisors of San Francisco*, 7 Pac. C. L. J. 614, necessarily results in relieving that company of the obligation to furnish water to the city and county of San Francisco free of charge for any purpose. *Ross, J., concurring.* (*San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.)

27. By the provisions of the act of the 23d of April, 1858, authorizing George Ensign and others, owners of the Spring Valley Water Works, to lay down water-pipes in the public streets of the city and county of San Francisco, the Spring Valley Water Works are not required to supply said city and county with water for municipal purposes free of charge, other than for the extinguishment of fires. (*San Francisco v. Spring Valley W. W.*, 39 Cal. 473.)

28. The third section of the act of the 23d of April, 1858, imposes upon the Spring Valley Water Works the obligation to furnish, free of charge, a pro rata supply of water for municipal purposes other than the extinguishment of fires, in the event of water being introduced by some other person or persons, as provided by said section. *Per Crockett, J.* (*San Francisco v. Spring Valley W. W.*, 39 Cal. 473.)

29. The provision of the act of April 22, 1858, "for the incorporation of water companies," requiring them to furnish water free of charge to cities and counties, cities or towns for certain purposes, was abrogated by the new constitution (art. XI, sec. 19, art. XIV, sec. 1); and such companies are now relieved from any such obligation. (*Spring Valley W. W. v. Board of Supervisors*, 61 Cal. 18.)

Mandamus to compel supplying of water. See *Mandamus*, 53.

Lien for water, against whom not enforceable. See *Liens*, 9.

Duty to furnish water. See *Watercourses*, 174, 175.

III. Water Rates; Contracts for the Supply of Water.

30. The board of supervisors of the city and county of San Francisco has had, since the new constitution went into effect, and has, the power to fix and determine the rates or compensation to be collected by the Spring Valley Water Works as well from the city and county (for water used for fire purposes, for flushing sewers, for public buildings and offices, for sprinkling streets, and for beautifying parks) as from private persons, any

provision in any statute to the contrary notwithstanding. *Myrick, J., concurring.* (*San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.)
Cited 61 Cal. 30, 50.

31. The constitution expressly declares that water rates or compensation shall be fixed in a certain specified manner, at a certain time, and by a certain body; and the body, failing to do so, is expressly made subject to peremptory process to compel action at the suit of any party interested, and liable to such further processes and penalties as the legislature may prescribe. (*People v. Stephens*, 62 Cal. 209.)

32. The act of March 1, 1876, "To establish water rates in the city and county of San Francisco," and the supplemental act of April 3, 1876, are unconstitutional and void, in so far as they attempt to provide a mode of fixing rates to be charged by corporations in San Francisco, differing from the mode provided for other corporations by general laws. *Spring Valley W. W. v. Bryant*, 52 Cal. 132, affirmed. (*San Francisco v. Spring Valley W. W.*, 53 Cal. 608.)

33. The power to fix water rates in the city and county of San Francisco is vested solely in the board of supervisors of the city and county, and the mayor has no power to veto an order duly passed by the majority of the board fixing such rates. (*Jacobs v. Board of Supervisors of San Francisco*, 100 Cal. 121.)

34. The supervisors are not bound to give notice to a water company of its intention to fix water rates; but they are nevertheless in duty bound to make a proper effort to procure all necessary information to enable the board to act intelligently and fairly in fixing the rates, and a failure to do so may defeat its action. (*Spring Valley W. W. v. San Francisco*, 82 Cal. 286.)
Cited 100 Cal. 130, 137.

35. The failure of the legislature to enact laws fixing water rates, if failure there was, could not prevent the establishment of the rates or compensation specifically required to be established by the constitution. (*People v. Stephens*, 62 Cal. 209.)

36. Section 1 of article XIV of the constitution providing for "peremptory process" to compel action of the supervisors fixing water rates should not be construed so as to compel the court to decree that the board of supervisors, after having passed an ordinance fixing water rates, shall act upon the objection of the mayor and proceed to fix rates without any certainty that its action will not be again vetoed, and so on indefinitely, or to decree, contrary to the principles regulating the writ of mandamus, that the supervisors shall abandon their judgment and make it conform to the opinion of the court or of any other person. (*Jacobs v. Board of Supervisors of San Francisco*, 100 Cal. 121.)

37. The Spring Valley Water Company was organized under "An act for the incorporation of water companies," passed April 22, 1858, by the provisions of which it had a right to have the water rates fixed by a board of commissioners; and the duty of appoint-

ing two of the commissioners was imposed by the fourth section of the act upon the board of supervisors. A board of commissioners was appointed under the act, and, a vacancy having occurred in the board by the death of one of the members appointed by the board of supervisors, the company applied for a writ of mandamus to compel the board of supervisors to appoint a new commissioner. Held, section 4 of the act in question was repealed by section 1, article XIV, of the constitution, and the subject matter is now governed by the act of March 7, 1881. (*Spring Valley W. W. v. Board of Supervisors of San Francisco*, 61 Cal. 3.)

Cited 100 Cal. 137.

38. The "act to establish water rates in the city and county of San Francisco" (Stats. 1875-76, p. 82) is unconstitutional in so far as it attempts to provide a mode of fixing rates to be charged by corporations furnishing water to the inhabitants of San Francisco differing from that provided for establishing rates to be allowed to other corporations formed under the general laws. (*Spring Valley W. W. v. Bryant*, 52 Cal. 133.)

Cited 53 Cal. 611; 72 Cal. 434; 82 Cal. 307.

39. The act of a city council of a municipality in fixing water rates under article XIV, section 1, of the constitution is a legislative act, and when performed is to receive all the presumptions and sanctions which belong to acts of legislative bodies generally; and the rates must be assumed to have been so fixed as to be just both toward the rate-payer and toward the company, and the mode of collection provided must be assumed to be that which will best subserve the interests and rights of both parties. (*Sheward v. Citizens' Water Co.*, 90 Cal. 635.)

40. Where an ordinance fixing water rates does not show upon its face that the rates to be collected, where the amount of consumption is ascertained by a meter, are different from those generally collected from persons who are rated by the use to which they apply the water, the fact that house rates for specific uses are fixed, in the absence of exact measurement, so as to be equivalent to meter rates only as a general rule, and that they may result in an inequality of individual rates, will not justify a court in inquiring into the propriety of the terms of the ordinance, especially if the house rates are not permanently conclusive upon either the consumer or the company, but either may demand a measurement of the exact amount of water consumed. (*Sheward v. Citizens' Water Co.*, 90 Cal. 635.)

41. In determining the validity of the ordinance, it must be assumed that a meter, which is a measurer, will correctly measure and determine the water which passes through it, and the objection that the meter may be inaccurate in measurement cannot be considered. (*Sheward v. Citizens' Water Co.*, 90 Cal. 635.)

42. The ordinance of the board of supervisors of San Francisco known as "Order No. 1573"—establishing water rates—does not fix the rates of compensation for the use of water, but leaves them indefinite and uncertain; and

is therefore not a valid execution of the power conferred upon the board of supervisors by section 1, article XIV, of the constitution. (*San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166.)

43. When the constitution provides for the fixing of rates or compensation for the use of water it means reasonable rates and just compensation; and to fix rates not reasonable, or compensation not just, is a plain violation of the duty of the board of supervisors. They have no right to fix the rates arbitrarily without investigation, or without the exercise of judgment and discretion in determining what is a fair and reasonable compensation. (*Spring Valley W. W. v. San Francisco*, 82 Cal. 286.)

Cited 100 Cal. 130, 137.

44. Under article XIV of the constitution, the use of water for sale is a public use, and the price at which it shall be sold is a matter within the power of the board of supervisors to determine; and, if they have fairly investigated and exercised their discretion in fixing the rates, the courts have no right to interfere on the sole ground that, in the judgment of the court, the rates fixed are not reasonable. To justify an interference by the courts there must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing. But the power of regulating rates is not a power of confiscation, or to take the property of the water company without just compensation; and whether the power of the supervisors to fix rates be judicial, legislative, or administrative, it is not above the control of the courts, if it is arbitrarily exercised, without a fair investigation, and the rates are so fixed as to render it impossible to furnish the water without loss, so that their pretended action amounts to a palpable fraud, which must certainly work injustice. (*Spring Valley W. W. v. San Francisco*, 82 Cal. 286.)

45. An ordinance fixing water rates, which gives every householder the option to require a meter upon his premises to be placed there by the water company, at its expense, and to pay for the water furnished at rates different from the house rates, is not for that reason invalid. It does not leave the rates indefinite or uncertain, and it is not unreasonable to require the water company to pay for the meter. The expense thereof cannot be imposed upon the consumer. (*Spring Valley W. W. v. San Francisco*, 82 Cal. 286.)

46. The complaint in this action held sufficient to sustain a judgment of the superior court setting aside and declaring void an ordinance of the board of supervisors of the city and county of San Francisco fixing water rates to be charged for water to be furnished to said city and its inhabitants for the year year commencing July 1, 1889, and enjoining its enforcement, and directing the board of supervisors to proceed forthwith to fix said rates and compensation as provided by the constitution. Thornton, J., dissenting. (*Spring Valley W. W. v. San Francisco*, 82 Cal. 286.)

47. The plaintiff made a proposal in writing to the board of trustees of the defendant to construct certain works for supplying the

city with water if the board would agree to purchase of the plaintiff a specified amount of water per month for five years; and, responding to this proposal, the board passed a resolution whereby they agreed to take a certain amount of water during the period specified and to pay therefor one hundred dollars per month. The company accepted this proposition, and in performance constructed its works and furnished the water; the city paid therefor until July 31, 1878, but since that time has refused to pay; and this action was brought to recover the contract price of the water. Held, the plaintiff, under the law, assumed the obligation to furnish water to the city in case of fire or other great necessities, free; and also to furnish water to the inhabitants for family uses, upon proper demand, at reasonable rates, to be fixed by a board of commissioners. If the water was furnished for municipal necessities the contract was void, because the company could not, under its charter, charge, nor could the city contract, for that which the company was under obligation to furnish "free of charge"; and if for family uses (for the use of the occupants of the city's prisons, hospitals, poor-houses, schools, etc.) the contract was equally void, because the rates which the company were authorized to charge had not been fixed according to law. (*San Diego Water Co. v. City of San Diego*, 59 Cal. 517.) Cited 61 Cal. 23.

48. The provisions of section 1, article XIV, of the constitution, requiring the rates or compensation to be fixed, have no application to water furnished by a municipality itself. Those provisions refer to the rates or compensation to be collected for water authorized by section 19 of article XI of the constitution to be introduced into cities by individuals or companies incorporated for that purpose. (*People v. Stephens*, 62 Cal. 209.)

Compelling fixing of rates. See *Mandamus*, II, 13, g.

Rates, duty of legislature to provide needful laws. See *Constitutional Law*, 74.

Supervisors cannot fix rates where water not for general distribution. See *Water-courses*, 176.

Water rate, manner of fixing, effect of new constitution on. See *Constitutional Law*, 87.

Prohibiting fixing of water rates. See *Prohibition*, 34.

Agreement to furnish water, construction of. See *Contracts*, 125, 126.

IV. Contracts Between Flume and Water Companies; Lease of Water Works.

49. Contract between flume company and water company for the furnishing of a water supply for domestic use by the inhabitants of a city, for the term of twenty years, and for a sharing of the proceeds of the sales of water, after deducting operating expenses of the plants within the city, to be determined by trustees, does not give to the water company the right to make a contract of lease of all of its rights to third persons, with the understanding that they were to sublease or transfer those rights to the city, so as to give the city the power to determine what the

operating expenses shall be. (*San Diego W. Co. v. San Diego F. Co.*, 100 Cal. 43.)

50. While the water company insisted upon its rights under the unauthorized contract with the city, the flume company had the right to stop furnishing its water, and the water company has no legal remedy by injunction to compel the flume company to continue its supply of water under the original contract; nor is it entitled to any accounting based upon the contract with the city. (*San Diego W. Co. v. San Diego F. Co.*, 100 Cal. 43.)

51. The fact that some of the members of the flume company may have encouraged the contract with the city cannot estop the corporation from objecting to such contract, there being no valid ratification of the contract by the corporation. (*San Diego W. Co. v. San Diego F. Co.*, 100 Cal. 43.)

52. In a lease of the Los Angeles Water Works, by the defendant to the plaintiff, it was provided that the plaintiff should not dispose of water for purposes of irrigation, but should only take from the river the water necessary for domestic purposes. The defendant took water from the plaintiff's pipes for the purpose of sprinkling the streets of the city; but, while this was done, the plaintiff had on hand of the waters of Los Angeles river more than sufficient for supplying the inhabitants of the city with water for domestic purposes. In an action by the plaintiff to recover from the defendant the value of the water taken, held, that the plaintiff was only entitled to receive pay for water furnished to the inhabitants of the city for domestic purposes, and that it had no right to the surplus. (*Los Angeles Water Co. v. Los Angeles City*, 55 Cal. 176.)

53. The plaintiff entered into an agreement with the predecessors in interest of the defendant, who were the holders of a lease of the plaintiff's water-works, by which, for an annual rent reserved, and other considerations, the holders of the lease and their assigns were granted the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use, etc. Afterward the mayor and council of the plaintiff passed an ordinance to impose monthly rates of license upon all persons or corporations not municipal vending water for domestic purposes; and the action was brought to collect such rates. Held, the plaintiff had already reserved a sum, to be paid by defendant, for the privilege of vending water for domestic purposes, and could not, during the term of the lease, increase the amount to be paid for the privilege granted. (*City of Los Angeles v. Los Angeles City Water Co.*, 61 Cal. 65.) Distinguished 67 Cal. 436.

Lessee of city water works, taxation of. See *Taxation*, 175, 176.

V. Injuries from Leakage.

54. In an action against a water company for injuries caused by the negligence of its employees in repairing its water pipes, by which water was thrown upon the roof of plaintiff's building, and goods therein dam-

aged, it is not contributory negligence that a scuttle in the roof of the building had been left open. (*Yik Hon v. Spring Valley W. W.*, 65 Cal. 619.)

Overflowing claim, contributory negligence, what is not. See Negligence, 137.

Action for negligence, variance. See Variance, 21.

Stockholder as witness in action against for causing overflow. See Witnesses, 172.

WATERCOURSES.

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2. *Ownership and Control; Grant of.*
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 - m. *Extent of Right of Diversion; Increasing Diversion.*
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- s. Conveyance, Reservation, or Lease of Water Right.
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See Wharves.

Bridges. See Bridges.

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Beach and water lots in San Francisco. See San Francisco, XIV, 10.

Swamp and Overflowed Land. See Swamp and Overflowed Lands.

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Water right derived under Mexican grant. See Statute of Limitations, 67.

Damages for failure to build dam. See Damages, 11.

Water rights in Los Angeles county. See Los Angeles.

Los Angeles river. See Los Angeles.

I. What Constitutes a Watercourse.

1. To constitute a watercourse it is not necessary that the water shall run in the bed or channel of the stream all the year. (*Span- gler v. City and County of San Francisco*, 84 Cal. 12.)

Evidence to prove existence of watercourse. See post, XIV, 2, p. D.

II. Navigable Waters.

1. What are.

2. The term "navigable streams," as used in section 2875 of the Political Code, prohibiting the construction of bridges across them without draws, and in section 3479 of the Civil Code, providing that any thing which obstructs the free passage of any navigable river or stream is a nuisance, does not include any streams which are merely navigable at certain seasons of the year when the water is high, or any streams other than such as have been declared navigable by the legislature, or are generally navigable in fact during ordinary stages of water. (*Cardwell v. County of Sacramento*, 79 Cal. 347.)

3. The legislature has, in effect, declared that the American river is a non-navigable stream, by dropping it wholly from the list of navigable waters, after successive amendments placing the limit of navigation lower and lower down; and no action will lie to enjoin the county of Sacramento from constructing a bridge across said river without a draw. (*Cardwell v. County of Sacramento*, 79 Cal. 347.)

4. A river beyond the ebb and flow of the tide may be navigable when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers; and this has been extended to its capacity to float

rafts of lumber. (*American River Water Co. v. Amsden*, 6 Cal. 443.)
Cited 79 Cal. 350.

5. To go beyond this and declare a stream navigable which can float a log would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression. (*American River Water Co. v. Amsden*, 6 Cal. 443.)

6. The only other instance in which a stream is navigable is when it is so declared by statute, and when so declared navigable to a certain point, by implication it is declared non-navigable above that point. (*American River Water Co. v. Amsden*, 6 Cal. 443.)

2. Ownership and Control; Grant of.

7. Subject to such restrictions as Congress may impose in the exercise of its power over commerce, the state has the right to control and regulate the use of navigable waters within its boundaries. (*People v. Williams*, 64 Cal. 498.)

8. Upon the admission of California into the Union, the state became vested with all the rights, sovereignty, and jurisdiction in and over the navigable waters, and the soils under them, which were possessed by the original states after the adoption of the constitution of the United States. (*Lux v. Hagg- in*, 69 Cal. 255.)

9. Absolute right of state to control, regu- late, and improve navigable waters within its jurisdiction is an attribute of sovereignty, which cannot be disputed, and this right may be delegated to individuals, either in a natural or corporate capacity. Per *Hastings, C. J.* (*Gunter v. Geary*, 1 Cal. 462.)

10. The state holds complete sovereignty over her navigable bays and rivers; and al- though her ownership is, by the law of nations, and the common and civil law, at- tributed to her for the purpose of preserving the public easement or right of navigation, there is nothing to prevent the exercise of her power, in certain cases, to destroy the easement in order to subserve the general good, which, when done, subjects the land to private proprietorship. (*Eldridge v. Cowell*, 4 Cal. 80.)

Cited 4 Cal. 368; 64 Cal. 499.

11. Navigable streams and the shores to high-water mark are held by the state in trust for the public; but qualified rights therein may be granted so far as they are not inconsistent with or in aid of the principal use, that of navigation. (*Heckman v. Swett*, 99 Cal. 303.)

3. As Public Highways; Obstructions in.

12. The navigable streams of the state are public highways, and are for the use of the people of the state. (*People v. Gold Run Ditch and Min. Co.*, 66 Cal. 138.)
Cited 71 Cal. 135.

13. The navigable waters of the Straits of Carquinez, adjoining the permanent water front of the city of Benicia, as established by the act of March 21, 1868, are a public high- way. (*Shirley v. Bishop*, 67 Cal. 543.)

Bed of river is public highway. See post, IV.

14. Any unauthorized obstruction or interference with these streams by a private individual is a public nuisance, which may be enjoined, upon application of the attorney general in the name of the people of the state. (*People v. Gold Run Ditch and Min. Co.*, 66 Cal. 138.)
Cited 71 Cal. 135.

15. The title to the bed of the ocean below low-water mark, along the shore, is in the state, and if obstructions are placed in it which obstruct navigation and fishery, they may be abated as public nuisances at the suit of the state. (*Coburn v. Ames*, 52 Cal. 337.)

16. In an action to abate, as a nuisance, a boom across a navigable river, made to intercept saw-logs floated down in time of high water, and for damages, it is incumbent on the plaintiff to prove that the obstruction was unreasonable. (*Brown v. Kentfield*, 50 Cal. 129.)
Cited 87 Cal. 139.

17. No right to obstruct navigation passes to the purchasers under the laws for the sale of swamp and overflowed lands. (*Taylor v. Underhill*, 40 Cal. 471.)

18. A private individual cannot acquire by custom a right to discharge debris into a navigable stream so as to destroy or materially interfere with the use of the stream for purposes of navigation. (*People v. Gold Run Ditch and Min. Co.*, 66 Cal. 138.)

Diversion of water of navigable stream as a public nuisance. See post, XIV, 2, o.

Obstructions to navigation by dams. See post, XI, 2.

Obstruction to sloughs in Stockton. See Stockton.

United States, deposit in by, right to remove. See Stockton.

Riparian owner cannot build wharf at common law. See Wharves, 1.

Riparian owner cannot maintain ejectment for wharf built in tide water. See Wharves, 15.

III. Non-navigable Waters; Ownership and Grant of.

19. By the law of Mexico the running waters of California were not dedicated to the common use of all the inhabitants in such a sense that they could not be deprived of the common use. (*Lux v. Haggin*, 69 Cal. 255.)

20. The United States is the owner of all innavigable streams on the public lands of the United States within the borders of the state, including their banks and beds. (*Lux v. Haggin*, 69 Cal. 255.)

21. A grant of public land of the United States carries with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title. (*Lux v. Haggin*, 69 Cal. 255.)
Cited 85 Cal. 229.

22. The state might have reserved from her grants of lands the waters flowing through

them, for the benefit of those who should subsequently appropriate the waters; but the state has not made such a reservation. (*Lux v. Haggin*, 69 Cal. 255.)

IV. Beds of River or Bay.

23. The bed of a river is a public highway of the state, and within its absolute control, subject only to the rights of commerce. (*Green v. Swift*, 47 Cal. 536.)

24. All that part of a bay or river below low water or low tide is a public highway, common to all citizens, and if any person appropriates it to himself exclusively, the presumption is, that it is a detriment to the public. Per *Hastings, C. J.* (*Gunter v. Geary*, 1 Cal. 462.)

Title to the bed of ocean below low-water mark. See ante, 15.

Laws changing course of rivers. See Constitutional Law, VIII, 13, c.

Bed of river is not swamp and overflowed land. See Swamp and Overflowed Lands, 5.

Rights on change of bed. See post, XIV, 2, k.

Change in bed of stream. See post, VI.

Change by action of waters. See Boundaries, 95.

Act authorizing straightening of river is not "taking." See Eminent Domain, 73.

Damages from straightening channel, liabilities of officers. See Offices and Officers, 97.

V. Accretion.

25. Land formed by natural accretion upon the bank of a stream belongs to the owner of the bank on which it has formed, notwithstanding the process of accretion has materially reduced the size of the adjoining stream, and rendered it innavigable. (*Fillmore v. Jennings*, 78 Cal. 634.)

26. Party as riparian owner cannot be protected as to accretions to his land which are not in existence, and which may or may not exist in the future. (*Taylor v. Underhill*, 40 Cal. 471.)

Cited 2 Wash. 250, 260.

27. Land formed by accretion on fractional quarter section is part thereof, and passes by a deed conveying the fractional quarter by its number. (*Tappendorff v. Downing*, 76 Cal. 169.)

VI. Fishery.

28. Where the river in making the new channel left the old channel between high and low water mark, low-water mark on the north side of the river being on the south side of the island formed by the new channel, where there was a bar or grade suitable for landing nets, while the bank on the south side of the new channel was abrupt and could not be used for that purpose, the owner of a patent issued subsequently to the change of the channel, to swamp land bordering on the north bank of the river at high-water mark, is entitled to the exclusive right to use the entire width of the river for fishing purposes, under the act of 1859 (*Stats. 1859, p. 298*), regulating salmon fisheries on Eel river; and the owner of the patent bordering on the south bank of the river has no right to use

the south shore of the island for fishing purposes. (*Heckman v. Swett*, 99 Cal. 303.)

29. The right given by the second section of the act of 1859 (Stats. 1859, p. 298), to the owner of land fronting on Eel river, of exclusive fishing privileges, is a right which attaches to the ownership of the land as an appurtenance, and no title by prescription can attach to the fishing privilege alone without including the land, but the land and the fishing privilege are inseparable; and a finding, in an action to quiet title to the fishing privileges, that the defendants had occupied and used the shore or the land for fishing purposes exclusively, openly, and under a claim of title, for more than five years next before the commencement of the action, is not sufficient to show title in the defendants by prescription. (*Heckman v. Swett*, 99 Cal. 303.)

30. Section 5 of the act of 1859 (Stats. 1859, p. 298), making it a misdemeanor for a person to fish in Eel river if he has no right to do so, no right to fish therein can be acquired by prescription in violation thereof by a trespasser. (*Heckman v. Swett*, 99 Cal. 303.)

31. In an action against several defendants to quiet title to fishing privileges, the fact that the defendants claimed and exercised their rights and interests severally and separately, each to a distinct part of the shore, does not render the joinder improper, where it appears that they severally claimed rights affecting plaintiff's right appurtenant to his land, and their claim, though under different patents, was from the same source, and the injury to the plaintiff, as well as their defense to the action, depended as to each upon the same facts. (*Heckman v. Swett*, 99 Cal. 303.)

Obstructing right of fishing. See ante, 15.

VII. Islands.

32. Where a patent issued on a confirmed Mexican grant describes the land conveyed as bounded by a river navigable in fact, the title of the patentee extends no further than the edge of the stream, and does not include an island situated in the river opposite the mainland, notwithstanding the portion of the river between the island and the mainland is not navigable. (*Packer v. Bird*, 71 Cal. 134.)

33. An exception in the patent excepting, reserving, and excluding from the land that portion thereof covered by the navigable waters of a bay must be construed as excepting an island lying in the bay, as well as the land covered by the navigable waters of the bay. (*De Guyer v. Banning*, 91 Cal. 400.)

34. Where the channel of the river was changed by a sudden freshet subsequent to the survey, but prior to the issuance of the patent, resulting in the formation of an island out of part of the land which formerly bordered on the southern bank of the stream, the island so formed belongs to the state, and does not pass under the patent which calls for a boundary on such bank. (*Heckman v. Swett*, 99 Cal. 303.)

Right to use for purposes of fishing. See ante, VI.

VIII. Springs; Percolating or Subterranean Waters.

35. In a controversy respecting the use of the waters of a spring, where there was nothing to show that it was supplied by any defined flowing stream, held, that it must be presumed to be formed by the ordinary percolations of water in the soil. (*Hanson v. McCue*, 42 Cal. 303.)
Cited 95 Cal. 616, 619, et seq.

36. Waters filtrating or percolating in the soil belong to the owner of the freehold, like the rocks and minerals found there; and he may use them as he chooses, free from any usufructuary rights of others. (*Hanson v. McCue*, 42 Cal. 303.)

37. Water flowing from springs upon public land of the United States may be appropriated under the provisions of the Civil Code; and the fact that the ditch used to convey the water was constructed up to the mouth of the largest spring cannot affect the result. (*Ely v. Ferguson*, 91 Cal. 187.)
Cited 95 Cal. 619.

38. The fact that the land to which springs of water were conveyed by an appropriator was at the time unsurveyed public land did not prevent the water from becoming appurtenant thereto, so as to pass by a deed of the possessory right to the land with its appurtenances, it appearing that the appropriator was, at the time of the appropriation, a rightful occupant of the land, and not a trespasser thereupon; and his successor in interest, who has acquired a patent to the land, may enjoin an obstruction to the flow of the water thus made appurtenant to the land by the first possessor. (*Ely v. Ferguson*, 91 Cal. 187.)

39. There can be no question of riparian ownership where there is no bed or channel in which water runs. (*Razzo v. Varni*, 81 Cal. 289.)

Right of riparian owner to natural flow. See post, 199.

40. Where underground currents of water, flowing in defined channels, are shown to exist, the rules of law which govern the use of similar streams flowing upon the surface of the earth are applicable to them. (*Hanson v. McCue*, 42 Cal. 303.)

Cited 69 Cal. 222, 324; 86 Cal. 18; 91 Cal. 82; 95 Cal. 616, 619, et seq.

41. Whether the upper proprietor of a subterranean stream can exercise the same rights as against a lower proprietor in respect to the diversion and use of water as though it was a surface stream, not decided. (*Hale v. McLea*, 53 Cal. 578.)

42. Percolating waters collected or gathered in a stream running in a defined channel constitute property, or incidents of property, which may be acquired by grant, express or implied, or by appropriation; and when rights in such percolating waters are acquired, the owner cannot be divested thereof by the wrongful acts of another. (*Cross v. Kitts*, 69 Cal. 217.)
Cited 91 Cal. 82, 190.

43. Where a spring is fed solely by percolating waters which sweep into it from swamp or wet land surrounding the same, and not

by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user, and no action will lie in favor of one who has collected the water at the spring in a reservoir, and transmitted it by a pipe for use, against one who has diverted the water from the reservoir by means of a tunnel and ditch, constructed above the reservoir on his own land, for irrigation and domestic use. (Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615.)

44. The law controlling the rights to subterranean waters not running through a channel or defined course is very different from that affecting the rights of surface streams. In the former case the water belongs to the soil, is a part of it, is owned and possessed as the earth is, and may be used, removed, and controlled to the same extent by the owner; and no action will lie for injuries caused by cutting it off. (Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615.)

45. A finding, in an action for the diversion of water from plaintiff's reservoir, that the reservoir was sustained by percolating waters alone, and that the digging of the ditch by the defendant was for useful purposes upon his own land, and above the reservoir, is sufficient to sustain the judgment in favor of the defendant, and a failure to find upon the issue of appropriation does not constitute a reversible error. (Southern Pac. R. R. Co. v. Dufour, 95 Cal. 615.)

46. Where the owner of a spring of living water, supplied by percolation only, and having no natural channel or outlet, constructed an artificial channel, by means of which he conducted the water over certain intermediate vacant lands to his residence, and a subsequent occupant of a portion of the intermediate land enjoyed the use of the water flowing through the channel for fifteen years, held, that such occupant acquired no rights as against the owner of the spring, and could not prevent him from tapping such spring and using all its waters for his own profit. (Hanson v. McCue, 42 Cal. 303.)

47. Where water, after leaving a spring supplied by percolation alone, was conducted by an artificial channel to premises below and there appropriated, held, that as the owner of the spring had no right to complain of such appropriation below him, the fact that he did not complain for fifteen years and upwards would not create any presumption of a grant of an easement as against him, nor prevent him from using all the water of his spring as he pleased. (Hanson v. McCue, 42 Cal. 303.) Cited 80 Cal. 184.

48. Whether the incidental obstruction or diversion of a subterranean stream, in the prosecution by an upper proprietor of a mining or other legitimate enterprise beneath the surface, can be made the foundation of an action by a lower proprietor, not decided. (Hale v. McLea, 53 Cal. 578.)

49. On the facts of this case, as admitted by the pleadings or found by the court, the defendant could, at most, exercise no greater rights in respect to the diversion or use of the waters of the subterranean stream flowing

across his land to the spring of the plaintiff, than if he had been an upper and the plaintiff a lower riparian owner on a surface stream flowing across their respective lands. (Hale v. McLea, 53 Cal. 578.) Cited 69 Cal. 393, 395.

50. On the facts admitted or found, the defendant was not entitled to divert the whole body of the stream. (Hale v. McLea, 53 Cal. 578.)

IX. Water Commissioners.

51. A water commissioner appointed under the act of May 15, 1854, to regulate watercourses, etc., has no power, as such, to repair a watercourse or to remove an obstruction from it. (Pico v. Colimas, 32 Cal. 578.)

52. The water commissioners of Tulare county have no power or right to take away the interest which a prior appropriator has in the waters of a stream; and it cannot be objected by a subsequent appropriator that the prior appropriator did not obtain permission of the water commissioners to construct a ditch or divert water. (Lakeside Ditch Co. v. Crane, 80 Cal. 181.) Cited 8 Utah, 84.

53. The act of May 15, 1854, creating a board of commissioners and the office of overseer in each township of the several counties of the state to regulate watercourses within their respective limits, and the acts amendatory thereof, do not authorize those officers to enter upon private watercourses, and to disturb the owners thereof in their use and enjoyment. (Charnock v. Rose, 70 Cal. 189.)

54. The board of water commissioners for San Bernardino county, created under the act of February 18, 1864, are merely agents selected, for the public convenience, to regulate the distribution of water according to the rights of the parties in interest; but their action in distributing water does not prevent the parties from applying to the court for, nor the court from granting, relief, if to any one is distributed more than his just proportion of the water. (Daley v. Cox, 48 Cal. 127.)

X. Mills.

55. An appropriation of water for mill purposes stands on the same footing as an appropriation for the use of miners. (McDonald v. Bear River etc. Co., 13 Cal. 220.) Cited 1 Mont. 658.

56. Water taken for a mill is not taken as an article of merchandise to be sold in the market; it is merely used as a motive power, and after it passes the mill and subserves its purpose may be used as an aid to the working of the mines. (McDonald v. Bear River etc. Co., 13 Cal. 220, 223.)

Diversion of water for mill, change of use. See post, 365.

Extent of right of appropriation for mill purposes. See post, 367.

Prior appropriator of water for mill purposes, rights of. See post, 243.

XI. Dams.

1. *Right to Construct; Action to Abate Dam as a Nuisance.*

57. The riparian proprietor to whom water first comes has not the right to erect dams

across the stream and spread out the water, so that it is lost by absorption and evaporation to an extent that prevents it from flowing to another riparian proprietor as it would have done but for the dams. (*Ferre v. Knipe*, 28 Cal. 340.)

Cited 69 Cal. 359, 393, 395; 71 Cal. 250; 75 Cal. 431.

58. It is not a reasonable use of water for a riparian proprietor, who desires to use the same for watering cattle, and for domestic purposes, to erect dams across the stream, by which the water is spread out and lost by evaporation and absorption so as to injure another riparian proprietor below. (*Ferre v. Knipe*, 28 Cal. 340.)

Right of riparian owner to construct dam to protect land. See post, XIV, 1, e.

59. Prescriptive right to obstruct watercourse by means of dam cannot be acquired by the owner of land merely through the action of water companies who conduct other water across his land with his consent for their own benefit, upon condition that they build the dam to prevent the water thus conducted from overflowing his land below. Such dam, being indispensable to the conduct of the water to the point of the user, cannot be claimed by the owner of the land. When destroyed, he has no right to rebuild it so as to obstruct the natural watercourse. (*Bliss v. Johnson*, 76 Cal. 597.)

60. In an action to recover damages for alleged injury to plaintiff's lands caused by the flooding of them by respondent's reservoir, and for an injunction, the plaintiff's evidence showed that he settled, as a pre-emptor, upon a tract of government land, including the locus in quo, and on February 27, 1871, duly filed his declaratory statement, and in 1877 proved up and paid for the land, and on January 23, 1879, received his patent. The reservoir of defendant was constructed after the filing of the plaintiff's declaratory statement in the year 1871. Held, the eighty acres claimed by the plaintiff were public lands of the United States until he proved up his claim and paid for the land in 1877; and under the act of Congress of July 26, 1866, entitled "An act granting the right of way to ditch and canal owners," etc., and the amendatory act of July 9, 1870, the defendant acquired the right to construct and use its reservoir on the public lands. This right was saved and excepted in the patent issued to the plaintiff; and a nonsuit was properly granted. (*Farley v. Spring Valley Min. and Irr. Co.*, 58 Cal. 142.)

Cited 80 Cal. 337, 407; 86 Cal. 282; 1 Wash. 578.

61. Suit by plaintiffs as prior appropriators of the water of Middle Yuba river, for damming up and diverting the water of three lakes situated one above the other, opening into each other, and discharging their water into the Middle Yuba river through the same channel, which is about a mile long, and is called "lake stream." The quantity of water varies with the seasons. Sometimes the stream is a torrent, and sometimes it is almost or quite dry. Defendants, to create a supply for their ditch during the summer,

erected a dam at the outlet of each lake, converting it into a sort of reservoir, from which the water was drawn as needed, contending that the circumstances justified the erection of the dams, and that the great value of the lakes as reservoirs justified the injuries resulting to plaintiffs. Held, that there is no law for such position, that if the injuries to plaintiffs were trivial, they would be *damnum absque injuria*, but that the legal superiority of conflicting rights cannot be determined by a comparison of their value. (*Weaver v. Eureka Lake Co.*, 15 Cal. 271.)

62. In an action to abate a nuisance and for damages, founded on section 249 of the Practice Act, plaintiffs charged in their complaint that the alleged nuisance was caused by the erection and maintenance by defendants of a dam across a cañon, on which plaintiffs' mining claim was situated, and below their claim, by which the outlet for the water and tailings from their claim was obstructed to such an extent as to render its working impracticable. To which the defendants replied, admitting in effect the erection of the dam and its effect upon the work of the plaintiffs, but denying plaintiffs' title to the mining ground or their right to work the same, and alleging that the ground worked by plaintiffs is in fact a part of their claim, and that the dam was erected for the purpose of working their claim, which could not be worked without it. Held, by the court, that to enable the plaintiffs to recover they must show (1) that they owned the ground claimed by them; (2) that the dam prevented their working it to advantage; (3) alternatively, that defendants had no title to the bed of the cañon, or, if they had, that their right was acquired subsequent to that of the plaintiffs, or, if prior, that the dam was not needed to enable defendants to work to advantage. (*Stone v. Bumpus*, 40 Cal. 428.)

63. Although it appears that the plaintiffs had the better title to the ground claimed by them, yet if the testimony establishes that the defendants had the prior right to mine, and that they could not mine without the dam, the plaintiffs cannot recover. (*Stone v. Bumpus*, 40 Cal. 428.)

Dams, right to erect. See Mines and Mining, 352, 353.

2. Obstruction to Navigation.

64. In so far as wingdam in navigable river obstructs navigation, it is a public nuisance; but if it obstructs the reclamation of swamp lands, it is a private nuisance. (*Yolo County v. City of Sacramento*, 36 Cal. 193.)

Boom across navigable stream. See ante, 16.

3. Adding to Height of Dam.

65. Where the plaintiff, by means of a dam of a certain height and dimensions, constructed at a certain point on Shady creek, and the excavation of a ditch extending therefrom, which at the time of their construction were well adapted to and ample for the purpose, appropriated a portion of the waters of said creek, whatever was thus left unappropriated, either of the waters of said

creek or mining ground therein, was open to be appropriated by defendants; and if the defendants, by first appropriation, acquired the right to work their mining claims, located in the bed and banks of said stream above plaintiff's dam, in their condition at that time, the plaintiff was not authorized, by subsequently erecting a higher dam, to interfere with said right; and this, although, by subsequent changes not wrought by defendants, occurring in the bed of the stream, it became impossible for plaintiff longer to divert the waters of the stream at the point chosen for its diversion, without so raising said dam. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

66. When plaintiff appropriated the waters of Shady creek, and before other conflicting interests had vested, the right to the water carried with it the right to construct such works as were necessary to the full enjoyment of the water. But when he established his works, and fully appropriated the water by means sufficient for the purpose, and used it for a term of years in a particular mode, then, unless there was something manifesting a more extended right, other parties had a right to suppose he had thereby defined the limits of his right, and act accordingly. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

67. Where the court instructed the jury, in substance, that if plaintiff acquired the prior right to divert a portion of the water of Shady creek, by means of a dam and ditch, and the dam and stream should at any subsequent time, by reason of mining by strangers above, become filled up to such an extent as to make it necessary to raise the dam higher than it originally was to enable the plaintiff to continue the diversion by means of said ditch, then the plaintiff is entitled to make additions to the height of the dam from time to time, as occasion requires, without limitation, and wholly irrespective of the effect of these additions upon the interests of other parties acquiring rights for mining and other purposes on the stream above, subsequent to said original appropriation of the waters of the stream, held, that the principle on which such instruction is founded is inadmissible and the instruction erroneous. (*Nevada Water Co. v. Powell*, 34 Cal. 109.) Cited 12 Col. 17; 6 Mont. 38; 10 Nev. 233.

68. Where plaintiff appropriated a portion of the waters of a stream, and diverted it by means of a dam and ditch, sufficient for the purpose in the natural condition of the stream as it then existed, it does not necessarily follow that he thereby acquires the right to raise his dam higher and higher, as occasion may require, to obviate obstructions to its use in the manner of said original appropriation, occasioned by physical changes in the condition of the stream not anticipated, whether arising from natural or artificial causes. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

69. The question, what is the extent of the right originally acquired by plaintiff in such a case, to which all subsequently acquired right must be subordinate, is one of fact for the jury. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

70. Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water onto plaintiff's claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz-mill, which they intended to construct. Held, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. (*Harvey v. Chilton*, 11 Cal. 114.)

Enjoining raising of dam. See post, XI, 4.
Decree ordering reduction of dam. See post, XI, 4.

4. Overflow from and Actions for.

71. In an action to abate a nuisance caused by the erection of a dam, and the consequent overflow of land by back-water, the evidence of an expert as to the effect of an obstruction in causing the back-water is admissible. (*Grigsby v. Clear Lake Water Co.*, 40 Cal. 396.)

72. Where a nuisance, by overflowing plaintiffs' mining claim by means of a dam erected by defendants, was found, the decree should have ordered such a reduction of the dam as would have prevented any overflow, from that cause, of the plaintiffs' ground, or, if necessary, an entire abatement. (*Ramsay v. Chandler*, 3 Cal. 90.)

73. Where defendants have been ordered to lower their dam so as to prevent an overflow of the plaintiffs' mining claim, a perpetual injunction to restrain the defendants from raising their dam higher than the point designated was allowed. (*Ramsay v. Chandler*, 3 Cal. 90.)

Cited 22 Cal. 491.

Action for overflow. See ante, 60.

Injuries from breaking of dam. See post, XI, 5.

Who competent to testify as to effect of dam in raising stream. See Evidence, 261.

5. Care Required in Construction; Injuries from Breaking.

74. The owner of the dam is bound to see to his own property, and to so govern and control it that injury may not result to his neighbors. (*Fraler v. Sears Union Water Co.*, 12 Cal. 555.)

75. If the owners of a ditch or flume for the conveyance of water erect a dam above mining claims, and the claims are afterwards damaged by reason of the breaking of the dam, its owners are not liable for the damages, if it was constructed with that reasonable care which prudent men would use, and no negligence is shown in its care and management. (*Everett v. Hydraulic Flume Tunnel Co.*, 23 Cal. 225.)

Cited 5 Dak. 22.

76. In an action for injuries from the breaking of a dam, where the court instructed the jury "that if they believe that the dam was improperly or inartificially con-

constructed, or that defendants could have constructed in a better or more substantial manner, so as to prevent its breaking, then they are liable," held, that such charge is too broad, and the court erred in giving the same. The question is not what the plaintiffs could have done, but what discreet or prudent men should do, or ordinarily do, in such cases, where their own interests are to be affected. (*Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413.)
Cited 10 Cal. 544; 17 Cal. 98; 23 Cal. 225; 35 Cal. 683; 82 Cal. 597; 5 Dak. 22.

77. The mere fact that the rock upon which the timbers of the dam rest presented outwardly a solid appearance, etc., does not necessarily show due diligence in making it a foundation, since many other circumstances, such as the knowledge of the defendants, or the builder, of the character or qualities of such rock, or a knowledge of it from testing it, etc., might still show it was unsafe for this purpose. (*Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413.)

78. When the evidence of plaintiff tends to show that the damages alleged to have been occasioned to plaintiff's mining claim by the breaking of defendant's wooden dam and reservoir were caused by its poor construction and its rotten and decayed condition, and were owing to defendant's want of care in attending to the reservoir, such evidence will support a verdict for damages in favor of plaintiff, though the evidence of defendant may tend to show that the breaking of the reservoir was not through fault in the dam or reservoir, or owing to negligence of the defendant in its construction or maintenance, but that the break was in the native earth at one end of the dam. (*Wiedekind v. Tuolumne County Water Co.*, 83 Cal. 198.)

79. In an action for damages for the breaking of a dam it is also error to instruct the jury that it was the duty of the defendant to constantly examine the dam during the season of freshets. Whether or not such a duty devolved upon the defendant might depend upon circumstances, and the question should have been left to the jury. (*Weiderkind v. Tuolumne County Water Co.*, 65 Cal. 431.)

80. In an action for damages for breaking defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count, and charges that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants, broke away," held, that the complaint is sufficient. (*Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413.)

81. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material, under our system of pleading, to require separate counts. (*Hoffman v. Tuolumne County Water Co.*, 10 Cal. 413.)

82. In an action for the negligent construction and maintenance of a wooden dam and reservoir of defendant, by the breaking of which plaintiff's land was flooded, a question as to the experience and observation of a wit-

ness as to the breaking of earth dams is irrelevant; nor would proof of any amount of familiarity with earth dams qualify a witness to testify as an expert in regard to wooden dams. (*Wiedekind v. Tuolumne County Water Co.*, 83 Cal. 198.)

83. The want of reasonable care on the part of another, who is injured by the breaking, cannot be set up in defense to an action for damages for the injuries thus suffered. (*Fraser v. Sears Union Water Co.*, 12 Cal. 555.)

84. The suit was brought to recover damages caused by an overflow of water by reason of the breaking of a dam, and the court charged the jury that unless the dam had gates sufficient for certain named purposes, it was insufficiently and negligently constructed. Held, that such an instruction charged them with respect to a matter of fact in violation of section 19 of article VI of the constitution. (*Weiderkind v. Tuolumne County Water Co.*, 65 Cal. 431.)

85. In an action for injuries to a garden, occasioned by the breaking of a reservoir, the court instructed the jury that, to entitle plaintiff to recover, it must appear that the breaking of the reservoir resulted from the gross negligence of defendants; and then proceeded to explain that defendants must have taken the same care of their reservoir, and of the water in it, as they would have done, being prudent men, had the garden of plaintiff been their property; and that, otherwise, they had been guilty of gross negligence, and were liable in damages. Held, that although the instruction without the explanation was wrong, still, with the explanation it was right, and could not have misled the jury. (*Todd v. Cochell*, 17 Cal. 97.)

Dam, injury from break in, where work built by independent contractor. See *Master and Servant*, 201, 202.

6. Trespass Upon and Diversion of Water; Actions for.

86. If a party claiming water is constructing his dam and canal, but has not yet diverted the water, an action for damages and to recover possession of the dam site and dam, and of the canal site and canal, will afford adequate remedy for a trespass upon an ouster from the possession of such dam and canal. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.)

87. An entry upon and ouster from a dam site and dam in process of construction, and a canal site and canal in process of construction, and a diversion of water claimed by means of the dam and canal, are two distinct causes of action, which cannot be united in the same statement of cause of action in a complaint, but should be separately stated. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.)
Cited 43 Cal. 184; 65 Cal. 405.

88. A complaint which leaves it in doubt whether the plaintiff sues for a trespass upon and ouster from his dam site and dam in process of construction, or for a diversion of the water claimed by the plaintiff, is ambiguous, and a demurrer for that reason should be sustained. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.)

XII. Ditches and Canals.

1. Nature of.

89. A ditch used for the conveyance of water for mining purposes is not a mere easement or incorporeal hereditament. (*Reed v. Spicer*, 27 Cal. 57.)

90. Whether ditch property in the mineral regions of this state, although conceded to be real estate, is to be regarded by courts of equity with the same measure of favor which is bestowed by them upon land which is held and cherished by the owner for itself, and not put to use for an ulterior object, is doubted, but not finally decided. (*Clark v. Willett*, 35 Cal. 534.)

Cited 1 Wash. 591.

91. Ownership of water ditch is not necessarily the same as the right to the water flowing through it, and is not a necessary incident thereto. (*McLear v. Hapgood*, 85 Cal. 555.)

Sale of ditch must be by deed. See post, XII, 12.

Ditches, agreements concerning, necessity of writing. See Statute of Frauds, I, 10, h.

Flume is realty. See Mortgages, 251.

Interest in ditch and water right is interest in realty. See Statute of Frauds, 74.

Ditches, statutes relating to. See Mines and Mining, XI, 8, b.

Irrigating ditch, when a private water ditch. See Irrigation.

Water ditches, exemption of. See Homesteads, X, 8.

Flumes, taxation of. See Taxation, IV, 3.

Irrigation ditch, dedication of to public, what is not. See Irrigation.

Canals as nuisances. See Nuisances, II, 4.

Right to construct ditch is a franchise. See Mines and Mining, 340.

2. Right of Way for; Obstruction of Highway by.

92. Person has no right to construct ditch through inclosure of another without his consent. (*Weimer v. Lowery*, 11 Cal. 104.) Cited 22 Cal. 453.

93. In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in their answer, among other things, the following: "That said tract of land is situated in the heart of the mineral regions of said state, and is a part of the public domain belonging to the government of the United States, and that said government has never granted or conveyed the same, or any part thereof, to the said plaintiff." "They further say that their said ditch was constructed in the summer of 1855, and has been used ever since, and still is, for the purpose of conveying the waters of the south fork of the American river from a point about five miles above said land to gold mining localities lower down, and in the vicinity of said stream, there to be used for gold mining purposes; that the same is fourteen miles in length, and was constructed for the purposes aforesaid at a cost to said defendants of about twenty thousand dollars"; which allegations were stricken out on motion of plaintiff's attorney. Held, that they were properly stricken out as irrelevant, for, if true, they

constituted no defense to the action. (*Weimer v. Lowery*, 11 Cal. 104.)

94. If the owners of a ditch constructed for conveying water use the same peaceably, openly, and exclusively, under a claim of right, with the knowledge of the owners of the land, for a continuous period of five years, they acquire, by prescription, the right to an easement over the land for the same. (*Campbell v. West*, 44 Cal. 646.) Cited 72 Cal. 601.

95. If it does not appear that an easement in the use of a ditch over the land of another, to which a prescriptive right is claimed by adverse user, has ever been assessed for taxes, the assessment-book, showing an assessment of the land over which the ditch runs, is not admissible against the claimant of the easement. (*Hesperia Land and Water Co. v. Rogers*, 83 Cal. 10.)

96. Persons who, under the local customs and decisions of the courts in California, had acquired a right to the use of water in a ditch, prior to the passage of the act of Congress of July 26, 1866, acquired by said act a right of way, and of the ditch through which the water was running, over the public lands, and the subsequent grantees of the United States take subject to the easement. (*Broder v. Natoma Water etc. Co.*, 50 Cal. 621.) Cited 58 Cal. 144.

97. A deed conveying to a mining company the right to erect and maintain a reservoir upon the land of the grantor, with a right of way across such land for a water ditch leading from the reservoir to a mine of the grantee, in consideration that the grantor should have the right to appropriate to his own use, and to conduct, wherever he should desire, so much of the waste water flowing from the reservoir as he saw fit, does not impose any restriction upon the disposition that the grantee may make of the waters of the reservoir, or prevent it from allowing another person to tap its ditch and conduct the water therefrom at a point between its mine and the land of the grantor. (*Bryan v. Idaho Quartz Min. Co.*, 73 Cal. 249.)

98. Where the plaintiff and his assignor entered into a parol agreement with defendant, by the terms of which they were to receive a conveyance of a right of way for an irrigating ditch over defendant's land, and of one-half of the water to be diverted thereby, the plaintiff and his assignor to survey and excavate the ditch and keep it in repair, and the ditch, when completed, to be used for the equal benefit of both the contracting parties for the purpose of irrigation, and the ditch was constructed and kept in repair by the plaintiff and his assignor, and used by both parties, the agreement is essentially one of purchase and sale, and the defendant will not be allowed to treat the transaction as a mere parol license which he may revoke after the work has been done and money expended by the other parties under the contract. (*Flickinger v. Shaw*, 87 Cal. 126.)

99. Where nothing remains to be done to complete such contract except the execution of a conveyance to the plaintiff of the right of way for the irrigating ditch, and of a

proper proportion of the water diverted thereby, the plaintiff has a perfect equitable title in the ditch and water, which equity will protect by injunction as readily and fully as it would protect the legal title. (*Flickinger v. Shaw*, 87 Cal. 126.)

100. In an action to quiet title, where the only interest claimed by the defendants in their answer is an easement to use a ditch for conveying water across the plaintiff's land to their own land, for the purpose of irrigation and domestic use, the plaintiff may show that the defendants were conveying in the ditch more water than was necessary for such purpose, and the exclusion of evidence showing the amount of water required for irrigation on the defendants' land, and the carrying capacity of such ditch, is error. (*Riverside Land and Irrigation Co. v. Jansen*, 66 Cal. 300.) Cited 83 Cal. 288.

101. Proceedings, under a statute, to acquire a right of way for a water ditch are special proceedings, and the statute must be strictly pursued. (*Dalton v. Water Commrs.*, 49 Cal. 222.) Cited 19 Nev. 419.

102. If a statute provides for a board of water commissioners for a township, and permits them, upon a petition signed by a majority of persons liable to work on water ditches in the township, to institute proceedings to acquire the right of way for a new ditch, and the township is divided while such proceedings are pending, the new township created cannot continue the proceedings in its name unless there is a provision in the statute authorizing it. (*Dalton v. Water Commrs.*, 49 Cal. 222.)

103. The use of water appropriated for sale, rental, or distribution is a public use, under the constitution of this state, and the statutes of the state recognize ditches and canals as of public use, and regulate such use, providing that where they cross or are on the lines of public highways, their work must be so laid and constructed as not to obstruct the public highways; and when the nuisance consists merely in the manner in which the canal is conducted and managed, it should be remedied by enjoining its use in such manner as to make it a nuisance, without decreeing a total destruction of the property. (*City of Fresno v. Fresno Canal and Irrigation Co.*, 98 Cal. 179.)

Right to construct ditch on public land. See ante, 60.

Act granting right of way for ditch over public land, effect of. See post, 271.

Ditch and water right as appurtenant. See Deeds, 303.

Ditch, easement of, right to maintain. See Easements, III, 1.

Ditch, conveyance of right of way for ditch for an interest. See Partnership, 12, 13.

Protection of ditches over public land. See post, XII, 6.

Ditches, priority over patent. See Mines and Mining, 181.

Ditches, right to build for mining. See Mines and Mining, XI, 8, b.

Prescriptive right in ditch, what establishes. See Easements, 10.

Estoppel to deny right of ditch owner by silence or acquiescence. See Estoppel, 96, 97.

Ditch on land granted railroad, abatement of. See Railroads, 39.

Ditches, enjoining. See Injunctions, II, 3.

3. Location and Construction; Diligence in Construction; Use of Water Pending.

104. Where the owners of a ditch had commenced their ditch and run their line before the location and appropriation of a lot of land by the plaintiffs, who sued them for trespass thereon, held, that a slight divergence in the construction of the canal from the original line, after the plaintiff's location and appropriation, both lines running equally through the plaintiff's claim, was no trespass in constructing the ditch on the new line; and if the plaintiffs suffered no actual injury by the change, it was *damnum absque injuria*. (*Conger v. Weaver*, 6 Cal. 548.)

105. In constructing canals, under the license of the state, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right. (*Conger v. Weaver*, 6 Cal. 548.)

106. The inclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietors no higher rights; nor is it necessary, as notice, to those who have received actual notice of the intended line of the canal. (*Conger v. Weaver*, 6 Cal. 548.)

Ditches, diligence requisite in building. See Mines and Mining, XI, 8, b.

107. Where parties projecting a ditch to convey water give notice to the world of their intention to dig such ditch and appropriate such water, in the usual manner, and mark out and designate the line of such ditch by the usual marks and indications, and pursue the work on the ditch with a reasonable degree of diligence until the same is completed so as to receive the water, they are entitled to such water as against all persons subsequently claiming or locating it. (*Kimball v. Gearhart*, 12 Cal. 27.)

Cited 12 Cal. 431; 37 Cal. 311, 312, 314; 75 Cal. 482.

108. Where parties commence the construction of a ditch who have not, at the time, the pecuniary means requisite to complete the same in a reasonable time, and they project the work and claim the water with a full knowledge of their pecuniary inability to complete the same within a reasonable time, they cannot urge such want of means as an excuse for not prosecuting the work. (*Kimball v. Gearhart*, 12 Cal. 27.)

109. The mere act of commencing a ditch with the intention of appropriating the water is not sufficient of itself to give a party an exclusive right to the water of such stream. (*Kimball v. Gearhart*, 12 Cal. 27.)

110. In determining the question of diligence in the construction of such a work, the jury have a right to take into consideration

the circumstances surrounding the parties at the date of the appropriation, such as the nature and climate of the country traversed by such ditch, together with the difficulties of procuring labor and materials. (*Kimball v. Gearhart*, 12 Cal. 27.)

111. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. (*Weaver v. Eureka Lake Co.*, 15 Cal. 271.) Cited 37 Cal. 314; 2 Mont. 493, 515.

Failure to complete diversion within reasonable time. See post, 374.

112. Where parties have appropriated the prior right to the use of the water of a stream, by the commencement and partial completion of a ditch and flume, they have the right to use so much of the waters of the stream as are necessary to preserve their flume from injury while in the process of construction. (*Weaver v. Conger*, 10 Cal. 233.)

113. As, from the nature of ditches to conduct water for mining purposes, time is necessary to complete them, the license would be valueless if the right did not commence until their completion; and it must be presumed that, in granting the license, the state did not intend it should be turned into so vain a thing, but designed it to be effectual for the object in view; and it consequently follows that the same rule must be applied here to protect this right as any other. (*Conger v. Weaver*, 6 Cal. 548.)

4. Substitution of Iron Pipe.

114. Ditches and flumes are the usual and ordinary means of diverting water in this state, and parties who have made their appropriations by such means cannot be compelled to substitute iron pipes. (*Barrows v. Fox*, 98 Cal. 63.)

Change from open ditch to pipe. See Easements, 77.

One diverting water by means of a flume cannot be required to put in a pipe. See post, 371.

5. Flumes are Part of Ditch.

115. Flumes constructed at different parts of the line of a ditch cannot change the general character of the work as an excavation. Such flumes are mere connecting links of the ditch over ravines and gulches, and the whole work must be regarded as a ditch. (*Ellison v. Jackson Water Co.*, 12 Cal. 542.)

6. Injury to; Protection of; Actions for.

116. If a plaintiff owns a ditch and right of way for same by priority of location, a court of equity has no power, by its judgment, to allow the same to be washed away for mining purposes, provided an aqueduct of sufficient capacity to carry the water is previously built in its place. (*Gregory v. Nelson*, 41 Cal. 278.)

117. A court of equity should not license a trespass upon ditch property in the mining

regions, nor compel the owner to exchange the same for another means of conveyance for the water flowing therein. (*Gregory v. Nelson*, 41 Cal. 278.)

118. The act of Congress of July 26, 1866, protected water and ditch rights which have vested and accrued since as well as before its passage; and the owner of a ditch which crosses mineral land subsequently patented, and the patent for which reserves the water rights and ditches mentioned in section 2339 of the Revised Statutes of the United States, is protected as to such ditch by sections 2339 and 2340 of such Revised Statutes. (*Jacob v. Lorenz*, 98 Cal. 332.)

119. Where it appears that the title to the water of which plaintiff was deprived by the destruction of his ditch antedated the rights of the owners of the mineral land crossed by the ditch, it is not material that the water right was conveyed to plaintiff subsequent to the date of the patent. (*Jacob v. Lorenz*, 98 Cal. 332.)

120. Complaint in action to enjoin owners of mineral patent from injuring or washing away the east branch of a ditch owned by the plaintiff, which crosses the mine, and which was constructed prior to the patent, does not state more than one cause of action, because of surplusage in unnecessarily describing such branch as connected with another ditch and a reservoir used by the plaintiff in working his mines, and the ditches as forming one complete system; nor is it insufficient in not alleging "that plaintiff owned a vested and accrued water right appurtenant to the ditch," when facts are alleged which show that he had such vested right. (*Jacob v. Lorenz*, 98 Cal. 332.)

121. Upon the issue of damages caused by the destruction of his ditch, plaintiff may prove his ownership of mines and mineral entries to show the use to which the water could be applied; and the fact that he was only part owner of some of the mines does not affect the admissibility of the proof, and the date at which plaintiff acquired title to the several parcels of mining property is wholly immaterial. (*Jacob v. Lorenz*, 98 Cal. 332.)

122. Though surface water from rains and melting snow is not the subject of appropriation, yet, to the extent to which it adds to the quantity of water received into a ditch, it adds to the value of the ditch, and its loss may be shown as an item of injury caused by the destruction of the ditch. (*Jacob v. Lorenz*, 98 Cal. 332.)

123. The ordinary and proper mode of proving the value of a water ditch is by shewing its capacity, the market value of water in the vicinity, and the probable duration of the demand. (*Clark v. Willett*, 35 Cal. 534.)

124. In such case evidence of the value or profits of certain mining claims belonging to the owners of the ditch and supplied therefrom with water to mine the same is inadmissible in evidence to establish the value of the ditch, unless accompanied by further evidence showing that the claims could not be worked without the aid of the ditch. (*Clark v. Willett*, 35 Cal. 534.)

Subsequent appropriator has no right to destroy ditch of prior appropriator. See post, XIV, 2, d.

7. Carrying Capacity of Ditch; Evidence and Findings; Enlargement of Ditch.

125. If the owner of a ditch is entitled to all the water flowing down the stream where the ditch starts out, other parties having ditches on the same stream cannot complain of its enlargement. (*James v. Williams*, 31 Cal. 211.)

126. Where a ditch is intended to supply, and does supply, water for use at various points along its course, the latter part of the ditch need not be so large as the first part; but the general rule for measuring the capacity of a ditch (making due allowance for evaporation, see page, etc.) is the amount of water that it will carry from the point of diversion to the point of use, and the point of least carrying capacity fixes the general capacity of the ditch; and this rule applies where it does not appear that the water was intended to be used along its course before it reaches the point at which the size of the ditch was decreased, the intention apparently being to supply first the homestead of the appropriator beyond the point of contraction. (*Posachane Water Co. v. Standart*, 97 Cal. 476.)

127. A witness who has had many years' practical experience in mining and measuring and selling water to miners, although not an expert in the science of measuring water, may testify to the carrying capacity of a particular water ditch. (*Frey v. Lowden*, 70 Cal. 550.)

128. The evidence is insufficient to show the carrying capacity of the ditch of an appropriator, where there is nothing to indicate the velocity of the flow except the width and depth of the ditch, without any evidence as to its grade. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

129. The opinion of a witness as to the grade per mile of a water ditch is admissible, although subject to be overcome by any more accurate information which may be produced by the opposing party. (*Posachane Water Co. v. Standart*, 97 Cal. 476.)

130. A finding as to the extent of appropriation of water by a ditch should be specific as to quantity, measured by some definite standard, as of inches or gallons, instead of by fixing the width, depth, and grade of the ditch. (*Lakeside Ditch Co. v. Crane*, 80 Cal. 181.)

Cited 8 Utah, 84.

131. A finding to the effect that the ditch of the defendants was twenty-seven feet wide on top, twenty feet on the bottom, and thirty inches deep, and had a grade of seven feet to the mile, and, being of that size and grade, carried four hundred and twenty-seven cubic feet of water per second, is not justified by the evidence, where the strongest evidence on behalf of the defendants shows that the ditch was only sixteen feet wide at the top in some places, and was smaller still in other places; and the only definite evidence as to the amount of water a ditch of a given size and

grade could carry showed that such a ditch could not possibly carry as much as four hundred and twenty-seven cubic feet of water per second. (*Posachane Water Co. v. Standart*, 97 Cal. 476.)

Capacity of irrigating flume. See post, 214. Evidence that more water was carried in ditch than was needed. See ante, 100.

Ditch, extending or enlarging. See *Mines and Mining*, XI, 8, d.

Flume extending or enlarging. See *Mines and Mining*, XI, 8, d.

8. Repairs to Ditches; Reservoir to Detain Water Pending.

132. Owners of ditches may be compelled to keep their ditches and flumes in good repair so as to prevent unnecessary waste. (*Barrows v. Fox*, 98 Cal. 63.)

133. While a ditch by which the waters of a stream have been appropriated is out of repair, and not in condition to carry any water, an action will not lie to abate, as a nuisance, a reservoir constructed across the bed of the stream, above the head of the ditch, by which the water of the stream is collected and detained, and caused to overflow unequally. (*Bear River etc. Co. v. Boles*, 24 Cal. 359.)

134. The reservoir does not become a nuisance until the ditch has been repaired and placed in a condition to carry the water. (*Bear River etc. Co. v. Boles*, 24 Cal. 359.)

9. Waste Water from, Rights in; Appropriation from Waste Gate.

Grant of right on consideration of use of waste water. See ante, XII, 2.

135. The action was brought to enjoin the defendants from interfering with the flow of the waters of an alleged natural stream. The water in dispute was contained in a lagoon located upon the land of the defendants, and never had any natural outlet. More than ten years prior to the commencement of the action a former owner of the lands of the plaintiffs and defendants cut a ditch over that portion of his land now owned by the defendants, through which he conducted the water of the lagoon for purposes of irrigation and drainage, and ever since he and the defendants have continuously used all of the water flowing in the ditch except such as they wasted as their own, and adversely to the whole world. The ditch is located upon the border of the plaintiffs' land, and, by the parol leave of the defendants and their predecessors, they have used the waste water of the ditch, but have no further claim or right therein. Held, that the defendants were the absolute owners of the water, and that the plaintiffs had never acquired any riparian right thereto. (*Green v. Carotta*, 72 Cal. 267.)

136. In an action to enjoin the closing of a waste gate to defendant's canal, brought by a plaintiff who alleges a prescriptive right to open the waste gate and divert water from the canal when not used to run defendant's mill, a nonsuit is properly granted where plaintiff's evidence shows that the waste gate was habitually opened by defendant's express or implied consent, in response to an inquiry

of plaintiff as to whether they desired to use the water, and does not disclose an uninterrupted adverse user of the water for a period of five years to the knowledge of defendant and his grantors, and with notice to them of a claim of right to open the waste gate and take the water from the canal without their consent. (*Ball v. Kehl*, 95 Cal. 606.)

137. An appropriation of so much water as the owner of a canal may elect to discharge from his waste gate does not include the right to take water from the canal through the waste gate by a trespass without the owner's consent; and such appropriation does not confer the same right as that of a second appropriation of the waters of a natural stream subject to the rights of a prior appropriator. (*Ball v. Kehl*, 95 Cal. 606.)

10. Care Required in Management; Injury from Percolation or Overflow.

138. The rule applicable to the percolation of water from a natural watercourse does not apply to water brought upon the land by artificial means; but in such case the rule applies that where one brings a foreign substance on his land, he must take care of it, and not permit it to injure his neighbor, and is subject to the maxim, *Sic utere tuo ut alienum non lædas*. (*Parker v. Larsen*, 86 Cal. 236.)

139. In an action to recover damages for an alleged injury to the plaintiff's land, resulting from the careless management of the defendant's water ditch, which traversed the land, held, that the defendant was bound to exercise no greater care to avoid the alleged injury to the adjoining lands than prudent persons would employ about their own affairs under similar circumstances. (*Campbell v. Bear River etc. Co.*, 35 Cal. 679.) Cited 11 Cal. 398.

140. The true principle applicable to such cases is, that in order to avoid doing a damage to the property of another, a person is bound in law to such care in the use of his own property as a prudent man would employ under similar circumstances if he were himself the owner of the property exposed to damage. (*Campbell v. Bear River etc. Co.*, 35 Cal. 679.)

141. The owner of a ditch is bound to use that degree of care and caution in its construction and management, to prevent injury to others, which ordinarily prudent men use in like instances when the risk is their own. (*Wolf v. St. Louis Water Co.*, 10 Cal. 541.) Cited 17 Cal. 98; 23 Cal. 225; 35 Cal. 683; 5 Dak. 22.

142. The question of negligence in the management of such property, and the degree of it, must necessarily depend, in a great measure, upon the surrounding facts, such as the existence and exposure of property below the dam and the like; for what, under one state of facts, would be prudence, might, under a different condition of things, be gross, or even criminal, negligence. (*Wolf v. St. Louis Water Co.*, 10 Cal. 541.)

143. A land owner who permits the water taken from artesian wells on his lands, and carried through a ditch for the purpose of ir-

rigating his fields, to percolate through the ditch, and to saturate his neighbor's land, to his injury, when it might have been drained from the ditch, so as probably to prevent such injury, is liable for the damages thereby occasioned, and may be restrained by injunction from continuing the injury. (*Parker v. Larsen*, 86 Cal. 236.)

144. Where K. owned a ditch which passed over the land of R., he was bound to so use it as not to injure R's land, and this irrespective of the question as to which had the older right or title; and if, through any fault or neglect of K. in not properly managing and keeping his ditch in repair, the water overflowed or broke through the banks and destroyed or damaged the land of R., by either washing away the soil or covering it with sand, K. was liable for such injury. (*Richardson v. Kier*, 34 Cal. 63.) Cited 35 Cal. 683; 66 Cal. 163.

145. Where K. discharged water from his ditch above R's land in such place that it naturally would, and did, flow over and upon and injure R's land, K. is responsible for such injury; nor can K. shield himself from this responsibility because he may have sold this water at such place to miners, by whom it was used for mining purposes before, in the course of its flow, it reached R's land and occasioned such injury. (*Richardson v. Kier*, 34 Cal. 63; *Richardson v. Kier*, 37 Cal. 263.)

146. In such case, the fact that the miners so using the water contributed to and enhanced the injury sustained, and are joint tort feorsors with K., will not relieve K. from his liability or affect its measure. (*Richardson v. Kier*, 34 Cal. 63.)

147. If the accumulation of sand in the defendant's ditch was such as to render it probable that the periodical overflow would, by its action, wash out the sand, and thus damage the land of the plaintiff, it was then the duty of the defendant to use all the means which an ordinarily prudent man could employ, under the circumstances, to prevent it. (*Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.)

148. When, by means of an artificial ditch, the waters of a stream are conducted from the bed of the stream over the adjacent country, crossing other small natural watercourses, the beds of which are dammed up by the embankment of the ditch, and by the fall of rain the waters of the streams become so swollen as to render it necessary to cut the embankment of the ditch to preserve it from injury, and the owners of the ditch cut the embankment at a point where there is no natural watercourse, so that the waters are turned onto cultivated land, causing injuries thereto, the injury thereby sustained is not the act of God, but results from negligence, and the owners of the ditch are liable therefor. (*Turner v. Tuolumne County Water Co.*, 26 Cal. 397.) Cited 35 Cal. 423.

149. Where the bed of a watercourse, extending through the farming lands of R., is used by K. as a channel to convey the waters discharged into it from his ditch, of which it

forms a connecting link, such watercourse will be considered as part of K's ditch; and where R's lands were injured by a deposit of sediment thereon, resulting from an overflow of the watercourse, which was caused either by the failure of K. to have it properly cleared of impediments, or by turning into it a quantity of water which, added to the natural waters flowing therein, exceeded its capacity to carry the same, K. is liable in damages to R. for such injury. (*Richardson v. Kier*, 37 Cal. 263.)

Cited 14 Col. 554.

150. A ditch owner may only adopt a ravine, which is also a natural watercourse, as part of his line of ditch, to the extent of the capacity of his ditch to convey water. If an injury result from an overflow of the water of such ravine, not occasioned by its use as part of such ditch, the ditch owner will not be responsible therefor. (*Richardson v. Kier*, 34 Cal. 63.)

151. A complaint which alleges that the plaintiffs were, on a certain day, the owners and proprietors of a certain valuable water ditch for the purpose of conveying water, and at which time and place the defendants were also the owners of a certain other water ditch for the purpose aforesaid, and that afterward, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth, and rubbish, and breaking said plaintiff's ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage of three thousand dollars, and thereof they bring suit, is sufficient. (*Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 193.)

152. That the overflow, or leakage, was occasioned, not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants opened their case. (*Jackson v. Feather River Water Co.*, 14 Cal. 18.)

153. Action for damages to a mining claim by overflow and leakage from defendant's ditch. To question by plaintiff to one of his witnesses, "Did you see water splashing over the flume?" he answered, "Yes." Defendant on cross-examination, proposed to ask, "Whose water was that you saw splashing over the flume?" Held, that the question was proper, even though it went to the ownership of the water. (*Jackson v. Feather River Water Co.*, 14 Cal. 18.)

154. Instructions as to the liability of ditch owners reviewed and held to be correct. (*Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.)

155. The court, at the request of the plaintiff, gave the instruction: "Negligence is not simply in originating the mischief, for this may be a lawful act, but in not controlling it when put in operation." Held, by this lan-

guage the court directed the jury that negligence is not simply in originating that which might be the cause of mischief or injury, but that it consists also in failing to control this cause so as to prevent it from inflicting injury. (*Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.)

Injury to ditch by tunneling, enjoining. See *Mines and Mining*, XI, 7.

Canals, injury from breaking of. See *Mines and Mining*, XI, 8, e.

Damages caused by overflow, when inadequate. See *New Trial*, 62.

Overflow of water as nuisance. See *Nuisances*, II, 4.

Seepage from levee. See *Easements*, 30.

11. Appropriating Water or Diverting Flow from Ditch.

156. Where a party attempts to construct a dam on a creek, for the purpose of diverting the water at that point, and such diversion is illegal as against another party, who has a dam lower down, the latter may oust the former from the possession of the ground at that point, and prevent the construction of the dam. (*Butte etc. Co. v. Morgan*, 19 Cal. 609.) Cited 24 Or. 313.

157. The owners of a ditch, by which the waters of a stream have been first appropriated, are entitled to recover damages for injury or loss sustained, caused by dams or other obstructions having been erected on the stream, above the head of the ditch, by which the regularity of the flow of its waters is so disturbed as to cause actual injury or loss to the proprietors of the ditch. (*Natoma Mining and Water Co. v. McCoy*, 23 Cal. 490.)

158. On the trial of an action to recover such damages, proof that, in consequence of the irregularity of the flow of water, the owners of the ditch have lost their customers, is competent evidence. (*Natoma Mining and Water Co. v. McCoy*, 23 Cal. 490.)

159. Appropriation of water by Kern Island Irrigation Company, prior to August, 1874, was of the waters of Old South Fork, and not of Kern river. (*Stein Canal Co. v. Kern I. I. C. Co.*, 53 Cal. 563.)

Right to have water flow to head of ditch. See *Venue*, 25.

12. Sale or Mortgage of; Conveyance to Different Persons.

160. The sale of a ditch used for appropriating water must be evidenced by a deed. Such sale cannot be proved by parol evidence. (*Smith v. O'Hara*, 43 Cal. 371.) Cited 91 Cal. 398; 11 Col. 606.

161. A deed conveying a right of way upon land, in, to, and for a ditch called the Mountain Brow ditch, is a conveyance of the ditch itself. (*Reed v. Spicer*, 27 Cal. 57.)

162. In an action to quiet title, a finding that a certain deed under which the defendant claimed did not carry with it, as an easement attached to the land conveyed, the right to maintain the water ditch in controversy, and to use for irrigation the waters flowing therein, held, supported by the evidence. (*Riverside Land and Irrigation Co. v. Jensen*, 73 Cal. 550.)

163. Where the owner of two adjoining tracts of land constructs a water ditch across one of the tracts for the purpose of irrigating the other, and while the ditch is so being used conveys the respective tracts to different purchasers, the grantee of the tract for the irrigation of which the ditch was constructed acquires an easement in the other tract of the right to use and maintain the ditch for the purpose for which it was constructed; and the grantee of the other tract takes the same subject to such easement. (*Quinlan v. Noble*, 75 Cal. 250.)

164. If a ditch for the conveyance of water for sale in the mining regions receives its supply of water from a stream at its head in the mountains, and extends a number of miles down, the water flowing through it the whole distance, and the title of the owner to the upper half or section of the ditch afterwards passes to one person, and the title to the lower half to another, the person who acquires the upper half is entitled to the exclusive use of the waters from the stream at the head of the ditch. (*Reynolds v. Hosmer*, 51 Cal. 205.)

Cited 1 Wash. 591.

Contract for sale of ditch, construction of. See Contracts, 126, et seq.

Ditch, reservation of, right of assignment. See Deeds, 323.

Ditch, mortgage of, right to possession. See Mortgages, 315.

Ditch, mortgage on, whether covers improvements. See Mortgages, VII, 6.

Flumes, mortgage on, what covers. See Mortgages, VII, 6.

XIII. Ditch and Water Companies and Partnerships, Questions Concerning; Water Stock, Assessments Upon.

Water companies. See Water Companies.

Irrigation districts. See Irrigation Districts.

Agreement to furnish water. See Contracts, 125, 126.

165. Unincorporated ditch companies, organized for the sale of water to miners and others, the stock in which is bought and sold at the pleasure of the owners, without consulting the co-owners, differ from ordinary commercial partnership. Some of the incidents of a partnership pertain to such companies, and some of mere tenancies in common likewise pertain to them. (*McConnell v. Denver*, 35 Cal. 365.)

Cited 89 Cal. 370; 11 Mont. 389.

166. A corporation organized for the purpose of supplying water for the use of the owners and occupants of land within a particular district may adopt by-laws limiting the right to use the waters of the corporation exclusively to its own stockholders on lands owned by them. (*McFadden v. Board of Supervisors of Los Angeles County*, 74 Cal. 571.)

167. A member of an unincorporated ditch company has no general authority by virtue of such membership to bind the company by his contracts. (*McConnell v. Denver*, 35 Cal. 365.)

168. The superintendent or managing agent of such company has no authority to bind

the company by a promissory note, given for materials used by the company, unless the authority to give such note is expressly conferred upon him by the company, or such authority may be implied from his acts recognized by the company, with full knowledge of the acts at the time of the recognition. (*McConnell v. Denver*, 35 Cal. 365.)

169. If an unincorporated ditch company duly authorizes its superintendent to give the company note for materials before then purchased by the company, all the members are bound by the note, whether they were such members when the materials were purchased or not. (*McConnell v. Denver*, 35 Cal. 365.) Distinguished 42 Cal. 194.

170. If lumber is furnished a ditch company under the agreement that it is to be paid out of the proceeds of the ditch of the company, and the proceeds have all been faithfully applied in payment, according to the agreement, the person who furnishes it is not entitled to recover the deficiency against the members of the company. (*McConnell v. Denver*, 35 Cal. 365.)

171. The property of a riparian proprietor in the water of a stream may, on payment of due compensation to him, be taken to supply farming neighborhoods with water. (*Lux v. Haggin*, 69 Cal. 255.) Cited 76 Cal. 370, 372.

172. In suits for the possession of land by ditch companies, incorporated under the act of April 14, 1853, by the fourth section of which they are authorized "to purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require," the defendants cannot question the necessity of such land for the purposes of the corporation. That is matter between the government and the corporation. (*Natoma Water and Min. Co. v. Clarkin*, 14 Cal. 544.) Cited 22 Cal. 430, 630; 5 Utah, 502, 503.

Acquiring right of way for ditch. See ante, XII, 2.

173. Section 551 of the Civil Code, requiring every water or canal corporation to construct and keep in repair for public use across their canal, flume, or water pipe, all the bridges that the board of supervisors may require, has not been repealed by section 2737 of the Political Code, as amended in 1883, authorizing the road overseer to construct bridges across all ditches that intersect public highways, upon the neglect of the persons excavating the ditches so to do. (*County of Fresno v. Fowler Switch Canal Co.*, 68 Cal. 359.)

174. Every corporation deriving its being from the act of May 14, 1862, "to authorize the incorporation of canal companies, and the construction of canals," whether incorporated for other purposes or not, has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it was created; and it cannot escape the performance of this public duty, as a water company, by the assertion of a right, as another sort of a corporation, to apply all the water to its own uses, or to those of its

grantees. (Price v. Riverside L. & I. Co., 56 Cal. 431.)

Cited 10 Col. 590; 21 Or. 422.

175. Section 552 of the Civil Code furnishes the rule by which the rights and duties of parties in this and similar controversies are to be determined. Myrick, J., concurring. (Price v. Riverside L. & I. Co., 56 Cal. 431.)

176. The board of supervisors of a county have no power, either under section 1 of article XIV of the constitution, or the act of March 12, 1885, to fix the water rates of a corporation which acquires and holds water solely for the use of its stockholders, and not for sale, distribution, or rental to the general public, and which does not sell, rent, or use its water in any way so as to accumulate a fund for the payment of dividends. (McFadden v. Board of Supervisors of Los Angeles County, 74 Cal. 571.)

177. A water right acquired by the owner of land under an agreement with a water company relinquishing riparian rights to the water company, and providing that the water company should put a one-inch tap in its mains, from which the owner of the land could draw all the water required for domestic purposes and for irrigation of a portion of the land, which water was furnished in accordance with the terms of the contract and used on the land for more than five years, constitutes an appurtenance to the land, and the right to it, including the flow of water from the main, passed under a conveyance executed in pursuance of a decree foreclosing a mortgage made prior to the agreement with the water company. (Clyne v. Benicia Water Co., 100 Cal. 310.)

178. If it be conceded that in consequence of the sale under the foreclosure of the prior mortgage, the water company lost the riparian rights it acquired from the owner of the land, and that it is entitled to rescind the contract for failure of the consideration, it could not effect such rescission without restoring to the purchaser under the foreclosure sale all of the riparian waters which it had in fact diverted from the land under the contract, and it is not enough that such purchaser has the right to sue to recover such riparian waters. (Clyne v. Benicia Water Co., 100 Cal. 310.)

179. An action by a purchaser claiming title under the foreclosure sale, to enforce specific performance of the agreement with the water company, is an affirmation of the contract made after the execution of the mortgage between the owner of the land and the water company; but it is proper that the purchaser should be required to convey the riparian right to the water company, as a condition of relief. (Clyne v. Benicia Water Co., 100 Cal. 310.)

180. A provision in an agreement between a land-owner and a water company, whereby the former covenants for himself and his successors in interest to take water from the company for a stated period and price for the use of the land, and that such covenant should "run with and bind the land," creates a lien on the land for the water furnished for such use, which is binding as against the successors in interest of the covenantor, with notice

thereof; but it is not a covenant running with the land, so as to be personally binding on the successor in interest. (Fresno Canal and Irrigation Co. v. Rowell, 80 Cal. 114.)

181. A subsequent purchaser will be charged with actual notice of such lien, if, at the time he purchased the land, he knew that the company had a water right in connection therewith, although he was ignorant of its exact conditions. Having such knowledge, it was his duty to inquire as to the water right, and his failure so to do will not relieve him from the obligation which the inquiry would have disclosed. (Fresno Canal and Irrigation Co. v. Rowell, 80 Cal. 114.)

182. Such agreement, although only acknowledged by the land-owner, was entitled to be recorded, and its recording imparted notice to subsequent purchasers under him of the lien of the water company. (Fresno Canal and Irrigation Co. v. Rowell, 80 Cal. 114.)

183. The water company, having complied with the conditions of the agreement with respect to furnishing water to the land, is entitled to a lien therefor, whether the subsequent purchaser used the water or not. (Fresno Canal and Irrigation Co. v. Rowell, 80 Cal. 114.)

184. When a water company agrees to furnish water from its ditch to irrigate the lands of one to whom a water right is sold, and agrees to construct a box or gate at the most convenient point thereon through which to pass the water into a ditch to be constructed by the vendee as provided in the contract, the grantee of the vendee cannot escape the enforcement of a lien upon the land for the price of the water by failing to construct the ditch, and the water company is entitled to recover for the water from the time it was prepared to furnish it at the box or gate constructed by it. (Fresno Canal and Irrigation Co. v. Dunbar, 80 Cal. 530.)

185. In an action for the price of water furnished, if it appears that the water sold was supplied at the place agreed upon, an offer of defendant to show that the plaintiff's ditch was so negligently and unskillfully constructed as to be an injury to defendant's land, and as to amount to a failure to perform its part of the contract, may be properly rejected as immaterial, the only material inquiry being whether the amount of water sold was supplied at the place agreed upon. Such evidence would also be irrelevant in the absence of a pleading under which it was proper. (Fresno Canal and Irrigation Co. v. Dunbar, 80 Cal. 530.)

186. A contract for the supply of water for irrigation construed, and held to entitle the defendant, daily, to two and one-quarter inches of water, miners' measure, under a four-inch pressure. (San Diego Flume Co. v. Chase, 87 Cal. 561.)

187. Failure of one partner in ditch to pay his proportion of expenses of the concern does not forfeit his right in the common property. (Kimball v. Gearhart, 12 Cal. 27.) Cited 2 N. Mex. 493.

188. A complaint in an action for an ac-

counting touching the affairs, rents, and proceeds of a water ditch, and for the sale of the property and a division of the proceeds, which first avers in general terms a copartnership between plaintiff and defendants in the ditch, without averring any partnership agreement, and then states that plaintiff acquired his interest in the ditch by the purchase of an undivided interest from other persons than defendants, does not state facts sufficient to constitute a cause of action, either for a dissolution, and settlement of the affairs of a partnership or for a partition. (*Bradley v. Harkness*, 26 Cal. 69.)

189. In an action for partition of water ditch, an account of the proceeds for water rates can be taken, and if one of the tenants in common holds a mortgage on the interest of his cotenants, that can be adjusted in the action by an application of the proceeds of the mortgagor's interest towards the payment of the same. (*Bradley v. Harkness*, 26 Cal. 69.)

190. In an action for the partition of a water ditch and the water rights appurtenant thereto, the complaint alleged "that the plaintiff and defendants are cotenants, and own, hold, and are in possession, as tenants in common, of the following described real property, situated in the county of Trinity, and state of California, viz., a certain water ditch, running from and taking water from Conner creek, at a point on said creek about forty yards below the site of Bartlett & Evans' sawmill, and running to and conducting the water of said creek to Red Hill, in said county, for mining and other useful purposes, which said ditch was formerly known as the Conner ditch." Held, under the decision of *McGillivray v. Evans*, 27 Cal. 92, this was a sufficient allegation that the property could not be partitioned in any other manner than by a sale and distribution of the proceeds. Held, further, in view of that decision, it was not necessary to introduce evidence that the water in controversy could not be partitioned. (*Lorenz v. Jacobs*, 59 Cal. 262.) Cited 71 Cal. 435.

Cotenancy of ditch, action for rents. See Cotenancy, 131.

Tenant in common of water ditch may recover share of profits. See Cotenancy, 131, 132.

Joint owners of water ditch, nature of relation. See Cotenancy, 6.

Cotenancy of ditch right may sue alone. See Cotenancy, 153.

Water ditches, cotenants of, actions between. See Cotenancy, 131.

Ditch, cotenants of, conveyances by. See Cotenancy, 64.

Partner in water right, power to convey entire interest. See Partnership, 173.

Water flowing in ditch cannot be partitioned. See Partition, 6.

191. Where the vendor claims from the purchaser a sum due as an assessment upon water stock sold with the land, the evidence is defective where it fails to show what was the pro rata share of the water stock, or that such sum was assessed or paid by the vendor upon such pro rata share of stock. (*Samuel v. Allen*, 98 Cal. 406.)

Shares of water stock, what pass on contract for sale. See Vendor and Vendee, 57.

Invalidity of water certificates as a defense in suit by vendor for price. See Vendor and Vendee, XI, 5, d.

Breach of covenant to supply, former judgment as evidence in action for. See Judgments, 277.

Ditch, diversion by consent of joint owner. See Cotenancy, 38.

Execution sale of several water ditches in one parcel. See Executions, 151.

Allegations in action by stockholders against directors. See Corporations, 618, 619.

Ditch company, ownership of water. See post, 351, 352.

XIV. Riparian Rights; Appropriation and Diversion of Water.

1. Riparian Rights.

a. Extent of Riparian Lands; State as Riparian Owner.

192. All land bordering upon a stream which is held by the same title is riparian to the stream; and the area of lands to which riparian rights are appurtenant cannot be diminished by the acts of a trespasser segregating for the time being the actual occupancy, without segregation of title, of a portion of the tract not bordering on the stream; nor can the use of all the waters of the stream for the irrigation of such portion of the tract either render the use of such waters non-riparian, or establish it as a fact that there can be but that number of acres riparian to the stream. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.) Cited 95 Cal. 113.

Right of riparian owner to accretion. See ante, V.

193. The water rights of the state, as a riparian owner, are not reserved to the state by section 1422 of the Civil Code, because, wherever the state has not already parted with its right to those who have acquired from her a legal or equitable title to riparian lands, the provisions of the code confer the right of the state to the flow on those appropriating water in the manner prescribed in the code. (*Lux v. Haggin*, 69 Cal. 255.)

Reservation of rights of state as riparian owners. See ante, XIV, 1, a.

State not estopped by what statute from asserting rights. See post, 200.

Riparian owner, owner below low-water mark in San Francisco is not a. See San Francisco, 275.

b. Right of Access to Water; Action for Obstruction of.

194. An owner of land, the boundary of which forms a part of the water front of the city of Benicia, has a vested right of free access to the navigable waters of the Straits of Carquinez, of which he cannot be deprived without compensation. (*Shirley v. Bishop*, 67 Cal. 543.) Cited 2 Wash. 282.

195. An action to abate a nuisance erected in a highway by water, obstructing the free

use of plaintiff's property, will lie the same as to abate a nuisance in a highway by land. (*Blanc v. Klumpke*, 29 Cal. 156.) Cited 67 Cal. 546.

c. Natural Flow and Reasonable Use; Appropriation or Diversion by Riparian Owner.

196. The right of a riparian owner to have the water of a stream run through his land is a vested right, and any interference with it imports at least nominal damages, even though there be no actual damage. (*Creighton v. Evans*, 53 Cal. 55.) Cited 69 Cal. 274, 393.

Riparian rights are protected by constitutional principles. See post, XIV, 2, e.

197. By the common law, the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as a part and parcel of it. Use does not create the right, and misuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application to it by other riparian owners. (*Lux v. Haggin*, 69 Cal. 255.)

198. The right of a riparian proprietor to the flow of a stream of water over his land is an incident of his property in the land, is annexed to the land, and considered part and parcel of it, but may be severed or segregated from the land by grant, condemnation, or prescription. (*Gould v. Stafford*, 91 Cal. 146.)

Property of riparian owner may be condemned for water company. See ante, 171.

Natural flow, rights of prior appropriator to. See *Mines and Mining*, XI, 8, c.

Common law touching water rights, effect of. See *Common Law*, 12.

Rights of riparian owner may be lost by adverse possession. See post, XIV, 2, g, A.

199. The right of the owner of land to have a well-defined watercourse continue to flow through it does not depend upon the length of the stream above him, nor is his right affected by the fact that the source of the stream is a spring upon the adjoining land of another, who has diverted the stream from its accustomed channel directly from the spring, nor is it material to consider the sources of the spring itself, in an action to restrain such diversion. (*Chauvet v. Hill*, 93 Cal. 407.)

Riparian rights as regards spring. See ante, VIII.

200. The common law as to riparian rights was not abrogated by certain statutes of the state, referred to in the opinion, applicable to a district of country within which is included the county of Kern, nor was the state estopped by such statutes from asserting its right to the flow of a natural stream from that district to and over the lands granted to the state by the act of Congress of 1850. (*Lux v. Haggin*, 69 Cal. 255.)

201. The removal of debris from the channel of a natural watercourse, by a party whose object is, not to use the natural flow of the

water, but to use the channel of the stream for the conduct of waters to be turned in and taken out by artificial means, will inure to the benefit of a riparian owner of the stream, though by the deposit of such debris the natural flow had been so interfered with that no water reached the lands of such owner except in time of high water. (*Paige v. Rocky Ford Canal and Irrigation Co.*, 83 Cal. 84.)

Prior appropriator, right of to remove obstructions to natural flow. See post, 278.

Purchaser from United States, right of to natural flow as against prior appropriator. See post, XIV, 2, f.

Failure of appropriator on public domain to post notice, rights of subsequent riparian owner. See post, 258, 259.

202. By the law of California, riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such a reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case. (*Lux v. Haggin*, 69 Cal. 255.)

Cited 70 Cal. 105; 71 Cal. 135, 250; 75 Cal. 122; 80 Cal. 193, 403; 84 Cal. 588; 93 Cal. 681; 19 Nev. 88.

203. The common-law rules as to riparian rights are so far modified in this state that an upper riparian proprietor has the right to the reasonable use of the water of a natural stream for irrigating the riparian land, where irrigation is necessary, although such use may appreciably diminish the flow down to the lower riparian proprietor; but he does not have the right to absorb all the water of the stream, so as to allow none to flow down to the lower riparian proprietor. (*Harris v. Harrison*, 93 Cal. 676.)

204. Under settled principles, both of the civil and common law, a riparian proprietor has a usufruct in the stream as it passes over his land. (*Pope v. Kinman*, 54 Cal. 3.) Cited 69 Cal. 359, 393; 13 Or. 499.

205. The right to a reasonable use of the water of a stream by a riparian proprietor, in common with others in like situation, for the purposes of irrigation, is recognized only as being in subordination to the rights of all other riparian proprietors to the use of the water for the supply of the natural wants of man and beast, extended to the occupants of each and every tract bordering upon the stream, held as an entirety, whatever its extent, and the right of irrigation cannot be extended even by implication so as to exclude the rights of other riparian proprietors. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.) Cited 95 Cal. 113.

206. The court instructed the jury that "every riparian owner upon a stream has a right to use in a reasonable way the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery if the quantity of water will warrant such use above the amount required for domestic purposes; and it was objected that, by this instruction, the right to use the water was qualified by the reasonable manner of its use, and not by any reasonableness in respect to quantity. Held, the instruction given em-

braced quantity, as well as manner. (*Ellis v. Tone*, 58 Cal. 289.)

207. In an action by one riparian proprietor against another for unlawfully appropriating the waters of a stream for the purpose of irrigation, an instruction to the jury that they should find for the defendant if they believed that he had used no more water than was necessary for that purpose is erroneous, for by it the jury is, in effect, told that the defendant was entitled to divert and use all of the water, if necessary for the irrigation of his lands, without regard to the necessities of the plaintiff. (*Learned v. Tangeman*, 65 Cal. 334.)

208. An upper riparian proprietor has not the right, for purposes of irrigation, to take all the water which flows in the stream at the point of diversion for that purpose. What would be a reasonable amount of water for irrigation is a question depending upon the particular circumstances of each case. The upper riparian proprietor can take all the water of the stream only where the whole is absolutely necessary for strictly domestic purposes, and to furnish drink for man and beast. He cannot irrigate nonriparian lands, and must see to it that all surplus water is returned to the stream. (*Gould v. Stafford*, 77 Cal. 66.)

209. An upper riparian proprietor is entitled to a reasonable use of the water of the stream for the purpose of irrigating his riparian lands, and an action will lie only for an unreasonable and unauthorized use. What is a reasonable use is a question of fact, depending upon the circumstances appearing in each particular case. (*Heilbron v. '76 Land and Water Co.*, 80 Cal. 189.)
Cited 84 Cal. 588; 96 Cal. 8.

210. The question as to what is a reasonable use of the water of a natural stream for irrigating the land of a riparian proprietor is a question of fact, depending upon the circumstances appearing in each particular case. (*Harris v. Harrison*, 93 Cal. 676.)

211. A riparian proprietor of private lands cannot acquire any right in the waters of the stream by mere appropriation. (*City of Santa Cruz v. Enright*, 95 Cal. 105.)

212. A riparian proprietor, who has appropriated and uses all the water of a stream crossing his land, as it ordinarily flows, cannot restrain the diversion, during times of extraordinary high water, of the surplus of the stream not used or appropriated by him. (*Edgar v. Stevenson*, 70 Cal. 286.)
Cited 80 Cal. 194.

213. An upper riparian proprietor cannot be perpetually enjoined from using the water of the stream for purposes of irrigation of his riparian lands by means of a canal constructed in part for that purpose, whether he has actually used it or not, or whether he intends to use it or not, nor can the diversion of surplus water be enjoined when no proprietor below would be injured thereby. (*Heilbron v. '76 Land and Water Co.*, 80 Cal. 189.)

214. Where the quantity of the waters of a creek, that may be used by a riparian proprietor for purposes of irrigation without interference with the rights of other riparian

owners, depends upon the stage of the water in the creek, which varies in different years, as well as at different seasons of the same year, such proprietor may lawfully construct a flume of sufficient capacity to convey from the stream to his land all the water that he or his lessees might be entitled to use for irrigation at any season of any year. (*Gould v. Stafford*, 91 Cal. 146.)

215. A riparian proprietor cannot, as against a lower proprietor, authorize a corporation to take water from the stream to be conducted to a distance and there sold. (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426.)
Cited 76 Cal. 10, 15; 84 Cal. 235.

216. Question of riparian proprietorship is eliminated from a controversy over the use of water for irrigation between owners of lands crossed by a natural stream, when both owners admit upon the trial that irrigation in the neighborhood of the stream is necessary; that it is the general custom for the farmers in such neighborhood to divert the water for irrigating purposes; and that the defendant, the upper proprietor, had for twenty years used the water for irrigation, leaving only the surplus water to the plaintiff. Under such admissions, the question is one of priority of right; and the plaintiff could not be injured by deprivation of water that he was not entitled to use. It devolves upon the plaintiff to prove a right to use the waters of which he was deprived, and an injury resulting from interference with such rights. (*Sharp v. Hoffman*, 79 Cal. 404.)

Extent of right of diversion, increasing diversion. See post, XIV, 2, m.

Right of riparian owners to divide the whole stream. See post, XIV, 1, d.

Right to erect dams. See ante, XI, 1.

Owner cannot protect land by dam so as to cut off natural flow. See post, XIV, 1, e.

Actions for diversion or appropriation. See post, XIV, 2, p.

Action to quiet title against riparian owner. See post, XIV, 2, r.

Wharf materially obstructing free access of riparian owner enjoined as a nuisance. See *Wharves*, I.

d. Division of Stream by Riparian Owners.

217. The sole occupants of lands bordering upon a stream which, after leaving the lands of the occupants, flows upon lands belonging to the government of the United States, have the right to appropriate the entire stream for any beneficial purpose, and may make a lawful contract dividing the entire flow between themselves. (*Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68.)
Cited 91 Cal. 155.

218. If, after making the contract for division of the flow of the stream, an occupant of land bordering on the stream, or his successor in interest, acquires title to other land below on the stream, his riparian rights are subordinated to the rights granted to the occupant of the lands above him, and if his successor in interest claims any rights under the contract, he cannot claim any riparian rights inconsistent therewith. (*Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68.)

219. The contract in this case construed, and held to indicate the intention of the parties to divide between themselves the entire flow of the stream. (*Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68.)

Agreement to divide waters of stream runs with land. See *Covenants*, 37.

e. Protection of Lands by Bulkheads, Breakwaters, or Levees.

220. The owner of land on a natural watercourse has the right to the usual flow of the water without obstruction, and an owner above cannot, in protecting his own land from injury, cut off the water of the stream from flowing to the land of the owner below, by means of a dam. He must protect his land by embankments or levees on the side of the stream without interfering with the flow of water in the channel. (*Bliss v. Johnson*, 76 Cal. 597.)

221. A riparian proprietor has a right to protect his land from a threatened change in the channel of the adjoining stream by erecting along the border thereof a bulkhead as high as the original bank of the stream. (*Barnes v. Marshall*, 68 Cal. 569.)

222. A complaint showing that the parties own land on opposite sides of a creek, which curves sharply into the land of plaintiff, along an abrupt bank of loose soil, and that defendant has built a breakwater, or bulkhead, on the inside of the curve, whereby the rise of water will be turned against plaintiff's land, to his damage, states facts showing that danger is probable and imminent, and is sufficient, as against a general demurrer, to justify final relief abating the breakwater as a nuisance. (*Nicholson v. Getchell*, 96 Cal. 394.)

223. A proprietor of higher land bordering on the Sacramento river cannot enjoin the erection of a levee or embankment by the proprietor of lower land adjoining his in the rear, the design of which is to prevent the overflow of the river from flooding the lower land, though such embankment may increase the accumulation of flood water on the higher land, the owner of the higher land having like means of protecting his own land. (*McDaniel v. Cummings*, 83 Cal. 515.)

224. In an action to recover for damages done to the land of the plaintiff by an overflow of water produced by a certain levee erected by the defendant, an averment in the answer that the levee was erected more than twenty years before the commencement of the action, and has since been maintained with the knowledge and consent of the plaintiff, is not an averment of a prescriptive right to maintain the levee. (*Montgomery v. Locke*, 72 Cal. 75.)

Levee districts. See *Swamp and Overflowed Lands*, XV.

Levees, right to erect. See *Swamp and Overflowed Lands*, XV.

Right to protect land by levee. See *Easements*, 29.

Right of reclamation district to erect and maintain levee. See *Swamp and Overflowed Lands*, XVII, 3, h.

Levees, enjoining. See *Injunctions*, II, 3.

f. Rights on Pollution of Water.

225. In an action for damages, caused by the pollution of the water of a stream which runs over the plaintiff's land, special damages cannot be proved unless they are alleged in the complaint. (*Potter v. Froment*, 47 Cal. 165.)

Cited 80 Cal. 580; 5 Mont. 11.

226. In such case, proof of the diminution of the rental value of the farm caused by the pollution of the water is inadmissible, if the complaint fails to allege that the plaintiff rented the farm, or was prevented from renting it, by reason of the injury to the water. (*Potter v. Froment*, 47 Cal. 165.)

Cited 66 Cal. 163.

Deterioration of water. See *Mines and Mining*, XI, 8, e.

2. Appropriation and Diversion of Water.

a. "Appropriation" is not a Common-law Doctrine; Definition of.

227. The doctrine of "appropriation," so called, is not the doctrine of the common law. (*Lux v. Haggin*, 69 Cal. 255.)

Cited 20 Nev. 281; 21 Or. 116.

228. Appropriation is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220, 232.)

b. What Constitutes Appropriation.

229. Appropriation of water cannot be constructive. (*Kelly v. Natoma Water Co.*, 6 Cal. 105.)

230. The erection of a dam across a natural watercourse is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam is brought into the watercourse by canals constructed by the owners of the dam. (*Kelly v. Natoma Water Co.*, 6 Cal. 105.)

231. Merely cutting a ditch for a drain, and using the water for no useful purpose, gives no priority. (*Maeris v. Bicknell*, 7 Cal. 261.)

232. The diversion of the waters of a stream with the object of drainage simply, or without the intention of applying them to some useful purpose, does not constitute an appropriation. (*McKinney v. Smith*, 21 Cal. 374.)

Cited 69 Cal. 447; 6 Mont. 38.

What acts necessary in appropriating water on public land. See post, 272.

Prior appropriation, what constitutes. See *Mines and Mining*, 351.

c. Right of Appropriation; Who may appropriate; Protection and Rights of Riparian Owners.

Right of appropriation and use for mining. See *Mines and Mining*, XI, 8, a.

233. Right to running water has been held in this state to exist without private ownership of soil, from the policy of our laws, upon the ground of prior location upon the land or prior appropriation and use of the water. (*Hill v. Newman*, 5 Cal. 445.)

234. No distinction can be drawn between mill owner and miner as to their rights in appropriating water. (*Ortman v. Dixon*, 13 Cal. 33.)

Cited 95 Cal. 614; 1 Mont. 658.

Right of riparian owner to appropriate water. See ante, XIV, 1, c.

235. Neither a grantee of the United States nor the grantee of a private person who was a riparian owner when the code was adopted need rely for the protection of his riparian rights on section 1422 of the Civil Code. Such persons are protected by constitutional principles. (*Lux v. Haggin*, 69 Cal. 255.) Cited 80 Cal. 193.

236. Section 1422 of the Civil Code, providing that the rights of riparian proprietors are not affected by the provisions of the title of the code governing the appropriation of water, is protective, not only of riparian rights existing when the code was adopted, but also of the riparian rights of those who acquired a title to land from the state after the adoption of the code, and before an appropriation of water in accordance with the code provisions. (*Lux v. Haggin*, 69 Cal. 255.)

237. The rights of riparian proprietors are an appurtenance to the land, running with it as a corporeal hereditament, and cannot be extinguished or defeated by an appropriation under the statute. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.) Cited 91 Cal. 155; 95 Cal. 113.

238. Prior appropriator of water cannot enjoin riparian proprietor from causing the water of a natural stream to flow over his lands for beneficial purposes, where it appears that the prior appropriator is only nominally damaged by the acts done and threatened by the riparian owner, and it does not appear that the prior appropriator has used the water for a beneficial purpose, or raised or attempted to raise any crops on his land. (*Perego v. McKissick*, 79 Cal. 572.) Cited 98 Cal. 66.

d. Successive Appropriations; Rights and Liabilities of Appropriators.

239. Possession or actual appropriation is test of priority in all claims to the use of water, where such claims are not dependent upon the ownership of the land through which the water flows. (*Kimball v. Gearhart*, 12 Cal. 27; *Kelly v. Natoma Water Co.*, 6 Cal. 105, cited 7 Cal. 262, 29 Cal. 206, 37 Cal. 312, distinguished 7 Cal. 49.)

240. The right of the defendant corporation to divert the waters of Kern river, based upon its appropriation in August, 1874, is subordinate to that of the several corporations which are joined as plaintiffs—except the Goose Lake Canal Company—to divert the several amounts by them respectively appropriated prior to August, 1874. (*Stein Canal Co. v. Kern I. I. Co.*, 53 Cal. 563.) Cited 1 Wash. 591.

241. Rights of parties, as fixed by priority and extent of their respective appropriations, though not founded on the legal title, are as perfect and absolute as if acquired by pre-

scription, or express grant from the riparian owner. (*Kidd v. Laird*, 15 Cal. 161.) Cited 96 Cal. 217; 24 Or. 313.

242. The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him, as well as below. (*Hill v. King*, 8 Cal. 336.) Cited 8 Cal. 334; 67 Cal. 269; 69 Cal. 359, 446; 80 Cal. 405; 5 Or. 106.

243. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes to the exclusion of any subsequent appropriation of it for the same or any other purpose. (*Ortman v. Dixon*, 13 Cal. 33.) Cited 69 Cal. 447; 80 Cal. 405; 95 Cal. 614; 2 Nev. 277; 3 Nev. 517; 21 Or. 42.

244. The natural water in ravine belongs to the first appropriator thereof, and for either a diversion or appropriation thereof an action will hold. (*Hoffman v. Stone*, 7 Cal. 46.)

245. If first appropriator of water takes only part of quantity flowing in a stream, another may afterward appropriate the remainder, and if the first appropriates the water only during certain days in the week, another may afterward take during the remaining days of the week. (*Smith v. O'Hara*, 43 Cal. 371.)

Cited 69 Cal. 447; 70 Cal. 290; 95 Cal. 614; 10 Nev. 245; 24 Or. 242; 7 Utah, 460.

246. If a prior appropriator suffers a portion of the water, or the body of it, after running the mill, to go on down its accustomed course, persons below may appropriate this residuum so as to make it a vested right. (*Ortman v. Dixon*, 13 Cal. 33.) Cited 70 Cal. 290, 291; 75 Cal. 614.

247. If the plaintiff appropriated a portion of the waters of a stream, and constructed a ditch and dam amply sufficient, under the conditions of the stream and the country as they then existed, to make the appropriation available, and thereby acquired the right to appropriate and use said portion of said waters in said manner only, this would not prevent or impair the right of other parties to acquire a right to the surplus waters of the stream, or to its bed and banks, or the adjacent land, to any extent that should not interfere with rights previously acquired. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

Subsequent appropriator of surplus, rights of. See post, XIV, 2, m.

248. One who diverts and uses the waters of a ravine for purposes of irrigation acquires thereby a right to the use of the water to the extent of his original appropriation. A subsequent locator, who diverts and uses the water suffered to go to waste and flow back into the ravine, acquires thereby no right, as against the prior appropriator, to the water originally diverted and used by him. (*Brown v. Mullin*, 65 Cal. 89.) Cited 95 Cal. 613.

249. If two persons appropriate water from the same stream, one prior in point of time to the other, and a third person builds a flume in the stream so as to increase the flow of water, the prior appropriator is first entitled to the increased flow of water, to the

extent of his appropriation. (*Davis v. Gale*, 32 Cal. 26.)

250. A subsequent appropriator of water from a natural stream has no right to destroy the ditch of a prior appropriator, or to materially diminish the quantity or deteriorate the quality of the water to which the latter is entitled. (*Junkans v. Bergin*, 67 Cal. 267.)

251. A court of equity has power to ascertain and determine, as between several appropriators of the waters of a natural stream, the extent of the respective rights of each in the waters therein flowing, to regulate the use thereof in such a way as to maintain equality of rights in the enjoyment of the common property, and to enjoin a subsequent appropriator from interfering with the rights of the prior appropriators as ascertained and established by the court. (*Frey v. Lowden*, 70 Cal. 550.)

Prior appropriation, rights on. See *Mines and Mining*, XI, 8, c.

Equity can determine between several appropriators. See ante, XIV, 2, d.

Appropriating water from ditch. See ante, XII, 11.

Prior appropriator on public lands, rights of. See post, XIV, 2, f.

Extent of right of diversion, increasing diversion. See post, XIV, 2, m.

Interfering with rights of subsequent appropriator by raising dam. See ante, XI, 3.

Appropriation of water for mill. See ante, X.

e. Validity of Appropriation; Compliance with Statute; Notice.

252. To render valid a claim of water by appropriation, the claim must be for some useful or beneficial purpose, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer. (*Weaver v. Eureka Lake Co.*, 15 Cal. 271.)

253. One who appropriates the waters of a running stream by an actual diversion thereof for the purposes of irrigation acquires the right to the use thereof as against a claimant who subsequently posts his notices upon the stream in accordance with section 1415 of the Civil Code, and proceeds thereafter, as required by statute, to perfect his rights, although the prior appropriator has not followed the statute in making his appropriation. (*Wells v. Mantes*, 99 Cal. 583.)

254. The scope and purpose of the provisions of the Civil Code upon water rights are merely to establish a procedure for the claimants of the right to the use of the water whereby a certain definite time might be established as the date at which their title should accrue by relation; and a failure to comply with the rules there laid down does not deprive an appropriator by actual diversion of the right to the use of the water as against a subsequent claimant who complies therewith. (*Wells v. Mantes*, 99 Cal. 583.)

255. The word "claimants" in section 1419 of the Civil Code, which provides that a failure to comply with the rules of the code "deprives the claimants of the right to the use of

the water, as against a subsequent claimant who complies therewith," refers to a party posting and recording the notices required by the provisions of section 1415 of the same code, and does not apply to an appropriator by actual diversion. (*Wells v. Mantes*, 99 Cal. 583.)

256. The question whether a person has made a valid appropriation of water depends on the questions whether he has given a proper notice of his intention to appropriate it, and whether he has prosecuted the work in that behalf with reasonable diligence. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.)

257. Whether an actual appropriation of water by means of a dam and ditch, not initiated by compliance with the provisions of the Civil Code as to posting and recording of notices, is valid, query? (*Perego v. McKisick*, 79 Cal. 572.)

Cited 98 Cal. 66.

258. The failure to post and record a notice of appropriation will not vitiate a prior actual appropriation of waters flowing upon the public domain, as against a riparian proprietor who subsequently settles upon and obtains a patent to land below the point of diversion. (*Burrows v. Burrows*, 82 Cal. 564.)

Cited 99 Cal. 584.

259. Under the act of Congress of July 16, 1866, a prior appropriator of a water right, who diverts the water from its natural channel by means of a completed ditch prior to the vesting of any rights in a subsequent pre-emptioner of the land over which the water would naturally flow, is protected to the extent and in the manner of such actual and completed diversion against any riparian rights of the subsequent pre-emptioner, notwithstanding the failure or neglect of the prior appropriator to comply with the Civil Code as to the posting and record of a notice of appropriation of the water right. (*De Necochea v. Curtis*, 80 Cal. 397.)

Cited 81 Cal. 126; 82 Cal. 567; 91 Cal. 190; 96 Cal. 217; 99 Cal. 584, 586; 2 Idaho, 724.

260. So far as defenses to an action for diversion of water are founded upon the statute of limitations and equitable estoppel, it is immaterial whether the defendant or his grantor made an appropriation of the water in compliance with the code requirements as to posting notices, etc., or not. To sustain those defenses, the actual construction of the ditch which diverted the water may be shown without preliminary proof of the posting or recording of notices. Evidence as to the convenience and necessity of the ditch to the land of the appropriator is relevant to the defense and estoppel, and to show that the water right became appurtenant to the land and passed with it to the defendant. (*Coonrad v. Hill*, 79 Cal. 587.)

261. The object of the legislature in prescribing in section 1415 of the Civil Code that a notice of appropriation of a water right is to be posted and record thereof to be made, and in section 1416 that work is to be commenced for diversion of the water within sixty days after the posting of the notice, and to be diligently prosecuted thereafter, etc., is merely, as declared in section 1418, to enable the claimant to avail himself of the doctrine

of relation as against an intervening appropriator. After the diversion of the water has been completed, and the same has been applied to a beneficial use, the appropriator has a perfect right to the water appropriated, against all the world except the owner of the soil, and those claiming adversely who have complied with the law. Whether a subsequent appropriator could at any time after the completion of the diversion by the prior appropriator take the water away from the latter by complying strictly with the code is not decided. (*De Necochea v. Curtis*, 80 Cal. 397.)

262. The notice of the intention to appropriate the water must be sufficient to put a prudent man on inquiry. (*Kimball v. Gearhart*, 12 Cal. 27.)
Cited 56 Cal. 580.

263. Notices of appropriation of water are to be liberally construed. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.)
Cited 11 Mont. 437.

264. If an appropriator of water, after duly posting his notice, and while diligently prosecuting the work of appropriating the water, posts a second notice of appropriation of the same water, he does not thereby abandon his first claim. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.)
Cited 8 Cal. 403.

265. A notice of intention to appropriate the waters of a certain stream is evidence of possession, but of itself, alone, is not sufficient. Taken with other acts, it amounts to sufficient evidence. (*Thompson v. Lee*, 8 Cal. 275.)

266. In an action involving the right to and extent of a water privilege claimed by plaintiffs under an alleged appropriation by a number of copartners, defendants, to limit the extent of the appropriation, offered in evidence a paper purporting to be a copy of the original locating notice of the copartners, and, without direct proof of its execution, showed that it was prepared with a knowledge of some of the partners, and was seen as a posted notice by a portion of them at the point of diversion, and about the time the work was commenced, and that its position was such that it must probably have been seen by all. Held, that upon this proof the paper was admissible as part of the *res gestæ*. (*McKinney v. Smith*, 21 Cal. 374.)

Appropriation by ditch, diligence in construction of. See ante, XII, 3.

Failure to complete whole diversion called for in notice in reasonable time. See post, 374.

f. Water Flowing Over Public Land, Rights in.

267. Semble, the occupant of a tract of riparian land, arable or grazing, on the public domain, is presumed to have received a grant of the flowing water, to the extent of the common-law right to the use of such water as it flows through the land. (*Lux v. Haggin*, 69 Cal. 255.)

268. Right to use of water flowing in stream over public land of the United States may be acquired by appropriation. (*Ramelli v. Irish*, 96 Cal. 214.)

269. The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, which has all along been recognized and sanctioned by the local customs and decisions, was expressly recognized by the act of Congress of July 26, 1866. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.)
Cited 58 Cal. 144; 69 Cal. 347, 348; 80 Cal. 337, 407.

270. Among the pursuits on public land encouraged by the government, and which have been referred to in legislative acts, and have been made the subjects of revenue, is the construction of ditches, canals, and flumes for the purpose of conducting water for mining purposes. (*Conger v. Weaver*, 6 Cal. 548.)
Cited 8 Cal. 280, 338; 10 Cal. 238; 69 Cal. 446, 447.

271. The act of Congress of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands," conferred rights to waters appropriated for agricultural purposes, and operates to confirm such rights initiated and maintained prior to the passage of the act. (*Cave v. Crafts*, 53 Cal. 135.)
Cited 80 Cal. 337.

272. In appropriating unclaimed water on the public lands, only such acts are necessary and such indications and evidences of appropriation required as the nature of the case and the face of the country will admit of, and are, under the circumstances and at the time, practicable; surveys, notices, stakes, and blazing of trees, followed by work and actual labor, without abandonment, will in every case, where the work is completed, give title to the water over subsequent claimants. (*Kimball v. Gearhart*, 12 Cal. 27.)

273. The court, at the instance of the plaintiff, in effect instructed the jury that the appropriator of the waters of a stream upon the public lands of the United States, for a useful purpose, acquired a right to the same against parties subsequently acquiring title from the government, and all other persons, except previous appropriators; and refused to instruct the jury, at the instance of the defendant, that such appropriation must have been made in the manner recognized by the local customs, laws, or decisions of the courts of this state, but modified the same by striking out the words "local customs," and gave the instruction as modified. Held, the objections to the instructions given were untenable, and the court did not err in modifying the instruction asked for by defendant. (*Himes v. Johnson*, 61 Cal. 259.)
Cited 80 Cal. 337, 407; 1 Wash. 591.

274. The first appropriator of the water of a stream passing through the public lands in the state has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters,

and divert an equal quantity, as often as they choose. (*Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143.)

Cited 83 Cal. 94; 2 Nev. 277; 10 Nev. 233.

275. Possession of public land gives the right to the use of water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another who has taken the same up subsequently, but before the attempt to change the course of the water. (*Crandall v. Woods*, 8 Cal. 136.)

Cited 8 Cal. 323; 10 Cal. 183; 69 Cal. 356-358, 360; 1 Mont. 685; 7 Nev. 289.

276. When an appropriation of water flowing over public land has been made for some useful or beneficial purpose, the rights acquired by the appropriator will be recognized and protected as against another person who subsequently obtains title to the land from the government. (*Ramelli v. Irish*, 96 Cal. 214.)

277. If a person acquires a vested right to appropriate water upon the public lands of the United States, prior to the issuance of a patent granting to another any portion of the public lands, the patentee's rights are, by express statutory enactment, subject to the rights of the appropriator. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.)

Cited 69 Cal. 347, 348, 433, 438, 449; 80 Cal. 337.

278. An appropriator of the waters of a natural stream flowing through public lands of the United States has a right, as against a subsequent purchaser from the United States, to go upon the land of such purchaser higher up the stream than the point of diversion and remove obstructions from the bed of the stream, so as to cause its waters to flow in their natural channel to the point of diversion. (*Ware v. Walker*, 70 Cal. 591.)

Cited 80 Cal. 337, 407; 92 Cal. 141.

279. The riparian rights of a homestead claimant under the laws of the United States, whose settlement upon the land is subsequent to an appropriation of the water flowing across the same in its natural channel by the owner of a water ditch which taps the stream below the homestead claim, are subject and subordinate to the prior appropriation of the stream by the owner of the ditch, and the homestead claimant may be enjoined from diverting the water of the stream from the ditch. (*South Yuba etc. Co. v. Rosa*, 80 Cal. 333.)

280. It has never been held by the supreme court of the United States, or by the supreme court of California, that an appropriation of water on the public lands of the United States, made after the act of Congress of July 26, 1866, or the amendatory act of 1870, gave to the appropriator the right to the water appropriated, as against a grantee of riparian lands under a grant made or issued prior to the act of 1866, except where the water so appropriated was reserved by the terms of such grant. (*Lux v. Haggin*, 69 Cal. 255.)

281. In a question of priority of right between an appropriator of water on the public lands and a pre-emptor, the rights of the latter date from the issuance of his patent; and

the latter makes no case for the application of the doctrine of relation by proving that, prior to said date, he settled on the land, and that the United States surveyor surveyed the same, and that he filed his declaratory statement, and proved up and paid for the land. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.)

282. Though a patent to a homestead claimant may relate back to a point of time five years before its date, still his rights as a riparian proprietor are subordinate to those of an appropriator who constructed a new ditch before that time, or who had succeeded to and still retained a complete and equitable title to an old ditch, constructed long before by first appropriators, and to the water right thereby acquired, which had never been abandoned or lost. (*Ramelli v. Irish*, 96 Cal. 214.)

283. Owner cannot acquire a prescriptive right to flood with water land higher than his own belonging to the United States, and the purchaser of such higher land from the United States may commence an action for the injury at any time within the statutory period after he buys from the United States, notwithstanding the fact that it may have been flooded while the United States owned it. (*Ogburn v. Connor*, 46 Cal. 346.)

284. An abandonment of a pre-emption claim defeats the right of a person claiming under the pre-emptor as grantee of a right to divert the waters of a stream flowing through the land pre-empted as against a subsequent pre-emptor. (*Conkling v. Pacific Improvement Co.*, 87 Cal. 296.)

Ownership of water on public land and grant of. See ante, III.

Division of entire stream by riparian owners where stream flows on public lands. See ante, XIV, 1, d.

Failure of appropriator on public domain to post notice. See ante, 258, 259.

Appropriation of springs on public lands. See ante, VIII.

Complaint in suit by pre-emptor to enjoin diversion. See post, 481.

Right of way for ditch over public land. See ante, XII, 2.

g. Obtaining Right by Adverse Possession.

A. Right may be Acquired by; in Case of Public Land or Mexican Grant.

285. Rights of riparian proprietors may be extinguished by the acquirement of a prescriptive right to divert the stream by actual and uninterrupted user, with or without the statutory appropriation, if adverse, for a useful purpose, under claim of right, and continued for the period prescribed by the statute of limitations. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

Cited 91 Cal. 155; 95 Cal. 113.

286. If one who has prior right to use of water permits another to acquire and hold for five years continuous adverse possession of the same, or any part thereof, he loses his right to the same or that part thereof which the adverse possessor enjoyed. (*Davis v. Gale*, 32 Cal. 26.)

Cited 70 Cal. 347; 96 Cal. 217; 1 Col. App. 498.

287. Right to use of watercourse in public mineral lands, and the right to divert and use the water taken therefrom, may be held, granted, abandoned, or lost, by the same means as a right of the same character issuing out of lands to which a private title exists. The right of the first appropriator may be lost by the adverse possession of another; and when such person has had the continued, uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him. (*Union Water Co. v. Crary*, 25 Cal. 504.)

Cited 27 Cal. 366; 32 Cal. 35; 69 Cal. 358; 85 Cal. 226; 70 Cal. 347; 1 Mont. 544.

288. No right by prescription can be acquired to the use of water as against the government of the United States. (*Wilkins v. McCue*, 46 Cal. 656.)

289. There can be no adverse possession of land, or adverse user of water to the natural flow of which such land is entitled, so long as the title to the land remains in the United States; but a prescriptive right to the use of water may be acquired after the legal title of such land has vested in a grantee of the government. (*Jatunn v. Smith*, 95 Cal. 154.)

290. If the doctrine as to adverse claims upon the public lands, as determined by the decisions of the state courts with respect to controversies upon the public land of the United States, be extended to the lands granted to the state, it cannot affect the title or estate of grantees of the state, the water not being reserved in the grant or in the legislation authorizing the grant. The doctrine is applicable alone to actions in which both parties claim only by possession. (*Lux v. Haggin*, 69 Cal. 255.)

291. If a grant of land by Mexico or Spain was imperfect, no prescriptive right to the use of water flowing from it can be acquired without an adverse user for five years from the time of a final survey, or the issuing of a patent to the grantee. (*Wilkins v. McCue*, 46 Cal. 656.)

Prescriptive rights to flood land belonging to the United States. See ante, 283.

Right of appropriation from waste gate by adverse user. See ante, XII, 9.

Prescriptive right to maintain dam. See ante, XI, 1.

Adverse possession by lessee of water right. See Adverse Possession, 186.

B. Elements of; What Constitutes; Duration of.

292. In an action for the wrongful diversion of water, if the jury are satisfied from the evidence that the defendants have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the water in dispute for five years preceding the commencement of the action, they are justified in presuming a grant to the defendants. (*Union Water Co. v. Crary*, 25 Cal. 504.)

293. The use of water in any particular way for a period corresponding to the time limited by statute within which an action must be

commenced to determine the right to it, raises a presumption of title to the same in the person enjoying the same as against a right in any other person which might have been but was not asserted. (*American Co. v. Bradford*, 27 Cal. 360.)

Cited 69 Cal. 358; 71 Cal. 250; 85 Cal. 226.

294. A prescriptive right to the diversion and use of a stream of water becomes fixed only after five years' adverse enjoyment. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

Cited 95 Cal. 113.

295. Rights to the use of water become fixed after five years' adverse enjoyment of the same. (*Crandall v. Woods*, 8 Cal. 136.)

Cited 10 Cal. 183; 71 Cal. 250; 72 Cal. 601; 85 Cal. 226; 7 Nev. 267.

296. The adverse enjoyment necessary to a prescriptive right to the diversion and use of a stream of water must have been asserted under claim of a title with the knowledge and acquiescence of the person having the prior right, and must have been such an invasion of the rights of the party against whom it is claimed that he would have a ground of action against the intruder, must be accompanied by all the elements required to make out an adverse possession, and must be continuous and uninterrupted for the period of five years. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

Cited 90 Cal. 229; 95 Cal. 113.

297. There can be no adverse possession of a water right, and title by prescription cannot be acquired, unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom those acts are performed, and to raise the presumption of a grant of an easement as the only hypothesis on which to account for his failure to complain thereof. A finding of adverse possession, if material, is not sufficient, unless it shows definitely a diversion of water of which the adverse party has a right to complain. (*Lakeside Ditch Co. v. Crane*, 80 Cal. 181.)

Cited 86 Cal. 18.

298. In order that the presumption of title from adverse possession may be conclusive, the right to the use of the water must have been asserted under a claim of title with the knowledge and acquiescence of the person having a prior right, and must have been uninterrupted. (*American Co. v. Bradford*, 27 Cal. 360.)

Cited 69 Cal. 358; 71 Cal. 250; 85 Cal. 226.

299. The adverse user of land belonging to a riparian proprietor does not make the use of water of the stream upon such land adverse to the riparian owner, such user being to his advantage, and giving him no independent right of action for diversion of the stream, so long as it was not diverted away from his land, nor used under notice of a claim of right to divert or use it elsewhere. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

300. The adverse user of water must be uninterrupted as well as continuous for five years, and the former does not follow from the latter; for the bringing of an action of ejectment for the riparian land upon which

the water is used, before the expiration of the five years, is an interruption of the possession of the water as an appurtenant to the land, although there may be a continuous enjoyment of the water pending the action, and the recovery of the land will carry with it the recovery of the water as an appurtenance thereto. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

301. Though the use of water by a trespasser upon the land of another does not make such water appurtenant to the land upon which it is wrongfully used, yet the use of water upon land to which it is already appurtenant, by one who is a trespasser thereon, will not disserve the water from the land, or confer any right to divert it, or to convey any title thereto, upon being lawfully ejected from the land. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

302. Incursions by an appropriator of a water right upon the land of a riparian proprietor, for the purpose of obstructing the flow of water in a certain channel and increasing the flow in another channel of the same river, not assented to by the riparian proprietor, who destroyed the work of the appropriator as often as he discovered it, do not secure to the appropriator any prescriptive right in the water secured thereby, however long the incursions may have continued, or however frequently they may have been repeated. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

303. Where it does not appear that any taxes were levied or assessed against the ditch and water right, no finding upon the question of taxes is necessary in order to sustain the prescriptive right. (*Spargur v. Heard*, 90 Cal. 221.)

304. When the water of a natural stream has been diverted by means of a dam and ditch, and has been used adversely to a lower riparian proprietor for more than five years as an appurtenance to the land of the appropriator, and no separate taxes have ever been levied or assessed upon the ditch and water right, the defense of the statute of limitations is made out. It must be presumed that the appropriator paid whatever taxes were due from him upon the ditch and water right by reason of the enhanced value of the land to which it was appurtenant, and that the situation of the ditch and water right and the disadvantages and benefits resulting to the riparian owner were considered by the assessor in assessing his land. (*Coonradt v. Hill*, 79 Cal. 587.) Cited 90 Cal. 230.

305. The use of water by permission of the owner is not adverse. (*Ball v. Kehl*, 95 Cal. 606.)

306. If one who has taken adverse possession of water, as against a prior appropriator, suffers a portion of the same to flow down to accommodate miners working in the stream, this does not prejudice his adverse possession so as to prevent the statute of limitations from running. (*Davis v. Gale*, 32 Cal. 26.) Cited 96 Cal. 217; 1 Col. App. 498.

307. Mere use of water during seasons of abundance, when it naturally flowed down a

certain channel of a slough to the head of plaintiff's ditch, without objection on the part of the riparian owner of the slough, gives no prescriptive right to the plaintiff as an appropriator to change the course of the flow in seasons of scarcity for the purpose of continuing its supply. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

308. No estoppel can arise from the neglect of a riparian proprietor to object to the use of the water of a stream by another proprietor during such time as there is an abundant supply of water for the use of all. (*Anaheim W. Co. v. Semi-Tropic W. Co.*, 64 Cal. 185.)

309. The mere use of the water of a stream, during a season of abundance, and without objection by a proprietor, is not an adverse use upon which a prescription can be founded. (*Anaheim W. Co. v. Semi-Tropic W. Co.*, 64 Cal. 185, cited 86 Cal. 20.)

310. Statutory appropriation is not necessary to prescription, but it gives to one seeking to acquire a prescriptive right to divert water the advantage of notice to prior claimants that his user is adverse, so as to set the statute of limitations in motion. (*Alta Land and Water Co. v. Hancock*, 85 Cal. 219.)

Rights by adverse possession, effect of failure to post notice on. See ante, XIV, 2, e.

311. An adverse possession and user of water for five years continuously and uninterruptedly, with the knowledge of and to the injury of the true owner, will bar the right of the latter thereto; but a mere claim of right to the use and enjoyment of the water, however long continued, will not have that effect. (*Cox v. Clough*, 70 Cal. 345.)

312. Where a lease by a party was of "one-half of the water flowing in his ditch every alternate day from 12 o'clock noon to 12 o'clock noon of the next day," and the parties thereafter each used the whole stream on alternate days, held, that the circumstances, and the practical construction of the parties, showed that the intention was that one-half of the water was leased, and that such half was to be arrived at by the use of the whole stream for half the time; that such use of the whole stream was under the lease, and not adversely to the lessor, and that the lessee could not base a claim to half the stream upon such use. (*Oneto v. Restano*, 78 Cal. 374.)

313. Where the grantee of land repudiated a lease of a water right under which his predecessor had used the water, and claimed the water absolutely, and thereupon a verbal sale of the water right to him by the lessor of his predecessor for a price which was paid, held, that, while there was no valid conveyance of the water right, yet that what occurred amounted to a repudiation of the lessor's right, acknowledged by the latter, and that the use thereafter must be held to have been adverse. (*Oneto v. Restano*, 78 Cal. 374.)

Elements of adverse possession. See ante, 285.

Diversion of water on railroad grant, statute begins to run, when. See Railroads, 40.

O. Pleading of.

314. A defendant, in an action for the diversion of water, cannot have the benefit of an

adverse user or prescription as a defense, unless it is set up in the answer. (*Mathews v. Ferrea*, 45 Cal. 51.)

315. The party claiming a right to the use of water by five years' adverse possession must set up the same as a defense in his answer; and if he does not, he loses the right to introduce evidence in support of it, and to have the court instruct the jury in relation to it. (*American Co. v. Bradford*, 27 Cal. 360.) Cited 69 Cal. 287.

316. An averment, in the answer to the cross-complaint, of the use of the water of the stream by the plaintiff for the requisite period, by a diversion which was "open, notorious, and continuous, and adverse to defendant," is a sufficient averment of a prescriptive right to the use of the water diverted, although the word "uninterrupted" is not used in the averment. (*Chauvet v. Hill*, 93 Cal. 407.)

317. The mere denial by the owner of the right of the adverse user to the possession of the water is not a sufficient interruption thereof to prevent the statute of limitations from operating as a bar. (*Cox v. Clough*, 70 Cal. 345.)

318. An allegation that, for ten years prior to the commencement of the action, the plaintiff "had the undisputed usufructuary right to the use of the waters" of a certain stream, does not allege a right to the use of the waters acquired by prescription. (*Heintzen v. Binninger*, 79 Cal. 5.)

Denial of adverse right, what sufficient. See post, 482.

D. Evidence.

319. The burden of proving an adverse uninterrupted use of water for five years, with the knowledge and acquiescence of the person having a prior right, is cast on the party claiming it; and if he leaves it doubtful whether the use was adverse, known to the owner, and uninterrupted, it is not conclusive in his favor. (*American Co. v. Bradford*, 27 Cal. 360.) Cited 94 Cal. 663.

320. In action to restrain the defendants from diverting the waters of a natural watercourse, where the prescriptive right relied on by the defendants was acquired by them through a user adverse to their grantor of the land on which the water was used, the declarations of the latter with reference to the water, and to the nature of the use of it by the defendants, are not admissible. (*Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598.)

321. Where it is sought to be proved by a director of the corporation claiming the water as appropriators, on his direct examination, that the company had used the water without interruption, a question asked upon his cross-examination, as to whether or not, as a director of the company, he understood and learned by the company's agents that the diversion of water had been interrupted, is pertinent and within the line of cross-examination, and should be allowed. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

322. In an action to restrain the diversion of water, the plaintiff having shown a prior appropriation of the water right by himself, which the defendant attempts to defeat by the plea of the statute of limitations, should be permitted to show in rebuttal that the defendant, before any bar of the statute could have attached, had acknowledged his claim and sought to become his lessee of the water right. (*Ledu v. Jim Yet Wa*, 67 Cal. 346.)

323. In an action for the wrongful diversion of water, where the answer sets up more than five years' continuous adverse possession in the defendant, if the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff, in rebuttal, may introduce evidence to show that defendant's possession had not been continuous, or uninterrupted, or adverse, but he cannot claim as a right to introduce evidence to prove the same facts that were proved in his opening. (*Union Water Co. v. Crary*, 25 Cal. 507.) Cited 67 Cal. 269; 94 Cal. 130.

Prescriptive right, evidence of notice claiming water. See Appeals, 2083.

E. Instructions.

324. It was not error to instruct jury that "in the state of California the right to the use of water becomes fixed after five years' adverse enjoyment of the same." There was some evidence upon which the charge might be predicated; and, further, the plaintiffs were entitled to recover if there was a diversion, which was clearly proved and, in fact not denied in the answer. (*Ellis v. Tone*, 58 Cal. 293.)

325. Where the defendant has pleaded adverse possession in himself, it is error to instruct the jury "that if they believe that the plaintiff was the first to appropriate and use the waters in dispute, and that his appropriation and use thereof was prior to that of defendant and those under whom he claims adversely to the plaintiff, and that his possession was continuous, exclusive, and notorious, and that he has not parted with his right thereto or forfeited the same, they will find for the plaintiff," for the reason that the instruction would authorize the jury to find for the plaintiff without considering the defense of adverse possession. (*Ledu v. Jim Yet Wa*, 67 Cal. 346.)

F. Findings.

326. Finding which does not show that use of water was adverse does not show a right to the water. (*Oneto v. Restano*, 78 Cal. 374.)

327. A finding that the party used the water "as his own property" is not equivalent to a finding that the use was adverse. (*Oneto v. Restano*, 78 Cal. 374.)

328. Findings that the grantor of the plaintiff appropriated and used a specified amount of the waters of a stream by means of a ditch for the purpose of irrigating his lands, and conveyed the lands, with the ditch and water right, to the plaintiff, and that for six years next succeeding said appropriation said water was used by the plaintiff and her grantor, and

such use was, with the full knowledge of defendants' grantors, continuous, uninterrupted, peaceable, open, and notorious, under a claim of right adverse and in hostility to all, and particularly to the defendants and their grantors, sufficiently show a prescriptive right to divert the water as against the defendants and their grantors, and it is immaterial how long they may have been riparian owners of the fee. (*Spargur v. Heard*, 90 Cal. 221.)

329. Though findings upon the subject of a prescriptive right to divert water may not be carefully and clearly expressed, yet if, reading and construing them all together, their evident meaning is that appellant maintained a dam and ditch upon the stream in controversy for more than five years continuously prior to the commencement of the action, but did not maintain the same under any claim of right adverse to the respondent's right, it follows that such continuous maintenance of the dam and ditch is no bar to an action to enjoin the diversion of the water-course, and a judgment enjoining such diversion will not be reversed for inconsistency of findings. (*Paige v. Rocky Ford Canal etc. Co.*, 83 Cal. 84.)

330. The action was brought to restrain the defendants from diverting the waters of a natural stream. The defense was a prescriptive right of diversion acquired under the statute of limitations. On the issue so raised various questions were submitted to the jury, who returned a special verdict thereon, in addition to which the court filed supplementary findings. On a review of the findings, held, that the same were not contradictory, and were supported by the evidence, and sufficient to show that the defendants had acquired a prescriptive right by adverse user to a definite portion of the waters of the stream. (*Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598.)

Cited 78 Cal. 376; 93 Cal. 348.

331. A finding that the appropriation and diversion of a stream by plaintiff was made continuously, uninterruptedly, and adversely to the defendants and their grantors is unsustained by the evidence, when the evidence shows, without conflict, that there were long periods of time, during several years, when, at the low stage of water, there was no water in plaintiff's ditch, and that for only two years plaintiff succeeded in getting water for a longer period by entering upon the lands of defendants, and diverting it therefrom without the knowledge or acquiescence of defendants or their grantors, and that when such diversion was ascertained to be to the prejudice of defendants, it was interfered with to such an extent as to restore the flow of water to its previous condition. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

332. In an action for the diversion of water, the defendant pleaded five years' adverse diversion and appropriation of the waters of the stream, and gave evidence tending to support the plea. Held, that the failure of the court to find on the issue thus presented was error. (*Heinlen v. Fresno Canal etc. Co.*, 68 Cal. 35.)

Finding as to payment of taxes is unnecessary, when. See ante, XIV, 2, § B.

h. Acquiring Right Through Acquiescence or Estoppel of Owner.

333. In an action to recover damages for the alleged diversion of water by means of a dam constructed by the defendants, it may be shown as a defense, under the denial of injury to the plaintiff, that the plaintiff participated with the defendants in the maintenance of the dam and diversion of the water, as a tenant in common with the defendants; and it is not necessary specially to plead such fact as an estoppel. (*Churchill v. Baumann*, 95 Cal. 541.)

334. A riparian proprietor is not estopped from objecting to the unlawful diversion of the waters of a stream flowing through his land by reason of the mere fact that the ditches used in diverting the water were constructed at great expense, with his knowledge, and without objection by him. (*Lux v. Haggin*, 69 Cal. 255.)

335. The plaintiffs are not estopped from maintaining an action to restrain a threatened unlawful diversion by reason of their assent to and approval of certain acts of a third person—the Kern Valley Water Company. (*Lux v. Haggin*, 69 Cal. 255.)

336. When a stream is diverted into a new channel, either by natural or artificial causes, so as to affect other riparian owners favorably, and the owner of the land over which it formerly flowed acquiesces in such change until new rights have accrued, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the water cannot be lawfully returned to its former channel. But this rule does not apply to a case where the right of way through the natural channel of a creek is purchased as a means of conveying water to be turned in and taken out of such channel by artificial means, or confer the right in such case to divert the natural flow of the stream, on account of acquiescence in such artificial use of the channel. The parties turning such water into the stream cannot divert more than they turn in, and the right of the riparian owner to the natural flow remains the same as before. (*Paige v. Rocky Ford Canal etc. Co.*, 83 Cal. 84.)

Evidence of convenience and necessity of ditch on defense of estoppel. See ante, 260.

i. Relation of Title Required by.

337. Where ditch is made for purpose of using water, the right thereto dates from the commencement of the work. (*Maeris v. Bicknell*, 7 Cal. 261.)

338. The title to the water conveyed through a ditch will, on completion of the work, date back from the beginning of the work as against subsequent appropriators. (*Kimball v. Gearhart*, 12 Cal. 27.)
Cited 2 N. Mex. 493.

339. Doctrine of relation in appropriation of water only applies when the first acts, from which the party appropriating seeks to date his right, indicate the intention of appropriating such water. (*Kimball v. Gearhart*, 12 Cal. 27.)

340. If person gives sufficient notice of his

intention to appropriate water, and prosecutes work with reasonable diligence, on the completion of the work his rights relate back at least to the commencement of the work. (*Osgood v. El Dorado etc. Co.*, 56 Cal. 571.) Cited 1 Wash. 576.

j. Ownership of Water.

341. Ownership of water as a substantive and valuable property, distinct, sometimes, from the land through which it flows, has been recognized by our courts, and this ownership draws with it all the legal remedies for its invasion. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220, 232.)

342. The right to water must be treated in this state as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil, and, as such, has none of the characteristics of mere personality. (*Hill v. Newman*, 5 Cal. 445.)

Cited 69 Cal. 392.

343. Running water, so long as it continues to flow in its natural course, cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property, but this right carries with it no specific property in the water itself. (*Kidd v. Laird*, 15 Cal. 161.) Cited 19 Cal. 616; 29 Cal. 206; 37 Cal. 311; 67 Cal. 270; 16 Col. 70; 6 Mont. 38.

344. The foundation of a right to water is the first possession, and this right is usufructuary, and consists not so much in the fluid itself as in its use. The owner of land over which it flows has the right to its use during its passage. This right is not in the corpus of the water, and only continues with its possession. (*Eddy v. Simpson*, 3 Cal. 249.)

Cited 6 Cal. 108; 11 Cal. 151; 29 Cal. 206; 37 Cal. 310.

345. The rule that an appropriator of water does not become the owner of the very body of the water as his personal property until he has acquired the control of it in conduits or reservoirs of his own, does not apply where the plaintiff is not seeking to recover the value of water which had become his personal property, but is seeking the determination of the adverse claim of the defendant of the right to divert and use a portion of it; and a finding in such action that the plaintiff is the owner and has the right to the use of all the water flowing in the stream at the defendant's dam in excess of a certain quantity is not in conflict with such rule. (*Riverside Water Co. v. Gage*, 89 Cal. 410.)

346. The interest in water acquired by one who locates on the bank of a stream, and appropriates the waters of the same for machinery, is not property in the water as such, but the right to the momentum of its fall at the point of location and to the flow of the water in its natural course above. (*McDonald v. Askew*, 29 Cal. 200.)

Cited 37 Cal. 311; 6 Mont. 38.

347. When water of stream leaves possession of party, all his right to and interest in it is gone. (*Eddy v. Simpson*, 3 Cal. 249.)

348. Owner of a ditch has the exclusive and absolute power of control, and right of

enjoyment, of the water diverted by and flowing in his ditch, but whether such water be his private property it is not necessary to decide. (*Kidd v. Laird*, 15 Cal. 161.)

349. An appropriator of water by means of a ditch leading from a natural stream may be entitled to the undiminished flow of the stream; but the water in the stream above his ditch is a part of the realty, and does not become his personal property until he acquires control of it in artificial conduits or reservoirs. (*Parks Canal etc. Co. v. Hoyt*, 57 Cal. 44.)

Cited 83 Cal. 94; 89 Cal. 418; 95 Cal. 613.

350. The appropriator in such case cannot maintain an action for the value of the water, as personal property sold and delivered, against one who, without his consent, has diverted the stream above the head of his ditch. (*Parks Canal etc. Co. v. Hoyt*, 57 Cal. 44.)

351. Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale, an article of commerce, as ordinary goods and merchandise. Engaging in the business of furnishing it to the inhabitants of a city for equivalent considerations to be received is engaging in "a species of trade or commerce" within the meaning of the Corporation Act of 1853. Ice companies organized to furnish the inhabitants of a city with ice, and gas companies organized to furnish them with gas, and the company in question organized to supply them with water, all stand upon the same footing. They are engaged "in a species of trade or commerce," though not in the technical acceptance of the terms "trading" or "commercial corporations." (*People ex rel. Heyne-man v. Blake*, 19 Cal. 579.)

352. Whether party, by erecting mill and dam, becomes entitled to water in specie, and whether he is entitled to any thing more than the use of the water as a motive power, whether there may not be an appropriation of a mere use of the water as well as an appropriation of it as property for sale, query? (*Ortman v. Dixon*, 13 Cal. 33.)

Ownership of ditch. See ante, XII, 1.

k. Rights on Change of Bed.

353. In an action for damages for digging a ditch in a river and thus diverting the waters of a slough, it is not error to refuse an instruction to the effect that if the jury believed from the evidence that the water of the river would not have flowed into the slough but for the filling of the natural channel of the river and the lowering of the natural channel of the slough, and that the defendants did no more than to cause the waters of the river to flow down its natural channel, they should find for the defendants. (*Ellis v. Tone*, 58 Cal. 289.)

354. The court refused the request of the defendant for an instruction to the effect that if the jury believed from the evidence that the bed of the head of Mormon slough was lowered by the act of man, and that, were it not for such lowering of the bed, the natural waters of the Calaveras river would not have flowed down Mormon slough, then the jury should find for the "evidence." Held, the

instruction was properly refused, even if the word "defendant" were inserted in the place of "evidence." (*Ellis v. Tone*, 58 Cal. 289.)

355. Action for damages for diversion of water from Mormon slough, and consequent injury to plaintiffs' crops. Mormon slough heads from and runs out of Calaveras river and flows through the plaintiffs' land, and at the time of the diversion, in the year 1877, the plaintiffs were preparing to irrigate from the slough a crop of wheat and barley on their land, when the defendants, who were riparian proprietors on the river below, diverted the water by digging a ditch in the bed of the river and damming the mouth of the slough. As appeared from the evidence, in 1850 the waters of the river flowed into the slough only when the water was high, but from 1862, owing to the filling of the channel by mining debris, and the floods of that year, the channel of the river was so raised that in dry seasons nearly the whole of the water ran into the slough, and little or none into the river below. The defendants had purchased four hundred miner's inches of water from the Mokelumne river, and turned the same into the Calaveras river above the head of the slough, so as to flow down to their land. Verdict and judgment for plaintiffs. Held, the evidence was sufficient to justify the verdict. (*Ellis v. Tone*, 58 Cal. 289.)

Right to erect bulkhead to protect against threatened change in channel. See ante, XIV, 1, e.

1. Changing Place of Diversion or Manner of Use.

356. A person entitled to the use of the waters of a stream by appropriation may change the place of diversion, or the place where it is used, if others are not injured by such change. (*Ramelli v. Irish*, 96 Cal. 214.)

357. One entitled to divert a quantity of water from a stream may take it at any point on the stream, and may change the point of diversion at pleasure, if the rights of other appropriators be not injuriously affected by the change. (*Junkans v. Bergin*, 67 Cal. 267, cited 12 Col. 18, 11 Mont. 390, 20 Or. 49; *Kidd v. Laird*, 15 Cal. 161, cited 96 Cal. 217, 16 Col. 68, 11 Mont. 360, 20 Or. 49, 24 Or. 313.)

358. This right so to change the point of diversion does not depend upon how the right to the use of the water was acquired, whether by express grant or by prescription, or whether it rests in the parol license, or the presumed consent of the proprietor. The difference as to the source of the right relates to the mode of determining its existence and extent, and not to the manner of its exercise and enjoyment. (*Kidd v. Laird*, 15 Cal. 161.)

359. A person appropriating and diverting the water of a stream at a given point cannot afterwards change the point of diversion to the prejudice of a subsequent locator. (*Butte etc. Co. v. Morgan*, 19 Cal. 609.) Cited 12 Col. 17; 6 Mont. 38; 24 Or. 313.

360. *Kidd v. Laird*, 15 Cal. 161, does not hold that the first appropriator has an absolute and unqualified right to change the point of diversion, and the doctrine of that case is

affirmed. (*Butte etc. Co. v. Morgan*, 19 Cal. 609.)

361. A water right need not be appurtenant to any particular ditch. The water right is the principal thing, and may be used through any ditch, and the place of diversion and use, or of the purpose to which the use may be applied, may be changed. (*Jacob v. Lorenz*, 98 Cal. 332.)

362. The restriction imposed by section 1412 of the Civil Code against a change of place of diversion, where others are injured by the change, is matter of defense in an action brought by one who has made such change. (*Jacob v. Lorenz*, 98 Cal. 332.)

363. The change of place of diversion by one who has the first right on a stream to a fixed quantity of water cannot injure a subsequent appropriator, whether his ditch is above or below the ditch of the prior appropriator. (*Jacob v. Lorenz*, 98 Cal. 332.)

364. Person is entitled to change the use to which water was first applied if others are not injured by the change. (*Ramelli v. Irish*, 96 Cal. 214.)

365. Arguendo: Where a party takes up a mill-seat on public agricultural land, erects a sawmill, dwelling, etc., and appropriates the water of the stream for the use of the mill, he may use the water for a grist-mill erected at the same place years afterward. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.) Cited 69 Cal. 358, 447; 8 Col. 616.

366. A person who has appropriated the water of a stream, and caused it to flow to a particular place by means of a ditch, for a special use, may afterward change the use to which he first applied the water, and the place at which he used it, without losing his priority of right, as against one who has dug a ditch from the same stream before the change is made. (*Davis v. Gale*, 32 Cal. 26.) Cited 93 Cal. 530; 96 Cal. 217; 12 Col. 17, 19; 16 Col. 68; 1 Col. App. 498; 1 Mont. 543; 11 Mont. 390; 20 Or. 49.

Changing use. See *Mines and Mining*, XI, 8, d.

m. Extent of Right of Diversion; Increasing Diversion.

367. The extent of the right of a prior appropriator for mill purposes depends on the nature and uses of the appropriation. (*Ortman v. Dixon*, 13 Cal. 33.) Cited 21 Cal. 381; 37 Cal. 313; 43 Cal. 375, 376; 95 Cal. 614.

368. The extent of an appropriation of water is limited, not by the quantity of water diverted, but by the quantity which is, or which may be, applied by the appropriator to a beneficial use; and as to any surplus, the riparian proprietor below the point of diversion has a right to demand that it should flow in the stream as it has been accustomed to flow. (*Barrows v. Fox*, 98 Cal. 63.)

369. In an action by an appropriator of water to enjoin the defendants from diverting the water from the plaintiffs' ditch, where the defendants answered contesting the plaintiffs' claim and asserting their own claims, both as riparian proprietors and as appropri-

ators, and praying affirmative relief, the court may ascertain the respective right of the parties, and enjoin each from interfering with the rights of the other, and it is not error for the court to enjoin the plaintiffs from diverting the whole amount of water appropriated by them for purposes of irrigation at times when it is found that they could not use it beneficially for that purpose, and when, as a necessary consequence, it would run to waste on nonriparian lands of the plaintiff. (*Barrows v. Fox*, 98 Cal. 63.)

370. In such case, where the trial court finds the quantity of water which the plaintiffs have a right to use on their lands for irrigation and other purposes, but fails to determine the quantity of water diverted, a decree limiting the diversion to the quantity which they are entitled to use on and at their lands has not a sufficient basis to support it. The plaintiffs have a right to divert from the stream a quantity of water sufficient to yield at the place of use the quantity required after the loss by absorption and evaporation of so much thereof as is necessarily lost in a ditch or flume well constructed and kept in good condition, that being the mode of their appropriation. (*Barrows v. Fox*, 98 Cal. 63.)

371. Where it appeared that the plaintiffs diverted the water appropriated by them by means of a ditch and flume across the land of other parties, a decree limiting their right of diversion to the quantity of water which would flow through a three-quarter inch pipe is erroneous, as the plaintiffs not only could not be compelled to put in a pipe, but they would have no right to do so in the land of others through which their ditch and flume extended, and the quantity allowed to be diverted is undetermined and incapable of determination except by a means legally impossible. (*Barrows v. Fox*, 98 Cal. 63.)

372. An appropriator of water on the public lands does not, by becoming a riparian owner, lose his right to acquire more of the water by a subsequent appropriation or enlargement of his ditch, but he may take all the water of the stream if he is the first or prior appropriator, and there is no other riparian owner at the time of the appropriation or enlargement of the ditch, and those who subsequently became riparian owners acquire no rights as against such prior appropriator. (*Healy v. Woodruff*, 97 Cal. 464.)

373. The taking up of the waters of a stream for a special limited purpose is an appropriation of only so much of the water as is necessary for that particular purpose. The surplus may be the subject of a new appropriation, which will give to the second locator a paramount right to the use of all the waters of the stream not required for the specific purpose of the first appropriation. (*McKinney v. Smith*, 21 Cal. 374.)
Cited 37 Cal. 313; 70 Cal. 290, 291; denied 32 Cal. 33.

374. Where the defendant has acquired by appropriation a limited right of diversion, and has lost further claim to appropriation by failure to complete the whole diversion called for by his notice of appropriation within a reasonable time, he cannot increase the amount

of his diversion thereafter to correspond with his notice of appropriation, to the prejudice of the rights of a riparian owner. (*Conkling v. Pacific Improvement Co.*, 87 Cal. 296.)

375. When the rights of the subsequent appropriators once attach, the prior appropriator cannot encroach upon them, by extending his rights beyond the first appropriation. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

376. When the right has once vested in the subsequent appropriator, the prior appropriator would be no more justified in extending his claim, or changing the means of his appropriation, to the prejudice of the second appropriator, than the latter would be in encroaching upon the prior rights of the first. In such case, each appropriator is, in respect to the particular thing appropriated by him, prior in time and exclusive in his right. (*Nevada Water Co. v. Powell*, 34 Cal. 109.)

377. Plaintiffs constructed a dam across Clear creek and dug a ditch for some distance along its bank, by means of which all the waters of the stream were diverted and returned to the creek at a point half a mile below. The object of the diversion was to drain the channel of the stream below the dam and supply the water for working a tract of mining claims owned by plaintiffs in the bed of the stream. Subsequently defendants dug a ditch at a point above, though which they diverted the waters of the same stream for general mining purposes. Still later plaintiffs extended their ditch to other mining points and to agricultural land below, and used the water for mining and irrigating at those latter places. In an action by plaintiffs to recover for injuries occasioned by the diversion of defendants to the use of the water at the latter points to which plaintiffs' ditch had been extended, held, that the prior right of plaintiffs was limited to the use of the water for working their original claims in the bed of the stream; that as to the surplus above what was required for that particular purpose defendants' right was paramount, and that plaintiffs could not recover. (*McKinney v. Smith*, 21 Cal. 374.)

378. While an appropriator of a water right has the right to take the water from the bed of the stream at the head of his ditch to the full extent of his appropriation whenever the water comes there, he has no right to enter upon the lands of a riparian proprietor and tap streams to increase his supply; nor has he any rights in the waters which naturally flow over and across the lands of a riparian proprietor while on the lands of such proprietor, but it is only when the riparian proprietor prevents the water from running back into the river at or above the head of the appropriator's ditch, by an interference with the course of nature, that the appropriator can complain, and he has no right to complain of the riparian owner for interrupting or stopping the trespasser of the appropriator upon his lands to divert water therefrom. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

379. Where the right of the defendant to divert a certain quantity of water by means of a pipe of a certain size is conceded and established, and it appears that defendant

has constructed another and larger pipe, which is capable of diverting more water than he is entitled to divert, he cannot be injured by an injunction against the excessive diversion, regardless of whether the smaller pipe would or would not divert all the waters of the stream. (*Conkling v. Pacific Improvement Co.*, 87 Cal. 298.)

Power to add to height of dam. See ante, XI, 3.

n. Diverting and Turning Back Water; Artificial Increase of Flow, Rights to.

380. If A is the owner of a ditch and of the right to divert and use the water of a stream in the same, and B diverts the waters of the stream at a point above A's ditch and uses them for mining, but turns them back into A's ditch at another point before A has use for them, A has no cause of action against B. (*Union Water Co. v. Crary*, 25 Cal. 504.)

381. Water brought into a stream from another source, by artificial means, so as to increase the flow of the stream for the uses of a riparian owner upon his land, is held by an entirely different claim from that which entitles such owner to the natural flow; but this would not affect the character of the stream, or the right to the water naturally flowing therein. (*Paige v. Rocky Ford Canal etc. Co.*, 83 Cal. 84.)

382. Where water from an artificial ditch is turned into a natural watercourse and mingled with natural waters of the stream, for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not, in so doing, diminish the quantity of the natural waters of the stream, to the injury of those who have previously appropriated such natural waters. (*Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143.) Cited 19 Nev. 362; 24 Or. 313.

383. The burden of proof devolves on the party thus mingling the water belonging to him with that appropriated by others. He can only claim such quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. (*Butte Canal etc. Co. v. Vaughn*, 11 Cal. 143.)

384. A riparian proprietor may restrain the diversion of any water from his stream by one who has conducted water into it from a foreign source, unless the latter shows that he has not taken from the stream more water than he turned in. (*Wilcox v. Hausch*, 64 Cal. 461.) Cited 83 Cal. 94; 2 Idaho, 383.

385. If the water of stream A be diverted from its natural channel by C and used by him, and then flows from his works into stream B by natural channels, it is lost to the first possessor, and he cannot reclaim it on the ground that the water of stream B was increased by his means. (*Eddy v. Simpson*, 3 Cal. 249.) Cited 7 Cal. 49; 19 Nev. 361.

386. If the water of stream B be in the possession of another party, D, the addition made

to it, flowing from the works of C, becomes a part of the body of water, and D has the right to its possession and use, and C has no right to withdraw it. (*Eddy v. Simpson*, 3 Cal. 249.)

387. In an action for diverting water from plaintiff's ditch, plaintiff and defendants both having ditches supplied from the same stream, the plaintiff's rights being prior and paramount, defendants asked the court to instruct the jury that if defendants had brought water from foreign sources and emptied it into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, "less such amount as might be lost by evaporation and other like causes." The instruction was given, with the explanation that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator. Held, that the explanation was proper, the concluding words of the instruction being too general and indefinite. (*Burnett v. Whitesides*, 15 Cal. 35.)

388. The jury having found plaintiff entitled to the use of so much of the water flowing in the stream as would run in a ditch of a certain capacity, a judgment was entered following the verdict. Held, that the judgment is not erroneous, as not distinguishing between the water ordinarily flowing in the stream and the water from foreign sources emptied in by defendants. The law regulates the rights of the parties in this respect, and the judgment must be construed with reference to such law. (*Burnett v. Whitesides*, 15 Cal. 35.)

389. If two persons, one prior in point of time to the other, appropriate water from the same stream, by means of ditches, and a third person turns water into the stream from his ditch starting out of another stream, without the intention of recapturing it, the water thus turned in becomes *publici juris*, and belongs to the persons who appropriated the stream, according to their priority of right. (*Davis v. Gale*, 32 Cal. 26.)

Rights of diversion of parties turning water into stream. See ante, 336.

Rights between successive appropriators where water turned into stream by third person. See ante, 249.

Findings as to turning back of water. See post, 456.

o. Diversion of Water as a Nuisance.

390. Diversion of waters of navigable stream may be both a public and a private nuisance. (*Yolo County v. Sacramento*, 36 Cal. 193.)

391. The diversion of a watercourse is a private nuisance. (*Tuolumne Water Co. v. Chapman*, 8 Cal. 392.)

Diversion of water as nuisance. See Nuisances, II, 4.

p. Actions for Diversion or Appropriation.

A. Who may Sue and Who Liable; Parties.

392. Until a claimant is himself in a position to use the water, the right to the water does not exist in such a sense as to enable him to maintain an action against another, either to recover the water or damages for its

diversion. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.)

Cited 69 Cal. 447; 88 Cal. 77.

393. Where different persons separately appropriate the waters of a stream, and are severally using the same under certain regulations as to the time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any portion of the water thus appropriated. (*Lytle Creek W. Co. v. Perdew*, 65 Cal. 447.)

394. V. erects a mill and acquires a water right in 1850. In 1851, defendants appropriate, for ditch purposes, water from the same stream, forty miles above the mill. In 1854, plaintiffs, M. & B., succeeded to the possession of V. Held, that plaintiffs may possibly recover damages for the diversion of the water, on their possession, without connecting themselves with the title of V. back to 1850; that defendants' appropriation in 1851 could only be on the water not appropriated by V., there being no abandonment by him, and that M. & B. can jointly maintain an action for damages accruing after they came into possession. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)

Cited 7 Nev. 327.

395. At all events, the objection that M. & B. have no common interest in the mill, etc., but claim title from V. under different rights, should have been taken by motion for nonsuit or upon instructions, the want of common interest appearing from plaintiffs' evidence. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)

396. The owners of two different tracts of land, each of whom owns a certain number of inches of the waters of a stream, and who have appropriated the amount of water owned by each by means of irrigating ditches leading from the channel of the stream to each tract, and carrying different amounts of water, neither owner having any interest in the land, water, or ditch of the other, have no joint or common interest which authorizes them to unite as plaintiffs in an action for damages against a third party for diverting the water, or which will sustain a joint judgment for damages. (*Foreman v. Boyle*, 88 Cal. 290.)

Cited 96 Cal. 233.

397. Actions for the diversion of waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. (*Parke v. Kilham*, 8 Cal. 77.)

Cited 69 Cal. 278; 75 Cal. 431.

398. The plaintiff was entitled to the use of four hundred inches of water flowing in a creek; the defendants severally diverted water from the stream so as, in the aggregate, to diminish the flow available to the plaintiff to a quantity less than four hundred inches. Held, that it was proper to join the defendants in an action to recover damages for the diversion, and to restrain its continuance. (*Hillman v. Newington*, 57 Cal. 56.)

Cited 66 Cal. 155; 71 Cal. 561; 87 Cal. 433.

399. Where the defendants all join in a common answer denying the plaintiff's title,

and alleging that all of the defendants claim an interest in the waters of the stream adverse to that of the plaintiff, by virtue of an appropriation made by one of the defendants and his grantors, and it appears that, in pursuance of said claim and for the several benefit of himself and his codefendants, such defendant entered upon the stream above the plaintiff's land and diverted the waters of the stream therefrom, all of the defendants are jointly liable for the damage resulting from such diversion, and the fact that the ditch had not been extended to the land of one of the defendants is immaterial upon the question of his joint liability. (*Hulsman v. Todd*, 96 Cal. 228.)

Appropriating water from ditch, liability for. See ante, XII, 11.

Landlord may sue for diversion. See *Landlord and Tenant*, 89.

B. Pleadings, Jurisdiction, and Venue.

400. A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. (*Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323.)

401. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. (*Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323.)

402. In an action of damages for diverting the water of a river from plaintiffs' mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)

403. A complaint, in an action to quiet title to water flowing across the plaintiff's land, and to enjoin a diversion thereof, and to recover damages for the diversion, which states a wrongful diversion of the water of the stream by the defendants, to the detriment of the plaintiff, and a threatened continuance of such diversion, is sufficient to entitle the plaintiff to some relief, and is not bad upon general demurrer because its averments as to the adverse claim of the defendants are merely to the effect that plaintiff is informed and believes that they claim some interest in the stream adverse to the plaintiff, without alleging that they do claim such interest. (*Hulsman v. Todd*, 96 Cal. 228.)

404. Complaint in action for diversion of water considered, and held that, although loosely drawn and containing much useless verbiage, the facts stated were sufficient to sustain a cause of action. (*Weaver v. Conger*, 10 Cal. 234.)

405. The union in one count of a complaint of an allegation that defendants "have wrongfully built dams and flumes across said Mormon creek . . . so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they . . . hoist for the purpose of

clearing out said dams and flumes of slum, stone, and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. (*Gale v. Tuolumne Water Co.*, 14 Cal. 25.)

406. The gravamen of the action is the diversion of the water, and the fact that the diversion is accomplished by different means is not important enough to require several counts. (*Gale v. Tuolumne Water Co.*, 14 Cal. 25.)

Actions for ouster from dam and diversion of water cannot be joined. See ante, XI, 6.

407. Where a complaint in an action for the diversion of a watercourse states facts showing that the plaintiff is a lower and the defendant an upper riparian proprietor upon the stream, averments of the plaintiff's use of the water for a mill, winery, domestic purposes, etc., are mere surplusage. (*Chauvet v. Hill*, 93 Cal. 407.)

408. In an action to recover damages for the diversion of the water of a stream from plaintiffs' mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claimed to be entitled, is an immaterial averment. (*McDonald v. Bear River etc. Co.* 15 Cal. 145.) Cited 3 Or. 346.

409. In such action for damages, no issue could be taken upon the averment as to the particular quantity of water diverted. (*McDonald v. Bear River etc. Co.*, 15 Cal. 145.)

410. In action to enjoin diversion of water, the rights of the plaintiffs in the artificial channel of the stream will not be considered on appeal, when no such rights are claimed in the pleadings. (*Green v. Carotta*, 72 Cal. 267.)

411. The action was originally brought by several plaintiffs against the defendant Walker and others, to restrain Walker from interfering with certain water rights owned by the plaintiff, Ware. The defendants other than Walker were joined as such because they refused to become plaintiffs. An amended complaint was subsequently filed, in which Ware alone was named as plaintiff, and Walker as defendant. Held, that the amended complaint did not change the nature of the action. (*Ware v. Walker*, 70 Cal. 591.)

412. An answer pleading a prior appropriation of a portion of the water in controversy, and also alleging that the defendant is the owner of a tract of land through which the river flowed, and that most of the tract was susceptible of and would be benefited by irrigation, but which fails to allege that he was entitled as a riparian owner to any definite quantity of the water, or what portion he could reasonably exhaust for that purpose, or whether the land was above or below the point of the plaintiff's diversion, is sufficient to raise any issue as to the extent of the defendant's right, as a mere riparian proprietor, to divert and exhaust any portion of the water as against the plaintiff; nor does a finding corresponding to such allegations conflict with a general finding in favor of the plaintiff as to

his ownership of the water decreed to him. (*Riverside Water Co. v. Gage*, 89 Cal. 410.)

Pleadings in action to quiet title to waters. See post, XIV, 2, r.

Actions for diversion and damages, joinder of. See Joinder and Severance of Actions, I, 2, f.

Venue of action to enjoin diversion. See Venue, I, 3, f.

Diversion, jurisdiction over action for. See Justices of the Peace, IV, 5, b.

O. Justification of Diversion.

413. An unlawful diverter of the waters of a natural stream cannot escape from liability to a riparian proprietor for his wrongful acts, by showing that other persons were making similar unlawful diversions. (*Heilbron v. Kings River etc. Co.*, 76 Cal. 11.)

414. In action for the diversion of a natural watercourse, evidence that persons other than defendant also diverted water from the stream is admissible only on the question of damages, and not as a defense against an injunction to prevent the diversion. If the claim to damages other than nominal is waived, such evidence is wholly inadmissible. (*Gould v. Stafford*, 77 Cal. 66.) Cited 84 Cal. 588; 88 Cal. 77.

415. When there is no denial in the answer of the allegation of the complaint that the defendants have diverted water from the plaintiff, it is not error for the court to refuse proof that water was diverted by other ditches later in time of diversion than either plaintiff's or defendants' ditches. (*Lakeside Ditch Co. v. Crane*, 80 Cal. 181.)

416. A party claiming a certain quantity of the waters of the stream, adversely to the riparian proprietor, under an unlawful appropriation thereof, cannot justify his diversion by showing that there was no appreciable difference in the quantity of the water flowing in the stream at a time when he took the water, and at a time when he did not. (*Heilbron v. Fowler Switch Canal Co.*, 76 Cal. 428.)

417. In an action to restrain the diversion of water of a stream, where the defendants defend and justify their acts under and by virtue of a prior right in one of the defendants to a ditch and water right, it is immaterial whether the strict legal title to the ditch or water right, or both, is in the said defendant individually, or is in a corporation to which a conveyance of the ditch and appurtenances had been made. (*Posachane Water Co. v. Standart*, 97 Cal. 476.)

D. Evidence and Instructions.

418. On the trial, certain witnesses on behalf of the defendant gave testimony tending to prove that after the commencement of the action and issues joined, and during the trial, there was no watercourse as claimed by the plaintiffs, and no channel through which water could have flowed. The plaintiffs thereupon offered in reply certain evidence, which was rejected by the court, tending to prove that after the dates mentioned by the witnesses for the defendant there was a watercourse and channel. Held, that the rejection

of the evidence was erroneous. (*Lux v. Haggin*, 69 Cal. 255.)
Cited 81 Cal. 406.

419. The court below in such case erred in rejecting certain certificates of purchase offered by the plaintiffs in reply. (*Lux v. Haggin*, 69 Cal. 255.)

420. A general allegation in a complaint for the diversion of water, that plaintiffs were entitled to all the water flowing into the cañon at the head of their ditch, entitles them to prove a diversion of water from the smaller branches of the cañon supplying water to that point. (*Priest v. Union Canal Co.*, 6 Cal. 170.)
Cited 11 Cal. 153.

421. In an action for damages, for diversion of water of plaintiffs, where defendants plead the general issue, it is not competent for the defense to prove that a prior claim to the water exists in the third party. Such a defense should have been specially plead, and the third party made a party to the action. (*Humphreys v. McCall*, 9 Cal. 59.)
Cited 69 Cal. 294.

422. It seems that where the answer in an action for the diversion of the waters of a ravine contains a specific denial of plaintiff's right to the waters, the defendant may prove any prior right in himself or in his grantors by virtue of such denial. (*Wixon v. Devine*, 91 Cal. 477.)

423. But when the answer raises no general issue, and admits plaintiff's right to the waters of the ravine, subject to a particular prior right of defendant claimed under an appropriation alleged to have been made by him personally at a specified date, he cannot, under such pleading, prove a distinct prior right acquired by his grantors under a different appropriation made at a prior date, and by them made appurtenant to the ranch subsequently purchased by the defendant. (*Wixon v. Devine*, 91 Cal. 477.)

424. Where parties go to issue in actions for the diversion of water, upon general averments and denials of title, anything that legally supports or attacks the title is admissible in evidence. (*Kimball v. Gearhart*, 12 Cal. 27.)
Cited 76 Cal. 210.

425. In an action by a riparian owner to restrain the diversion of water the plaintiff cannot prove title to land not described in the complaint. (*Heinlen v. Fresno Canal etc. Co.*, 68 Cal. 35.)
Cited 71 Cal. 563.

426. In an action by a riparian proprietor, to restrain the diversion of water from a stream adjoining his lands, and to recover damages for a prior diversion, evidence of injuries caused by the diversion to lands of the plaintiff not bordering on the stream, and to his cattle pastured thereon, is inadmissible. (*Heinlen v. Fresno Canal etc. Co.*, 68 Cal. 35.)

427. Testimony as to rights of persons on stream below premises of both plaintiff and defendant can have no relevancy to the issue, and is therefore inadmissible. (*Himes v. Johnson*, 61 Cal. 259.)

428. The complaint in an action for a diversion of water having averred that the court

had decided in a former action that the defendants had the legal right to divert water enough to fill their ditch, evidence that after the diversion of the water by means of the ditch a portion of it was turned back into the stream by a wasteway is properly excluded. (*Lillis v. Emigrant Ditch Co.*, 95 Cal. 553.)

429. In an action for damages for the diversion of water, where one of the plaintiffs witnesses has testified that he is a member and officer of a water company which pays the expenses of the litigation, it is error to refuse to allow the defendant to ask the witness, on cross-examination, why such company pays the expenses of the litigation. Such question is proper for the purpose of showing the interest, bias, or prejudice of the witness. (*Gould v. Stafford*, 91 Cal. 146.)

430. The following question was asked to several witnesses, over the objection of the defendants that the damage sought to be established was speculative and uncertain: "What, in your opinion, would the land of the plaintiffs have produced in the year 1877, if you could have procured water to irrigate it?" Held, the objection was properly disallowed. (*Ellis v. Tone*, 58 Cal. 293.)
Cited 10 Mont. 508.

Evidence in suit to quiet title to water. See post, XIV, 2, r.

Evidence in action for appropriating water from ditch. See ante, XII, 11.

Showing similar diversions by others. See ante, XIV, 2, p, C.

Evidence in rebuttal on plea of statute of limitations. See ante, XIV, 2, g, D.

Evidence as to convenience and necessity of ditch. See ante, 260.

Copy of notice of location as evidence. See ante, XIV, 2, e.

431. In an action for diverting water from the plaintiff's ditch, and where both parties claimed, in part, the waters of the same stream, held, that the following instruction was properly given by the court to the jury: "That defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbit creek more water than he was entitled to at the precise time that such deficiency existed." (*Brown v. Smith*, 10 Cal. 508.)
Cited 37 Cal. 313; 70 Cal. 290.

432. So, where the court instructed the jury that if they believed that defendant's ditch was so filled with tailings during the period of the alleged injury that it was incapable of diverting the waters of the creek, then plaintiff cannot recover. (*Brown v. Smith*, 10 Cal. 508.)

433. The court, of its own motion, instructed as follows: "If you believe that the Mormon slough was a natural stream of water, and the water would have flowed through their lands but for the diversion by the defendants, the plaintiffs are entitled to a verdict for whatever damages they may have sustained to their crops, provided they were prepared to use the water. The measure of damages is the amount of injury to the crops. . . . If, however, the plaintiffs received no damage, or the defendants did not divert the natural waters to the injury of the plaintiffs,

then your verdict will be for the defendants." It was objected to these instructions that they assumed the fact of diversion; that they, in effect, directed the jury to find a verdict for damages to plaintiffs' crops, no matter from what cause the damage originated, and that they did not state the true rule, and gave no definite rule, for ascertaining the damages. Held, the instructions were not objectionable on any of the grounds stated. The whole instruction of the court should be taken together to arrive at its meaning, and no proper interpretation can be made on detached or isolated portions of it. The court was not bound, of its own motion, to give any instruction as to the measure of damages, and its failure to do so was not error. (Ellis v. Tone, 58 Cal. 289.)

434. The court refused an instruction of the defendants to the effect that if the jury believed from the evidence that the waters of the slough would not have flowed upon the plaintiffs' land, unless diverted by a dam on the land of a third party, and thereby made to flow over the lands of others without their consent, they should find for the defendant. Held, in the absence of objection by the intermediate land owners, the defendant could not make the objection for them. (Ellis v. Tone, 58 Cal. 289.)

435. In an action for diversion of waters of Mormon slough, which heads from and runs out of Calaveras river, the following instruction was refused: "The plaintiffs are not in any event entitled to recover damages for the diverting from Mormon channel any waters which were not the natural waters of the Calaveras river, nor for the diverting of any waters in excess of plaintiffs' just and fair proportion of the natural waters of the Calaveras river and Mormon slough. If the jury believe from the evidence that the defendants, or any of them, caused to be turned in and run down the Calaveras river, above Mormon slough, prior to the erection of plaintiffs' dams, and until the 1st of June, 1877, waters taken from the Mokelumne river, and if the jury further believe from the evidence that the natural waters of the Calaveras river did not run down the river to the head of Mormon slough in sufficient quantity to irrigate plaintiffs' land in the spring of 1877, and after plaintiffs had constructed their dams, then the jury should find for the defendants." Held, the instructions were substantially given. (Ellis v. Tone, 58 Cal. 293.)

436. It was not error to refuse the request of the defendant for an instruction to the effect that if the jury found for the plaintiffs, in determining what would have been the increase in the value of their crop by the irrigation, they should deduct from the market value of the increase the expenses of irrigating the land after building the dam, and the expenses of harvesting, thrashing, sacking, and hauling such increase, and that it was incumbent on the plaintiffs to prove affirmatively the amount of such expenses. The portion of the instruction italicized would give the rule too broadly. If there was evidence in the cause from which the jury might have found the necessary deductions, they might have done so, whether the testimony was di-

rect to the point, or consisted of facts from which they might have been inferred, whether affirmatively shown by the plaintiffs or in any other way. This portion of the instruction being erroneous, the whole was vitiated. (Ellis v. Tone, 58 Cal. 293.)

Notice of party of intent to testify in action for diversion. See Witnesses, 97.

E. Damages, Verdict, Judgments, and Costs.

437. In an action to recover damages for the diversion of a stream, the plaintiff cannot recover damages for injuries caused by the diversion to lands owned by him which are not described in the complaint. (Heinlen v. Heilbron, 71 Cal. 557.)

438. In action against defendants severally diverting water, it is proper, as against the defendants, to apportion the costs and damages recovered by the plaintiff equally among the defendants. (Hillman v. Newington, 57 Cal. 56.)

Burden of proof of damages from diversion. See ante, 436.

Evidence as to damages. See ante, 430.

Damages for injury to land not described, review of on appeal. See Appeals, 1319.

439. In an action to determine the rights of the plaintiff to the waters of a creek, the complaint alleged that the plaintiff was entitled to "five hundred inches, measured under a four-inch pressure," of the waters in question; and the jury found that he was entitled to "forty inches, miners' measurement." Held, that the verdict was uncertain, and a new trial ordered. (Dougherty v. Haggin, 56 Cal. 522.)

Cited 68 Cal. 7.

440. In an action to recover damages for the diversion of water, and for an injunction, the complaint alleged that the plaintiff was entitled to the use of five hundred inches, measured under a four-inch pressure, of the waters of the creek in question; and the jury found that the plaintiff was entitled to eight hundred inches under a four-inch pressure, and that he had been damaged in the sum of one thousand dollars by the diversion of the said waters. The plaintiff was permitted by the court below to remit the excess of three hundred inches, and judgment was entered accordingly. Held, the judgment as entered cannot stand. If the nature of the case admitted of the remitting by the plaintiff of a portion of the water awarded him by the jury, he was not entitled to judgment for one thousand dollars damages. (Dougherty v. Haggin, 61 Cal. 305.)

441. The evidence was not sufficient to sustain a verdict or the judgment for five hundred inches of the water in dispute. (Dougherty v. Haggin, 61 Cal. 306.)

442. H. constructed a water ditch, by which he appropriated three hundred inches of water from a running stream, but not all of the stream. B. appropriated the remainder of the water. Subsequently H. made a new ditch, appropriating water from the same stream. In a suit to enjoin B. from interfering with H. in the use of the water, H. obtained a verdict that the second ditch did not diminish the quantity appropriated by B.,

and judgment was rendered enjoining B. from disturbing H. in the use of three hundred inches of water. Held, that the judgment was consistent with the verdict and with justice. (*Higgins v. Barker*, 42 Cal. 233.) Cited 3 Mont. 225; 11 Mont. 390.

443. A judgment in an action to determine and define a water right, adjudging that the defendants are the owners of a quantity of the waters in question "equal to a constant flow of two and one-third inches, measured under a four-inch pressure, on their said premises, and are entitled to the use of the pipes, ditches, aqueducts, and reservoirs belonging to plaintiff," for the purpose of storing, preserving, and conducting the same upon their lands, does not entitle the defendants to put into the pipe an appliance by means of which they can at one time accumulate a head of water greater than a constant flow of two and one-third inches under a four-inch pressure, and average the flow so as to equal the amount of such constant flow, but requires them not to obstruct the flow to any greater extent at any time than the constant flow provided for by the judgment. (*Alhambra Addition Water Co. v. Richardson*, 95 Cal. 490.)

444. The matters in issue related to the rights of the respective parties to the waters of a certain stream. The judgment determining such rights and an order refusing a new trial affirmed on the evidence and findings of the court. (*Lowden v. Frey*, 67 Cal. 474.)

445. When the court finds that both parties are riparian proprietors, and that defendants are prior appropriators of twenty-five inches of the stream, and fails to find what amount would be reasonable for defendants to use as riparian proprietors for irrigation or other necessary purpose, a judgment ordering that all the waters of the stream be allowed to flow unrestricted to plaintiffs' lands, excepting twenty-five inches to which defendants are entitled as prior appropriators, and cutting the defendants off from all reasonable use of any other part of the water as riparian proprietors, is unsupported by the findings, and is contrary to law. (*Van Bibber v. Hilton*, 84 Cal. 585.)

446. A judgment determining the rights of parties as riparian proprietors on the same stream of water is conclusive when the conditions remain unchanged. (*Los Angeles v. Baldwin*, 53 Cal. 469.)

447. In an action for damages for diversion a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed, so as to be *res judicata* in a subsequent suit. (*McDonald v. Bear River etc.* Co. 15 Cal. 145.)

448. If, by the terms of a stipulation, entered into after the commencement of the former action, the defendants acquired any rights in water flowing their lands in the pipes of the plaintiff, other or different from those specified in the judgment, they are entitled to be protected therein in a subsequent action involving the water right; but it is necessary that the court in such subsequent action should find whether the stipulation was made before or after the commencement of the former action and what were its terms.

(*Alhambra Addition Water Co. v. Richardson*, 95 Cal. 490.)

449. When a former action was brought by the riparian proprietor, who is defendant in the present action, against the plaintiff corporation, who claimed the water as an appropriator, to restrain it from deepening the stream, and from damming up the head of the slough in controversy and from interfering with the channel of the stream or slough, or interfering with the flow of water from the channel of the stream into and through the channel of the slough, and a final judgment was rendered in such action, enjoining the appropriator "from doing any act or thing which shall interfere with or in any manner prevent the free flow of water into or down the channel of said slough," such judgment is *res judicata* as between the same parties, and estops the plaintiff in an action brought by the appropriator for an injunction to restrain the riparian proprietor from turning away the waters of the stream from the plaintiff's ditch so as to run in the said slough upon the riparian lands of defendant. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

450. The action was brought by the plaintiff to establish his rights in the waters of a certain stream known as Mill creek, and to enjoin the defendants from interfering therewith. In a prior action between the two parties and the predecessors in interest of certain of them for the purpose of determining their respective rights in the same stream, it was adjudged that the present plaintiff and his grantors were the owners of the waste water from a ranch belonging to the defendants, known as the Carpenter ranch. The waste water was defined in the decision in the prior action as being "that portion of said waters which is not necessary to irrigate the Carpenter ranch, and for household purposes thereon." Held, that under the prior decision the defendants were only entitled to use the waters of the stream upon that particular ranch, and that it was erroneous to exclude evidence tending to show the amount of water reasonable and necessary for the purposes of the ranch and the amount diverted by the defendants for other purposes. (*Byrne v. Crafts*, 73 Cal. 641.)

451. A former adjudication in favor of the plaintiff, restraining the defendant from interfering with the plaintiff's dam, flume, or ditch, or from turning out any of the water of a ravine after it shall have reached plaintiff's dam, so long as the quantity shall not exceed twenty-five inches, though inconsistent with any prior appropriation of the water by the defendant below the dam of the plaintiff, is not inconsistent with a prior appropriation of the stream by the defendant above plaintiff's dam, and does not preclude the proof of such prior appropriation in a subsequent action, nor estop the defendant from proving that such prior appropriation had not in fact been litigated in the former action. (*Wixson v. Devine*, 80 Cal. 385.)

452. In an action for damages for the diversion of water from the plaintiffs' ditch, the defendants denied the diversion, and alleged that the water used by them was used by

agreement between the Volcano Water Company and themselves, and the water came from the reservoir of the Volcano Water Company. On the trial, after the plaintiffs had introduced in evidence the judgment wherein the right to the use of the water had been adjudged between the plaintiffs and the Volcano Water Company, and offered to prove by oral testimony that the water used by defendants is the same water that was in controversy in that suit, held, that such evidence was proper and should have been admitted, as there was no other means than by parol of establishing this fact. (*Walsh v. Harris*, 10 Cal. 391.)

Diversion, former action for. See Abatement, 23.

Construction of opinion as to diversion. See Appeals, 2994.

Decree in action to restrain diversion. See post, XIV, 2, q.

Decree in action to enjoin waste by prior appropriator. See ante, 369, et seq.

Decree apportioning water in suit to quiet title. See post, XIV, 2, r.

Judgment in action for diversion where party turning water into stream seeks to reclaim it. See ante, XIV, 2, n.

Prescriptive right, division of court as to. See Appeals, 2980.

Diversion, judgment for, conclusiveness of. See Judgments, 304.

F. Findings.

453. When acts of trespass charged in the complaint in respect to the diversion of water are not denied in the answer, defendant relying upon a denial that they were wrongful or unlawful, findings as to the title and prior right to the water in favor of the plaintiff are conclusive of the contention made as to the trespass. (*Wood v. Pendola*, 78 Cal. 287.)

454. When the notice of appropriation corresponds with the allegations of the complaint, a finding that the extent of the appropriation and diversion actually made by plaintiff's ditch, and which the plaintiff is entitled to make, is twelve times the amount claimed in the complaint, is erroneous, as in direct conflict with and in excess of the allegations of the complaint. (*Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1.)

455. Where the complaint alleged ownership and right of use in a certain portion of the waters of a river, an adverse and unfounded claim by the defendant to and a wrongful diversion of a portion of the water, and the answer admitted the defendant's adverse claim, alleged that it was valid, and denied the wrongful diversion, and the findings on the issues raised are as broad and specific as the pleadings themselves, and contain every thing necessary to support the judgment, findings that the plaintiff has acquired a prescriptive right to the water as against the defendant, and that the defendant is barred by certain sections of the statute of limitations from the assertion of any rights he may have had as a riparian owner, being upon issues not raised by the pleadings and not necessary to support the judgment, are not material; and the failure to find the facts

from which the prescriptive right arose, and the facts necessary to show that defendant was barred by the statute of limitations, is not error. (*Riverside Water Co. v. Gage*, 89 Cal. 410.)

456. In an action to restrain the diversion of water from a certain creek, the finding on the issue as to whether the water, after its diversion, was returned to the bed of the creek or not, held, too indefinite and uncertain to sustain the judgment restraining the diversion. (*Stanford v. Felt*, 71 Cal. 249.) Cited 75 Cal. 431; 80 Cal. 193.

457. When the complaint alleges that defendants were making preparations to divert the whole of the water in controversy under a claim of right to do so, and the answer asserts a right to use forty inches of the stream for irrigation of defendants' lands, and the issues as to title are found in favor of plaintiff, findings are not necessary upon the questions whether defendants claim water belonging to plaintiff at a time when plaintiff shows himself entitled to it, or whether defendants have actually interfered with the use of the water at the season when plaintiff was entitled to it. (*Perego v. Sellick*, 79 Cal. 568.)

458. The findings reviewed and held to cover all the material issues raised by the pleadings. (*Heilbron v. Kings River etc. Co.*, 76 Cal. 11.)

459. In an action to enjoin the diversion of water, where the pleadings admit the defendants' construction of the ditch in controversy, and the plaintiffs' title therein depends upon an alleged agreement that they should become tenants in common with the defendants, in consideration of their extending and enlarging the ditch, and a finding that there is no such agreement is not excepted to, the question whether the ditch was materially enlarged by the plaintiffs is not material, and an order granting the plaintiffs a new trial, upon the sole ground that a finding against them upon that question was not sustained by the evidence, will be reversed. (*Hayes v. Fine*, 91 Cal. 391.)

460. It is doubtful whether a defendant, in an action to restrain the diversion of a watercourse, can obtain relief against a counterdiversion of the same stream by the plaintiff at a point below the defendant's diversion, to the injury of the defendant, yet a plea by the plaintiff, in answer thereto, of a prescriptive right to such diversion will support a finding in favor of the plaintiff. (*Ohauvet v. Hill*, 93 Cal. 407.)

Judgment, when not supported by the findings. See ante, 445.

Failure to find in suit to divert water, when not prejudicial. See Appeals, 2131.

Riparian rights, failure to find on, when not error. See Findings, 145.

Finding of prescriptive right, insufficiency of evidence. See Appeals, 2527.

q. Suits to Enjoin Diversion.

Enjoining diversion or use. See Mines and Mining, XI, 8, f.

Joinder of parties in action to enjoin diversion. See Injunctions, 302, et seq.

461. A court of equity will not restrain the diversion of water by injunction until the party complaining is in a condition to use it. While the dam and canal of the party claiming the water are in process of construction, but are not yet in a condition to appropriate the water, the use of the water by other parties is no injury, and such use affords no ground for relief, legal or equitable. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.) Cited 70 Cal. 290.

462. In an action to restrain the diversion of water from a stream, the complaint alleged that the plaintiff was the owner and in possession of a certain ditch connected with the stream, and that he had a right to appropriate for use and distribution so much of the water of the stream as the ditch had capacity to carry. Held, that an allegation to the effect that the plaintiff was in a position to use or distribute the water was unnecessary. (*Moore v. Clear Lake W. W.* 68 Cal. 146.) Cited 71 Cal. 250; 87 Cal. 305; 90 Cal. 237.

463. A riparian proprietor is entitled to an injunction to restrain the threatened unlawful diversion of the waters of a stream flowing through his land, without first establishing his right at law by recovering a judgment in damages. (*Lux v. Haggin*, 69 Cal. 255.) Cited 90 Cal. 237.

464. There is no occasion that the plaintiff should first establish his title at law, before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer. (*Tuolumne Water Co. v. Chapman*, 8 Cal. 392.)

465. The diversion of water from a watercourse will not be restrained at the suit of one who owns land located on another watercourse to which the former is an occasional tributary, unless such diversion diminishes the quantity of water which would otherwise have flowed into the other watercourse by a natural channel, and shortens the period of the natural flow, and it will be restrained only as to such quantity and period. (*Creighton v. Kaweah Canal etc. Co.*, 67 Cal. 221.) Cited 83 Cal. 94.

466. A tenant for years of land bordering upon a natural stream may enjoin the unlawful diversion of the waters thereof, the injunction necessarily becoming inoperative at the termination of his estate. (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426.)

467. No equitable remedy can be had for a mere past diversion of a watercourse; but when the injury is continuing, relief may appropriately be sought in equity. (*Tuolumne Water Co. v. Chapman*, 8 Cal. 392.)

468. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction, to prevent future injury, is proper. (*Marius v. Bicknell*, 10 Cal. 217.) Cited 1 Ariz. 387.

469. The fact that the unlawful diversion of water had actually taken place before the commencement of a suit to enjoin the diversion, and that a water-pipe of improper size, by which the water was diverted, was completed before the filing of an amended com-

plaint seeking to enjoin the diversion of water thereby, constitutes no objection to an injunction to prevent the continued diversion of the water. (*Conkling v. Pacific Improvement Co.*, 87 Cal. 296.)

470. A mere temporary or trivial irregularity in the flow of the water, such as does not cause actual injury to the prior appropriator below, will not be actionable; but if a sensible or positive injury be caused, such as would diminish the value of the water right, an action will lie, not only to recover damages, but to enjoin the future commission of the wrong. (*Phoenix Water Co. v. Fletcher*, 23 Cal. 481.)

471. The diversion by a mere intruder of the water of a canal, by means of a ditch constructed across the land of the owner of the canal, may be enjoined by the owner as an injury to his right. (*Walker v. Emerson*, 89 Cal. 456.)

472. Where a bill avers that plaintiffs are the owners and in possession of a tract of land; that defendants are insolvent, and threaten to, and will, enter upon said land, and, by excavations, embankments, and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance, and create a cloud upon plaintiffs' title, injunction lies. (*Bensley v. Mountain Lake W. Co.*, 13 Cal. 306.)

473. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes, that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for twenty-one thousand eight hundred dollars damages. Held, that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. (*McDonald v. Bear River etc. Co.*, 15 Cal. 145.)

Appropriation or diversion by riparian owner, enjoining. See ante, XIV, 1, c.

Appropriator of water cannot enjoin riparian proprietor from using water. See ante, XIV, 2, c.

Restraining waste by prior appropriator. See ante, XIV, 2, m.

474. If it appears that the diversion of water from a riparian owner is wrongful, it is not necessary for the plaintiff to prove damages, to entitle him to an injunction. (*Conkling v. Pacific Improvement Co.*, 87 Cal. 296.) Cited 90 Cal. 230, 237.

475. The right to an injunction does not depend upon the extent of the damage measured by the money standard, and is not defeated by a finding that plaintiff has not been actually damaged by the water taken. (*Walker v. Emerson*, 89 Cal. 456.)

476. In an action to restrain the diversion of water, where the plaintiff complains of a continuous wrongful act and consequent infringement of his rights, an injunction will be granted, although there is no allegation or proof of actual damage. (*Moore v. Clear Lake W. W.*, 68 Cal. 146.)
Cited 75 Cal. 431; 90 Cal. 230, 237.

477. In order to sustain an injunction restraining the diversion of water belonging to the plaintiff, it is not necessary that any actual damage by reason of the diversion should be alleged, or proved, or found, and a failure to find upon an issue as to the extent of actual damage is immaterial, if no damages are granted. (*Spargur v. Heard*, 90 Cal. 221.)

478. Where it appears that the plaintiff has acquired a right to appropriate the waters of a stream as against the defendants, who are lower riparian owners, and that the defendants have wrongfully obstructed the flow of water into the plaintiff's ditch, and threatened to continue to do so, the plaintiff is entitled to a perpetual injunction, without proof of damages. (*Spargur v. Heard*, 90 Cal. 221.)

479. A riparian proprietor is entitled to an injunction to restrain the unlawful diversion of the waters of a stream adjoining his land, although the injury caused by the diversion is incapable of ascertainment, or of being estimated in damages. (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426.)

480. The injury caused to a riparian proprietor by the unlawful diversion of the waters of a stream adjoining his land for a distance of thirty miles cannot be deemed inconsiderable merely because it is incapable of ascertainment, or of being estimated in damages. (*Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426.)

481. In an action by one riparian owner to enjoin another from diverting water from the stream, where the plaintiff claims the possession of his tract of land as a pre-emptor from the government, for which he holds a receiver's receipt, it is not necessary to allege in his complaint facts showing that the lands were subject to pre-emption, and that he was a qualified pre-emptor, and took the steps necessary to acquire title from the government; but it is sufficient to allege and prove the receiver's receipt, which is prima facie evidence that he is rightfully in possession of the tract described therein, and entitled as a riparian owner to protect himself against an unlawful diversion of the waters of the stream. (*Conkling v. Pacific Improvement Co.*, 87 Cal. 296.)

482. If the complaint, in an action to enjoin the diversion of water, alleges that the plaintiff has appropriated and used the water for more than five years, and the answer denies that the plaintiff ever at any time used or took up or appropriated the water, the denial is sufficient. (*Wilkins v. McCue*, 46 Cal. 656.)
Cited 3 Mont. 225.

483. If the complaint in such action avers that from the spring there ran and flowed immemorially upon the plaintiff's premises a constant and never-failing stream of pure fresh water, and the answer denies that the water flowing from the spring ever at any time ran or flowed to or upon the plaintiff's

premises, the denial is sufficient. (*Wilkins v. McCue*, 46 Cal. 656.)

Allegation that plaintiff is in condition to use water. See ante, 462.

Action for possession, amendment seeking injunction. See Pleading and Practice, 572.

Allegations as to adverse claim on information and belief. See ante, 403.

Cross-complaint in action to restrain diversion. See Cross-complaint, 18.

Evidence of title to land not described in complaint is not admissible. See ante, 425.

484. Where the decree in an action to restrain the diversion of water permits the diversion of it by the defendant for any useful purpose, so as not to leave an insufficient flow for the plaintiff's domestic use and watering of stock, and restrains the defendant from diverting the water beyond the watershed of the stream, and requires him to return the unused surplus to the stream above the plaintiff's land, the decree is as favorable to the defendant as he can properly ask for, and cannot be complained of by him upon appeal. (*Chauvet v. Hill*, 93 Cal. 407.)

485. The clause of a decree enjoining the defendants "from in any manner interfering with the waters of said springs so as to prevent the same, or any part thereof, from flowing into Lytle creek," only applies to defined streams, and does not restrain him from availing himself of percolations upon his own land, even though he might thereby diminish the water which would otherwise issue from the springs. (*Huston v. Leach*, 53 Cal. 262.)

486. In an action by a subsequent appropriator of water for purposes of irrigation and domestic use, to restrain its diversion when not needed by a prior appropriator for mill purposes, an allegation that the defendant was continuing, and that he threatened to continue, to divert the water, when not needed for mill purposes, is material; and a finding that on a certain day the defendant deprived the plaintiff of the use of the water is insufficient to sustain an injunction, without a finding as to how long the deprivation continued, or as to whether the defendant threatened to continue it. (*Ball v. Kehl*, 87 Cal. 505.)

Nonsuit as to persons improperly joined. See Parties, 77.

Disobeying order enjoining diversion. See Contempt, 58.

Findings in suit to restrain diversion. See ante, XIV, 2, p. F.

r. Actions to Quiet Title or Determine Adverse Claims to Water.

487. Action lies to quiet title to a sheet-iron water-pipe, and to water flowing through the same from a reservoir to a quartz-mill owned by the plaintiff, to which the pipe and water right are appurtenant. Such water-pipe constitutes an artificial watercourse appurtenant to the real estate. (*Standart v. Round Valley W. Co.*, 77 Cal. 399.)
Cited 79 Cal. 571.

488. Party who is not in possession of water cannot maintain action, under section 254 of the Practice Act, to determine an adverse

claim to it. (*Nevada etc. Co. v. Kidd*, 37 Cal. 282.)
Cited 75 Cal. 483; 6 Mont. 38.

489. It is not necessary, in order to maintain an action to quiet title to a water right, that there should be an actual interference with the plaintiff's right. The assertion of an adverse claim is all that is required. (*Perego v. Sellick*, 79 Cal. 568.)

490. A plaintiff in an action to quiet title, who claims a right to divert a stream as against riparian proprietors below the point of diversion, must base his claim wholly upon prescription, and if his claim has not merged into a prescriptive right, he has no right which can be quieted, and is not in a position to question the rights or the extent of the rights of the defendants. (*Alta Land etc. Co. v. Hancock*, 85 Cal. 219.)

491. An action will lie to quiet title to a water right acquired by appropriation by means of a dam and ditch, and to the full flow of the stream to the head of the ditch, and a complaint alleging an appropriation by plaintiff of the water for purposes of irrigation and domestic purposes, and charging an adverse entry upon the stream and diversion of the water by defendants, and that the claim of the defendants is entirely subject to plaintiff's claim and title, and is wholly invalid and without right as against the appropriation of said water by plaintiff, states a cause of action. (*Perego v. Sellick*, 79 Cal. 568.)

492. When a complaint in an action to quiet title to the waters of a stream shows that the plaintiffs were the owners of certain land to and upon which the stream of water in question naturally flowed, and that by virtue of their riparian ownership of the land they were entitled to have the use of the water in the stream upon the land, the complaint sufficiently shows the riparian right of the plaintiffs, and the fact that it also alleges that the plaintiffs have the right to divert from its natural channel, and to use for irrigating and domestic purposes, all the waters of the stream, does not restrict the plaintiffs to proof of a right acquired by appropriation, but such latter allegations may be treated as surplusage, so far as the statement of the cause of action is concerned, and do not vitiate the complaint. (*Harris v. Harrison*, 93 Cal. 676.)

493. In an action to determine the adverse rights of the parties to the waters of a stream, where the complaint alleges that the plaintiff is the owner of and entitled to the use of all the water, at the point where the defendant's dam was erected, in excess of two hundred inches, an allegation that the plaintiff has been deprived of the use and enjoyment of upward of four hundred and fifty inches of water by the acts of the defendant in erecting the dam does not limit the plaintiff's claim to the four hundred and fifty inches, or in any manner qualify the allegation that the plaintiff owns all the water in excess of two hundred inches. (*Riverside Water Co. v. Gage*, 89 Cal. 410.)

494. When the facts alleged in a complaint to quiet title to water flowing through a pipe

to the plaintiff's mill show that the use of the water is necessary to the use of the mill, the absence of a direct allegation to that effect will not vitiate the complaint as against a general demurrer. (*Standart v. Round Valley W. Co.*, 77 Cal. 899.)

Allegation as to adverse possession on information and belief. See ante, 403.

495. In an action to quiet title to the use of water, a witness who has testified that he had measured the water in the stream in question at a specified time, and also the water of other streams, and given the results of his measurement of the stream in controversy, cannot be properly asked as to the comparative amount of water in the other streams at points not stated, whose measurement, length, or watersheds are not specified, as compared with the amount of water in them in preceding years, for the purpose of showing that there was more than the average amount of water in the stream in question at the time of the measurement, the evidence being too general and remote to be competent for that purpose. (*Harris v. Harrison*, 93 Cal. 676.)

Evidence of carrying capacity of ditch, where the only right claimed in suit to quiet title is right of way for. See ante, 100.

496. In an action to quiet title to a stream of water claimed by one riparian proprietor as against another, no other rights being involved, where the evidence shows that the amount of water in the stream is so small that the upper riparian proprietor cannot use it for any useful irrigation without practically absorbing it all, and leaving none to flow down to the land of the lower riparian proprietor, and the evidence is sufficient to warrant the court in finding that in order to irrigate it is necessary that the full flow of the stream be used at once, a decree apportioning equally between the parties the use of the full flow of the stream during alternate periods of time is not erroneous, and is supported by pleadings setting up the rights of the parties to irrigate their respective lands by the use of the water in controversy. (*Harris v. Harrison*, 93 Cal. 676.)

Costs in action to try title to use of water, and for damages. See Costs, 13.

s. Conveyance, Reservation, or Lease of Water Right.

497. Right to water acquired by appropriation may be transferred like other property: *Arguendo*. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)

498. Any contract executed which passes the equitable right to a ditch and the use of the water appurtenant to, or connected with, the ditch, as the property of the grantee, is enough to insure to him the rights for which he stipulated as against an adverse claimant. (*Ortman v. Dixon*, 13 Cal. 33.)

499. Whether a water right, to pass the legal title from grantor to grantee, the premises being in adverse possession, must be conveyed by deed, query? (*Ortman v. Dixon*, 13 Cal. 33.)

500. One who enters into the possession of a ditch used for appropriating water, under a

verbal sale made to him of the same, does not succeed to the rights of the seller so as to claim the benefit of the seller's prior appropriation of the water flowing in the same, but must date his appropriation from the time he enters into possession. (*Smith v. O'Hara*, 43 Cal. 371.)

Cited 3 Mont. 228.

501. Where the owner of land receives water acquired by appropriation by means of a ditch passing through the land of another and flowing therefrom over adjacent land, and such water is necessary to the proper use of his land, and by such means has been brought and actually used upon the land for years, the water right is an appurtenance to the land upon which it is used, which will pass by a deed conveying the land, even though the ditch terminates at a long distance from the land conveyed, and the right to take the water therefrom across the adjacent land was partly without right and partly conferred by a revocable license. (*Crooker v. Benton*, 93 Cal. 365.)

502. As long as the purchaser of the land, who took the water right as an appurtenance thereto under his conveyance, is permitted to take the water over the adjacent land, the vendor cannot object, nor can he sell the ditch to a third party so as to convey the water right, or enable such third party to plead the infirmity of the purchaser's title to the right of way for flow of the water across the adjacent land. (*Crooker v. Benton*, 93 Cal. 365.)

503. If, by the erection of a mill and the possessory right of land on a stream, the water be acquired, a transfer of the possession of the property to a vendee, as owner, passes the water right: *Arguendo*. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)
Cited 21 Or. 118.

504. The defendant agreed to sell to the plaintiff a lot of land (part of a larger tract) with the water right appurtenant to the lot, the said water right being the pro rata share belonging to said lot of the water right for the larger tract, etc., and in an action for the breach of the contract by the vendee, the court found that the defendant wholly failed to deliver to the plaintiff upon said lot the water appurtenant and belonging thereto, etc. Held, the contract did not require the defendant to deliver any water to the plaintiff, but simply to transfer the water right, and this was effected by the delivery of the contract and of the possession of the land to the plaintiff. (*Booth v. Chapman*, 59 Cal. 149.)

Cotenant of water right conveying right to divert. See *Cotenancy*, 37, 38.

Water right passes on sale under foreclosure. See ante, XIII.

Water right as appurtenant to land. See *Deeds*, 305.

Water right may be assigned without mill. See *Assignments of Contracts*, 15.

Deed does not carry right to damages for past illegal use. See *Deeds*, 260.

Grantor is not estopped to divert water, when. See *Deeds*, 294.

Reservation of, what is not. See *Deeds*, 312.

Spring passes as appurtenant. See ante, 33.

505. In an action for the diversion of water from a ditch, brought by the owner of the ditch property against the successor in interest of the grantor of the right of way, in which the issue to be tried is as to the right to a permanent easement of defendant in the ditch and water right, it is error to admit evidence as to a verbal contract with the grantor for the use of water on behalf of the defendant. (*Dorris v. Sullivan*, 90 Cal. 279.)

506. The defendant in such action cannot avail himself, as a defense, at the trial, of the fact that the verbal contract was partly performed by his grantor, if he has failed to plead facts sufficient to entitle him to a specific performance, nor can he avail himself of the defense of an irrevocable license if no license of any kind has been pleaded. (*Dorris v. Sullivan*, 90 Cal. 279.)

507. The defendant in such action is not entitled to enforce a specific performance of the verbal contract, where it does not appear that the plaintiff was unable to perform the contract on his part, in the absence of proof of a tender of full performance on the part of the defendant, and a request from him of full performance by the plaintiff, and where it appears that only part of the purchase money was paid by the grantor of the plaintiff, and no offer or intention appears on the part of the plaintiff or of his grantor to pay the remainder, no part specific performance can be enforced. (*Dorris v. Sullivan*, 90 Cal. 279.)

508. A grant of all or any portion of riparian rights, as such, to a water company severs the rights granted from the land, and disables the riparian proprietor from granting them with the land to a subsequent purchaser. (*Gould v. Stafford*, 91 Cal. 146.)

509. If a grant of riparian rights is only for a limited time, or upon condition subsequent by which it may be terminated, the grantor may maintain an action to protect his reversionary right against the acquisition of a prescriptive title, but can maintain no action if his grant was absolute and unconditional. (*Gould v. Stafford*, 91 Cal. 146.)

510. A grant made by the owner of land of a right to divert and use the water of a stream bordering upon his land cannot affect in any way the rights of an adjacent proprietor to the use of his due proportion of the water. The vendor can grant only the right to the use of such proportion of the water as pertains to his own land. (*Anaheim W. Co. v. Semi-Tropic W. Co.*, 64 Cal. 185.)
Cited 69 Cal. 409, 445.

511. If one who has appropriated a part of the water of a stream to propel machinery at a point on the same makes a conveyance of all his interest in the water of the stream to one who has a ditch above, he does not thereby lose his prior right to the water which flows down after the sale, as against one who appropriated the water of the stream below him after his appropriation, but before his sale. (*McDonald v. Askew*, 29 Cal. 200.)

512. A person who has built a mill on a

stream and appropriated a part of its water to propel machinery does not lose his prior right over one who has claimed the water below him for mining purposes, by a sale of his interest in the water of the stream to be used in a ditch above. (*McDonald v. Askew*, 29 Cal. 200.)

518. An agreement, stated in the opinion, whereby the plaintiff was to furnish and the defendant to take, at a specified price, certain water, to be used in running a quartz-mill belonging to the latter, held, not to require the defendant to pay the stipulated price after he had parted with his ownership of the mill. (*Table Mountain etc. Co. v. Chavanne*, 70 Cal. 616.)

Agreement as to right of way for a ditch, when a sale and not a mere license. See ante, XII, 2.

Agreements for use of water, writing necessity of. See Statute of Frauds, I, 10, h.

Covenant to furnish water right, complaint in suit to enforce. See Specific Performance, 184.

514. A reservation of water rights acquired by the owner of land under a contract for the division of the flow of a stream, made in a grant of part of the land, does not entitle the grantor to develop water on the land granted, by the digging of wells or the running of tunnels, or preclude the grantee from so developing water, so long as he does not interfere with or perceptibly diminish the flow of the stream. (*Alhambra Addition Water Co. v. Mayberry*, 88 Cal. 68.)

Agreement by riparian owner for water right on relinquishment of rights. See ante, XIII.

515. An upper riparian proprietor who enters into an agreement, purporting to be a lease, with a lower proprietor, whereby the latter grants to him for a certain term the right to the use of the waters of the adjoining stream for domestic purposes and irrigation, is not, upon the expiration of the agreement, estopped from asserting his right as a riparian proprietor to the use of the water of the stream. (*Swift v. Goodrich*, 70 Cal. 103.) Cited 80 Cal. 193.

516. A flume not being a nuisance per se, a riparian proprietor, after he has leased the land, has no power or right to control the use of the flume by the lessee, and is not responsible for any unlawful or excessive use of the stream by means of it, for purposes of irrigation, unless the lease contemplated or necessarily involved a nuisance or a wrongful use. (*Gould v. Stafford*, 91 Cal. 146.)

517. There can be no presumption, in the absence of evidence, that the lessor intended or contemplated an unlawful use of the flume by his lessee; and a finding that the lessor diverted or misapplied or wasted the waters of the stream, or caused, authorized, or promoted its misapplication or waste, is not sustained by the evidence where it merely appears that his lessee misapplied the water by means of the flume constructed by the lessor. (*Gould v. Stafford*, 91 Cal. 146.)

Lease of water right, adverse possession by tenant. See ante, XIV, 2, g, B.

t. Abandonment or Termination of Water Right.

518. It would require clear proof that the purposes of the water for a sawmill had been fully answered, to hold that the title to the water was abandoned. (*McDonald v. Bear River etc. Co.*, 13 Cal. 220.)

519. The facts that water was appropriated for a particular purpose, and that the purpose has been fully accomplished, and that when accomplished the appropriators dispersed and allowed a long time to elapse without using the ditch, and then sold it for a nominal sum, may be received in evidence as tending to show abandonment. (*Davis v. Gale*, 32 Cal. 26.)

520. One who has abandoned his prior right to the use of water cannot, by afterward making a sale of the same, revive his prior right in favor of his grantees, even if the sale is made in good faith. (*Davis v. Gale*, 32 Cal. 26.)

521. After a ditch by which the water of a creek was appropriated for mining purposes has fallen into disuse and has been abandoned, the water right is destroyed by the abandonment, and where, after such abandonment, the water of the creek has continuously flowed over lands belonging to a riparian owner, and been used by him for irrigation and for domestic and general farming purposes, for many years, no person claiming under the appropriators can revive the old ditch and water right so as to divert the water beyond the watershed of the creek, to the injury of the riparian owner. (*Kirman v. Hunnewill*, 93 Cal. 519.)

Water turned into stream, whether abandoned. See ante, XIV, 2, n.

Second notice of appropriation is not abandonment of first. See ante, 264.

Abandonment of pre-emption claim defeats right of grantee to divert. See ante, 284.

522. Water right under appropriation for mining purposes is not lost by exhaustion of the mine for which it was appropriated. (*Lowden v. Frey*, 67 Cal. 474, 477.)

Abandonment of water rights. See Mines and Mining, XI, 8, g.

WATER FRONT.

San Francisco, water front of. See San Francisco, XIV, 10, a.

Streets on. See Streets, II.

WATER LOTS.

San Francisco beach and water lots. See San Francisco, XIV, 10.

WAYS.

See Highways.

Easement of. See Easements, III, 3.

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Railroad, right of way for. See Railroads, IV.

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WEIGHTS AND MEASURES.

Liability of county for purchase of set by scaler. See Counties, 56.

WHARFAGE.

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WHARVES.

I. Right to Build Wharf; Enjoining Erection of.

II. Act Granting Right to Build Wharf; Petition for Franchise.

III. Wharves Built into Tide Water.

IV. Legislative Confirmation of Void Lease, Effect of.

V. Keeping in Repair.

VI. Injury to Wharf.

VII. Wharfage and Dockage; Grant of Right to Free Dockage.

VIII. Wharves in San Francisco.

See Harbor Commissioners.

Delivery at wharf. See Sales, IV, 7.

Accretion caused by. See San Francisco, 276.

Ordinance delegating power of city over. See Ordinances, 127.

Conveyance of easement, conclusiveness of. See San Francisco, 294.

House is no part of wharf. See Deeds, 315.

I. Right to Build Wharf; Enjoining Erection of.

1. At common law a riparian proprietor on navigable water has no right to wharf out against his own land. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.) Cited 2 Wash. 248.

2. The point not decided whether, at common law, a riparian proprietor can wharf out from his land into deep water. (*Coburn v. Ames*, 52 Cal. 385.)

3. The state harbor commissioners may be enjoined from erecting a wharf upon a water lot which is the property of private persons. (*Payne v. English*, 79 Cal. 540.) Cited 85 Cal. 618.

4. Erection of wharf materially obstructing free access of riparian owner will be enjoined as a nuisance. (*Shirley v. Bishop*, 67 Cal. 543.) Cited 74 Cal. 467; 2 Wash. 282.

Right to build wharf in San Francisco bay. See post, VIII.

Erection or obstruction of, enjoining. See Injunctions, II, 8.

II. Act Granting Right to Build Wharf; Petition for Franchise.

5. A legislative grant, authorizing the grantee to build and erect a wharf, and conveying the right "to the use and occupancy of the adjoining land," with a proviso that "it shall be used for none other than wharf purposes" for a specified time, confers such an interest in the land as entitles the grantee to recover the possession of a party who intrudes upon

and deprives him of the possession. (*Frisbie v. McOlernin*, 38 Cal. 568.)

6. An act of the legislature granting to the parties therein named the right "to build a wharf as long as twelve hundred feet near the island in the tule in Suisun valley, county of Solano, on the land of the state," is not void for uncertainty, but is good as a grant from the state of such rights and privileges as can be held to have passed by a fair and reasonable construction of its terms. (*Rush v. Jackson*, 24 Cal. 308.)

7. Under the terms of such a grant, the grantees therein named have the right to select any point on the slough which was near the island in the tule, in Suisun valley, for the erection of their wharf, and to build it of any length they may elect, not exceeding twelve hundred feet. (*Rush v. Jackson*, 24 Cal. 308.)

8. No obligation is imposed on the grantees, but it is left to their choice and election whether they accept the grant or build a wharf, and of what length the wharf shall be, so that it does not exceed twelve hundred feet. (*Rush v. Jackson*, 24 Cal. 308.)

9. Under such a grant the grantees must, within a reasonable time, select the site of their wharf and prosecute its erection with ordinary diligence, and the extent of the grant will be determined by the length of wharf built, or amount of appropriation made within a reasonable time. (*Rush v. Jackson*, 24 Cal. 308.)

10. Where the act making such grant was passed in 1852, and in the same year the grantees selected the site for their wharf, and built it two hundred feet in length, and from that time up to 1858 made no further erection or appropriation, held, that the grantees thereby determined their acceptance of the grant, and the extent of their acceptance, and the grant became inoperative beyond the two hundred feet appropriated. (*Rush v. Jackson*, 24 Cal. 308.) Cited 80 Cal. 341; 92 Cal. 646.

11. Application to board of supervisors for franchise to construct a wharf in accordance with the provisions of the act of March 1, 1870, must particularly describe the locality of the wharf. (*Templeton v. Coburn*, 48 Cal. 563.)

III. Wharves Built into Tide Water.

12. It does not follow as a legal conclusion that a wharf erected below high-water mark in tide water and upon the soil thereunder belonging to the state, is a public nuisance, or an injury to commerce and navigation. Whether such wharf is a public nuisance is a question of fact. (*People ex rel. Teschemacher v. Davidson*, 30 Cal. 379.) Cited 45 Cal. 55; 76 Cal. 161.

13. If a wharf is erected in tide waters and upon soil belonging to the state, without a license from the state, it will belong to the state, and possession of the land and wharf, if withheld, can be recovered in ejectment by the state. (*People ex rel. Teschemacher v. Davidson*, 30 Cal. 379.) Cited 31 Cal. 590; 52 Cal. 397; 91 Cal. 220.

Wharves built in San Francisco bay. See post, VIII.

Right of private owner to collect wharfage where wharf extends into tide water. See post, 26.

14. The state may maintain ejectment for a wharf constructed without authority beyond low-water mark. (*Coburn v. Ames*, 52 Cal. 385.)

15. If a wharf is constructed over the land of a riparian proprietor, extending beyond low-water mark into deep water, he cannot maintain ejectment for that part of the wharf extending beyond low-water mark into the ocean. (*Coburn v. Ames*, 52 Cal. 385.)

16. If a lease is given of land on the shore of the ocean, extending down to low-water mark, and the lessee constructs a wharf from the shore extending into the water beyond low-water mark, that portion of the wharf beyond low-water mark is not an improvement on the demised premises, nor appurtenant thereto, nor is it affixed to them in the sense of the statute, even if attached to the wharf on the demised premises by nails, bolts, and screws. (*Coburn v. Ames*, 52 Cal. 385.)

17. A lease of a tract of land on the seashore extending down to low-water mark, with a clause that, at the expiration of the term, the lessees shall surrender the demised premises, does not compel the lessees to surrender to the lessor a wharf beyond low-water mark which they have constructed during the term, and which is attached to a wharf on the demised premises. (*Coburn v. Ames*, 52 Cal. 385.)

IV. Legislative Confirmation of Void Lease, Effect of.

18. The confirmation by the legislature of a lease of a wharf, the property of the state, void because made by a board of commissioners who had no power to make it, only vests in the lessee the estate attempted to be created by the lease. (*People ex rel. Harbor Commrs. v. Broadway Wharf Co.*, 31 Cal. 33.)

V. Keeping in Repair.

19. A wharf company is bound to keep its wharf in a proper condition, and it is liable for losses sustained by reason of its neglect to do so. (*Finn v. Vallejo Street Wharf Co.*, 7 Cal. 253.)

VI. Injury to Wharf.

20. When there is material evidence to show that the damage caused to plaintiff's wharf by defendant's schooner being driven against it by a violent gale was the result of inevitable accident, and not of defendant's negligence as claimed by plaintiff, the finding of the court below that the accident was inevitable will not be disturbed. (*Stearns v. Hooper*, 78 Cal. 341.)

VII. Wharfage and Dockage; Grant of Right to Free Dockage.

Wharfage. See Harbor Commissioners. Power to tax, the right to collect. See Taxation, 153.

21. The term "wharfage" is applied to a

charge for landing goods, whether upon an artificial erection or a natural landing. (*Sacramento v. New World*, 4 Cal. 41.) Cited 4 Cal. 45.

22. A mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament—an uncertain profit issuing out of the realty. (*De Witt v. Hays*, 2 Cal. 463.)

23. Where the city authorities have the right to erect, repair, and regulate wharves and the rates of wharfage, and the banks of the river in front of the city are dedicated to the public, it follows that the right to collect wharfage devolves on the corporation. (*Sacramento v. New World*, 4 Cal. 41.)

24. The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be claimed for that part of the wharf below the line of low water. Per *Hastings*, C. J. (*Gunter v. Geary*, 1 Cal. 462.)

25. Whenever the state shall have constructed or acquired wharves in the interest of commerce, it may collect wharfage as proprietor for the use of the wharves. *Myrick*, J., concurring. (*People v. Pacific Rolling Mills Co.*, 60 Cal. 323.)

26. Dockage is collected to assist in defraying the expense of dredging; and under the lease from the state harbor commissioners to the defendant (made under the act of April 4, 1870, Stats. 1870, p. 799)—by the terms of which the defendant is to do all the dredging at its dock—the former have not the right to collect dockage fees for vessels engaged in the defendant's business, landing at its wharf; but the latter may, under contract with such vessels, collect such fees. (*People v. San Francisco Gaslight Co.*, 54 Cal. 248.) Cited 60 Cal. 326.

27. To attempt to impose "wharfage" in advance of the construction or acquisition of a wharf, would be an attempt to lay a duty on tonnage, in violation of article I, section 10, of the constitution of the United States. (*People v. Pacific Rolling Mills Co.*, 60 Cal. 323.)

28. For the use of wharves, landings, and other artificial means for facilitating the loading of merchandise, a charge proportioned to the tonnage of the vessels using such accommodations may be exacted by individuals or municipal corporations authorized by the state; and such charge is not a duty on tonnage within the meaning of section 10 of article I of the constitution of the United States, which forbids the states to lay any duty on tonnage without the consent of Congress. (*People ex rel. English v. Roberts*, 92 Cal. 659.)

29. A charge against a lighter and barge for the privilege of using wharves, docks, and slips within the jurisdiction of the state board of harbor commissioners, under regulations of the board fixing the rates of dockage for such privilege in proportion to the tonnage of the vessels using the accommodations, it appearing that the board kept the wharves in repair and the slips dredged, and that but for

the dredging the vessels could not have used the slips, is not a duty on tonnage. (*People ex rel. English v. Roberts*, 92 Cal. 659.)

30. Such charge for "dockage" is not a violation of section 5 of the act of the legislature of March 17, 1880, which provides that no "wharfage" is to be collected upon commerce within the state. "Wharfage" is the charge against merchandise for the use of a wharf, while "dockage" is a charge against vessels for the privilege of mooring to the wharves in the slips. (*People ex rel. English v. Roberts*, 92 Cal. 659.)

31. If a ferry company leasing wharf from the harbor commissioners under the act of March 4, 1864, conducts a railroad business in connection with the ferry, as to such transportation business it must be considered as acting in its capacity of a railroad company, and must be held to the same rule in respect to tolls as if its road terminated at the wharf, instead of the other side of San Francisco bay, or as if it employed some other vessel than a ferryboat for the purpose of crossing the bay with its passengers and freight. (*People v. San Francisco etc. R. R. Co.*, 35 Cal. 606, 618.)

32. If a ferry company leasing a wharf from the harbor commissioners under the act of March 4, 1864, undertakes the transportation of freight from the line of its railroad to San Francisco, and the delivery thereof over the wharf to the parties to whom it may have been consigned, it is not in respect to such business a ferryman, and has therefore no special privileges, but stands upon the same level upon which all other transportation companies stand, and must pay the same tolls. (*People v. San Francisco etc. R. R. Co.*, 35 Cal. 606, 618.)

33. An action for wharfage may be maintained, although the law imposing it speaks only in terms of a charge for "arrivals." (*Sacramento v. Steamer Confidence*, 4 Cal. 45.)

34. Moneys collected as wharfage and tolls become the property of the state as soon as collected. It is not necessary that they be first paid into the treasury. (*People v. Gray*, 66 Cal. 271.)

35. The provisions of section 11 of said act (Stats. 1863-64, p. 144), which provide for the collection of "all tolls, dockage, and wharfage charges authorized and required to be collected, shall be due and collectable exclusively in gold and silver money of the United States," do not come within the provisions of the Specific Contract Act; but as charges upon property to raise money for public purposes they do come within the principles laid down in *Perry v. Washburn*, 20 Cal. 350, and are valid. (*People ex rel. Harbor Commrs. v. Steamer America*, 34 Cal. 676.)

36. The passage of an ordinance by the common council of a city, setting apart and dedicating a portion of the water-front in its harbor for public use as a free public dock for ships, is a mere offer to dedicate, and the dedication is not complete, nor does the public acquire any right to the easement until it has been accepted and used by the public in

the manner intended. (*San Francisco v. Calderwood*, 31 Cal. 585.)

Cited 42 Cal. 554, 557; 60 Cal. 505; 64 Cal. 502; 70 Cal. 480; 81 Cal. 77, 79; 90 Cal. 531; 1 Mont. 417.

37. The dedication of a portion of the water-front of a city, in its harbor, for public use as a free public dock for ships, gives the public only an easement, and not any estate in the land; and the right to enter upon and possess the space dedicated, subject to the easement, remains in the grantor of the same. (*San Francisco v. Calderwood*, 31 Cal. 585.)

38. The grant to the public of a right to the use of a portion of the water-front of a city for a free public dock for ships is the grant of an easement. (*San Francisco v. Calderwood*, 31 Cal. 585.)

Receiver for wharfage, order for payment over of money on discharge. See Receivers, 36.

Bond of wharfingers, actions on. See Harbor Commissioners, 15, 16.

Wharfingers' bond, breach of, what is. See Suretyship, 35.

Wharfingers, estoppel of sureties. See Suretyship, 87.

Evidence of secretary as to approval of bond. See Bonds, 97.

VIII. Wharves in San Francisco.

See Harbor Commissioners.

39. The charters of San Francisco of 1850 and 1851, by which the power was conferred on the mayor and common council "to erect, repair, and regulate public wharves and docks, and to regulate the erection and repair of private wharves, and to fix the rates of wharfage thereat," did not vest in the city any proprietary interest in the wharves. (*People ex rel. Harbor Commrs. v. Broadway Wharf Co.*, 31 Cal. 33.)

40. The act of the 1st of May, 1851, authorizing the city of San Francisco "to construct wharves at the ends of all the streets which terminate on the bay," etc., and extend the street six hundred feet into the bay, did not relinquish to the city of San Francisco a proprietary interest in the wharves built on the streets outside the beach and water-lot line. (*People ex rel. Harbor Commrs. v. Broadway Wharf Co.*, 31 Cal. 33.)

41. The owner of a lot on the water front of San Francisco has no right, without a license, to wharf out from his own land into the bay. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.)

42. In case of purpresture or encroachment by the erection of a wharf in the bay of San Francisco beyond the city front, the right to recover possession is in the people, and not in the owner of the land adjoining on the city front. (*Dana v. Jackson Street Wharf Co.*, 31 Cal. 118.)

43. The fourteenth section of article III of the act of April 15, 1851, incorporating San Francisco, taken in connection with the act of May 1, 1851, funding the floating debt of said city, did not give the commissioners of the funded debt of said city any control over or interest in the public wharves in the streets

extending beyond the water-front, or their revenues. (People ex rel. Harbor Commrs. v. Broadway Wharf Co., 31 Cal. 33.)

44. The act of May 1, 1851, to fund the floating debt of San Francisco, and creating a board of commissioners of the funded debt, did not vest in said board the title to any wharf in San Francisco which belonged to the state. (People ex rel. Harbor Commrs. v. Broadway Wharf Co., 31 Cal. 33.)

45. The conveyance made by the common council of San Francisco, by ordinance of August 23, 1850, to the board of commissioners of the sinking fund, of Broadway wharf, was void for want of power, and the lease of the wharf to Francis Salmon by said board on the 13th of February, 1851, was also void for the same reason, as was also the conveyance of said wharf, made by said board of commissioners on the 24th of May, 1851, to the commissioners of the funded debt, created by the act of May 1, 1851. (People ex rel. Harbor Commrs. v. Broadway Wharf Co., 31 Cal. 33.)
Cited 32 Cal. 449.

46. The lease of Broadway wharf in San Francisco, made by the commissioners of the funded debt of San Francisco on the 31st of January, 1861, was not valid, and did not confer upon the lessees any right to the same as against the state. (People ex rel. Harbor Commrs. v. Broadway Wharf Co., 31 Cal. 33.)

47. The action was brought to determine whether a wharf erected on Channel street, and being the property of the state, was subject to the control of the board of state harbor commissioners, or of the city and county of San Francisco. Held, that the control of the wharf was vested in the board, and not in the city. (People v. Williams, 64 Cal. 498.)

Ferry company leasing wharf from harbor commissioners in San Francisco, liability for wharfage. See ante, VII.

Dockage on wharves in San Francisco. See Harbor Commissioners.

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Forgery of will, indictment for. See Criminal Law, 1624.

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I. What Instruments are Wills.

1. Same instrument may operate both as conveyance and as will or devise in regard to different pieces of property. (*Adams v. Lansing*, 17 Cal. 629.)

2. No particular words are necessary to show a testamentary intent; it must appear only that the maker intended by it to dispose of property after his death. (*Mitchell v. Donohue*, 100 Cal. 202.)

3. A letter from a brother to his sister, expressing a desire for full information about his mother and his sister's children, stating that he is pecuniarily independent, that his health is probably ruined, and that he wants to anticipate possibilities, and that "you and your children get everything; your boy I want given the best of educations," is not testamentary in character, the writer not being in extremis, and there being nothing in the circumstances or surroundings of the writer which unmistakably evince his intention that the letter, apart from a formal will executed or intended to be executed, should of itself be a testamentary disposition of his estate to his sister and her children. (*Estate of Richardson*, 94 Cal. 63.)

4. Two instruments in the handwriting of the deceased, attached together, and found among his papers, one being in the form of a letter signed by him and addressed to his sister, and the other purporting to be a copy of a deed of gift from the former to the latter, and it appearing on the face of the letter that the property described in the deed was intended by the deceased as a provision for the sister after his death, held, to be a will, and admissible to probate. (*Estate of Skerrett*, 67 Cal. 585.)

Cited 78 Cal. 481; 100 Cal. 208.

5. An instrument purporting to be a deed of gift, but inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will. (*Estate of Skerrett*, 67 Cal. 585.)

6. The following instrument: "I wish five thousand dollars to go to John C. Cole in the event of my dying intestate, and the balance of my property to go to Robert Beatie, to be disposed of by him as his judgment may dictate," if properly executed and witnessed, is testamentary in its character, and is a will. (*Estate of Wood*, 36 Cal. 75.)
Cited 11 Mont. 576.

7. Under the rule that if the instrument was intended to be testamentary, the court will give effect to the intention, the following instrument held to be testamentary in its character and admitted to probate: "Dear old Nance: I wish to give you my watch, two shawls, and also five thousand dollars. Your old friend, E. A. Gordon." (*Clarke v. Ransom*, 50 Cal. 595.)

8. A written document providing that "this is to serify that ie levet to mey wife Real and persnal and she to dispose for them as she wis" is properly construed as if it read: "This is to certify that I leave to my wife my real and personal property, and she to dispose of them as she wishes," and, as thus read, shows a testamentary intent, and such document, if wholly written, dated, and signed by the testator, is entitled to probate as an olographic will. (*Mitchell v. Donohue*, 100 Cal. 202.)

9. In a contest over the probate of such olographic will, where it appeared that the testator had, many years previously, transferred certain real and personal property to his wife, and the contestants sought to prove that the wife became intensely jealous of her husband a dozen years or so before his death, and feared that he had transferred or would transfer all of the property to others and leave her destitute, and expressed such fears to her husband, who assured her of the contrary, but could not satisfy her, for the purpose of showing that the instrument was not intended as a will, but merely as a certificate that the husband had "left" the property that he had previously transferred to his wife subject to her disposal, a ruling by the court admitting all of this offered evidence as to what had been said and done by her within three or four years before her husband's death, but excluding all of it relating to earlier dates, is not materially erroneous or prejudicial to the contestants, and is not ground for reversal of the judgment admitting the will to probate, it not appearing that the verdict and judgment could have been different if the court had ruled entirely as asked by the appellant. (*Mitchell v. Donohue*, 100 Cal. 202.)

10. Parol testimony will be received for the purpose of showing whether an instrument propounded as a will, which is not upon its face testamentary in its character, is such; and if it appears from the surrounding circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, and in such case the particu-

lar form of the instrument is immaterial. (*Clarke v. Ransom*, 50 Cal. 595.)
Cited 100 Cal. 208; 11 Mont. 576.

What instrument is not. See *Gifts*, 9.

II. Extent of Power of Disposition; Disposition of Community Property, or Property of Third Person.

11. There is no limitation upon power of disposition by will in this state. (*Norris v. Harris*, 15 Cal. 226.)

12. A father, during his lifetime and after the death of his wife, may, although there have been children of the marriage, dispose of the gananciales for any honest purpose, when there is no intention to defraud the children, and may, by last will and testament, direct the sale of them for the payment of his debts. (*Panaud v. Jones*, 1 Cal. 488.)

13. A, having married, and there being children of the marriage, and his wife having died, and there being common property acquired during the marriage (gananciales), held, that the children, upon the death of the wife, did not acquire a vested estate in the common property (gananciales), and that the father had the absolute dominion in and control over and power to dispose of such property during his life, and the power by last will and testament to direct the sale of the same for the payment of debts, not only such as were contracted during the continuance of the marriage, but also as were contracted by the husband after the dissolution of the marriage by the death of his wife. (*Panaud v. Jones*, 1 Cal. 488.)

14. A testator cannot dispose of more than one-half of the common property by will. (*Estate of Frey*, 52 Cal. 658.)
Cited 81 Cal. 242.

15. A testator must be presumed to know the law, that he has no power to dispose by will of his wife's interest in the community property, and not to intend to devise any property over which he had no power of testamentary disposition. A general devise of all the property of which the testator may die possessed, without naming any specific property, applies only to his moiety of the community property. (*Estate of Gilmore*, 81 Cal. 240.)

16. The will in question construed, and held, that the half of the community property to which the testator's wife would have been entitled had she survived him was not disposed of by the will. (*Estate of Williamson*, 75 Cal. 317.)

17. If testator undertakes to dispose of property of third person, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of the disposition by the will; for a person cannot accept a benefit under a will and at the same time reject it by asserting in opposition to it his own inconsistent proprietary rights. (*Noe v. Splivalo*, 54 Cal. 207.)
Cited 74 Cal. 104; 81 Cal. 243.

18. Though a testator has not the power to dispose of the property of another person by his will, still if he undertakes so to do, and such person accepts a bequest or devise under the will, such acceptance is a confirmation of

the testamentary dispositions of the testator. (*Morrison v. Bowman*, 29 Cal. 337.)
Cited 55 Cal. 87.

Unreasonableness or unfairness of disposition, effect of. See post, VII, 2.

Power to dispose of community property by will. See *Husband and Wife*, II, 3, 5.

Donations to charity. See *Charitable Uses*, 9.

Devise to charity, extent of and validity. See *Charitable Uses*, 10, 11.

III. Agreement to Make Will.

19. Where a son conveys real estate to his father—the only consideration being a verbal agreement by the father to make a will and devise to the son certain property, and the father dies without having complied with the agreement—the agreement is void, the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property, it being shown that the transaction was not a gift. (*Russ v. Mebius*, 16 Cal. 350.)

IV. Form and Execution of; Blanks in.

20. Legislature has power to prescribe formalities to be observed in the execution of a will; and, by so doing, it does not interfere with the natural right of an individual to dispose of his property as he sees fit. (*Estate of McCabe*, 68 Cal. 519.)

21. Will may be informally drawn and may consist of one or more papers. (*Mitchell v. Donohue*, 100 Cal. 202.)

22. Fact that will was begun on one day and finished several days afterward, the delay being for the purpose of procuring a competent person to direct the manner of drawing it, it seems is no ground for invalidating a will under the Mexican law. (*Castro v. Castro*, 6 Cal. 158.)
Cited 64 Cal. 565, 569.

23. The strictness of the rules of the civil law requiring five, or at least three, witnesses to a will, was relaxed expressly in favor of remote districts. (*Castro v. Castro*, 6 Cal. 158.)

24. By the customs of California, under the Mexican rule, which have the force of law, two witnesses were sufficient to a will. (*Castro v. Castro*, 6 Cal. 158.)
Cited 10 Cal. 477; 31 Cal. 522.

25. Where a will was attested by two witnesses, and made before a person who was a *sindico*, held, the fact that such person signed the instrument as *sindico* did not the less render him a witness. (*Tevis v. Pitcher*, 10 Cal. 465.)
Cited 64 Cal. 565.

26. Where a last will and testament was executed, on the nineteenth day of September, 1846, by a Mexican citizen of California, before the judge (*juez*) of the place, who certified at the foot of the will that the testator was possessed of his entire judgment and understanding, and retained his perfect memory, held, that it was incumbent on the person contesting the validity of the will to establish

that the testator was not of sound mind and disposing memory. (Panaud v. Jones, 1 Cal. 488.)

Cited 6 Cal. 160; 64 Cal. 565.

27. By Spanish and Mexican law, wills are divided into solemn or sealed, and open or nuncupative. The former need not be written by nor be subscribed by the testator, but must be attested by the escribano of the place and seven witnesses, by subscribing their names on an envelope in which the will is inclosed, the testator saying to them: "This is my will; I desire you to write your names upon it." Such a will was probably never made in California. In the latter, the testator declares his will either viva voce, or in a writing which he reads himself, or has the escribano read, if one is in attendance, or any one of the witnesses present, so that all the witnesses present may hear it. Such a will need not be signed by the testator. (Panaud v. Jones, 1 Cal. 488.)

28. Where an open will (testamento abierto) was admitted on the face of the complaint to have been "dictated" by the testator, and was reduced to writing, and signed by three subscribing witnesses, citizens (vecinos) of the place, one of whom was the alcalde, and it was recorded in the proper book of the juzgado, held, that the will was valid, although the testator had not signed it, and although it was not made in the presence of an escribano. (Panaud v. Jones, 1 Cal. 488.)

29. By the civil law an escribano may act in the double capacity of escribano and witness in the execution of a will. Per Bennett, J. (Panaud v. Jones, 1 Cal. 488.)

30. A will is valid, although one of the three subscribing witnesses was alcalde of the place. (Panaud v. Jones, 1 Cal. 488.)

31. Where a testator had precisely ordained in what way his property was to be disposed of, and what duties the executors were to perform, held, that the will was valid, notwithstanding one of the three subscribing witnesses was named in the will as one of the two executors, he not being named as heir or legatee, nor empowered to institute an heir, nor vested with any discretion in respect to the disposition of the estate; and held, further, that such executor was competent as a witness to testify in support of the will. (Panaud v. Jones, 1 Cal. 488.)

32. A will in writing, having been acknowledged by the testator to be his last will and testament before the alcalde, who possesses, in California, the powers and jurisdiction of an ordinary judge (juez ordinario), having been attested by the alcalde and two witnesses, and there having been no escribano in the place, and the will having been registered by the alcalde in his book of records, held, that it was a public writing (escritura publica) as fully as it could have been made so in California, and required no further probating in order to authorize the executor to act under it; and held, also, that the omission to reduce it to the form of a public writing would not have affected its validity; and held, further, that it was not necessary, in order to uphold acts of the executor, done in conformity with the provisions of the will, to show

that he had taken out letters testamentary, the will itself being his authority and commission. (Panaud v. Jones, 1 Cal. 488.)

33. An alcalde appointed in a will as executor, but not named therein as heir or legatee, nor deriving any profit or advantage under it, and being allowed by law no compensation for his services, is competent to authenticate the will in his judicial capacity. (Panaud v. Jones, 1 Cal. 488.)

34. Where the whole body of a will, including the name of the testatrix, is written by one who is a subscribing witness to the will, and the will is signed by a mark made by the testatrix, without repeating the name in immediate connection with the mark, the mark is a sufficient signature, under the terms of section 14 of the Civil Code. (Will of Guilfoyle, 96 Cal. 598.)

35. The subscription by a witness to a will of the name of the testatrix, made under her direction, in her presence, and at her request, is a sufficient execution of the will, although the person signing her name omits to write his own name near by as a witness to her signature. (Estate of Langan, 74 Cal. 353.)

36. The name of a testatrix was subscribed to the will by one of the subscribing witnesses, and she declared the document to be her will in the presence and hearing of the witnesses, who subscribed their names at her request, and in her presence, and in the presence of each other. Held, to be a sufficient execution. (Estate of Toomes, 54 Cal. 509.)

37. A testator signed his will in the presence of a subscribing witness, and the witness then signed it at his request; the scrivener, being present, then asked the testator if the paper was his will, to which he replied, "Yes," in the presence of the witness. Held, that the transaction was a sufficient declaration to the witness that the paper was the will of the testator. (Estate of Johnson, 57 Cal. 529.)

38. The naming of an executor is not essential to the validity of a will. (Estate of Barton, 52 Cal. 538.)

39. Where the testator and the witnesses to a will are dead, proof of the signatures of the witnesses and of the testator will be sufficient evidence of its due execution. (Teviss v. Pitcher, 10 Cal. 465.)

40. Where a testator left the amount of a bequest blank, and a witness testified that when the will was signed he called the testator's attention to the omission, but the deceased said to let it go, and if he made a codicil he would then put something in the codicil for him, an instruction to the jury that if they found from the evidence that the testator, when he signed the proposed will, omitted bequests which he desired to make, the proposed will was incomplete, and not the decedent's will, is erroneous; but the error will be considered harmless, where it appears that no is-ue was presented to the jury embodying the matter embraced in the instruction. (In re Flint, 100 Cal. 391.)

41. Document referred to in will, but which is not in existence at the time of its execution, does not constitute a part of the will, and is

not entitled to probate as such. (*Estate of Shillaber*, 74 Cal. 144.)
Cited 78 Cal. 480, 481.

Reference in olographic will to letter not in existence. See post, V.

Olographic wills. See post, V.

Execution of olographic will before adoption of the Civil Code. See post, V.

Oral instructions as to will are invalid. See *Executors and Administrators*, VI, 3, o.

Subscribing witnesses. See *Witnesses*, V, 8, c, K.

Signing by mark. See *Contracts*, 50, 51.

Mexican law, custom as to attestation. See *Usages*, 9.

V. Olographic Wills.

42. An olographic will is not invalid because made and executed prior to the time section 1277 of the Civil Code became operative, if the testator did not die until after the section took effect. (*Estate of Learned*, 70 Cal. 140.)

43. A date is essential to the validity of an olographic will. (*Estate of Martin*, 58 Cal. 530.)

Cited 64 Cal. 427.

44. A recital in an olographic will that the testator is of the age of sixty years does not constitute a date. (*Estate of Martin*, 58 Cal. 530.)

45. A paper offered for probate as an olographic will, held, to be invalid because a portion of the date was printed. (*Estate of Billings*, 64 Cal. 427.)

46. Where portions of the paper were printed in the form of a stationer's blank, and the vacant spaces therein were filled in the handwriting of the deceased, the instrument is not an olographic will. The portion of the paper which was written by the deceased cannot be admitted to probate as his olographic will, as that would be in effect to change the statute and make it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. (*Estate of Rand*, 61 Cal. 468.)
Cited 64 Cal. 427.

47. The will in question, which was entirely in the handwriting of the testatrix, contained a bequest to the executor of certain personal property, and requested him to dispose of the same "in the manner specified in my letter to him of this date." After the execution of the will, the testatrix dictated a letter to the executor disposing of the property. The letter was in the handwriting of the executor, but was signed by the testatrix. Held, that the will was properly admitted to probate as an olographic will, and that the letter was properly excluded. (*Estate of Shillaber*, 74 Cal. 144.)

What document regarded as an olographic will. See ante, 8, 9.

Olographic codicil, what is. See post, XIII.

Olographic codicil to attested will. See post, XIII.

VI. Custody and Opening of Wills.

48. A person competent to make a will has a right to select the custodian, and to cause

it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will; and the subsequent incompetency of the maker of the will does not entitle the guardian to the possession of the instrument. (*Mastick v. Superior Court*, 94 Cal. 347.)

49. Section 1800 of the Code of Civil Procedure should be read in connection with sections 1459 and 1460 of the same code, and the phrase "instrument in writing," as used in section 1800 of such code, must be construed as referring to instruments to the possession of which the guardian is entitled as an asset or as evidence of his ward's title to property, and does not apply to the last will and testament of the ward. (*Mastick v. Superior Court*, 94 Cal. 347.)

50. Where a person competent to make a will delivered it to another as the custodian thereof, with special directions to retain the same until her death, unless she called for it, and upon her death to deliver it to her executor, the custodian so selected is charged with the execution of the trust, which trust can only be revoked by the testator; and the fact that the custodian afterward delivered the will to a messenger at the request of the testator, and that subsequently the same messenger delivered to such custodian a sealed package indorsed thereon as containing the testator's will, does not extinguish the trust. (*Mastick v. Superior Court*, 94 Cal. 347.)

51. Upon a hearing in the trial court upon an order to show cause why the custodian of a will should not deliver it to the testator's guardian, a finding by the court that the sealed package supposed to contain the will belonged to the testator and belongs to her estate, and that the guardian is entitled to its possession, is a conclusion of law from the facts found by the court, and is not conclusive upon certiorari as against the right of the custodian of the will to its possession, where the findings show that the package was tendered to the court for examination of its contents, and the custodian offered to deliver possession of any thing contained therein except the will. (*Mastick v. Superior Court*, 94 Cal. 347.)

52. Formalities of opening and publishing a sealed will considered. Per *Bennett, J.* (*Panaud v. Jones*, 1 Cal. 488.)

VII. Validity of Will.

1. Presumptions in Favor of.

53. Presumption of law, in absence of all proof, upon the contest of a will, is in favor of the will. (*Estate of McDevitt*, 95 Cal. 17.)

Defective execution. See ante, IV.

Olographic will is invalid where part of it is printed. See ante, V.

2. Unreasonableness and Unfairness of Disposition, Effect of.

54. A testator of sound mind has a right to make an unjust, unreasonable, or even a cruel will, and if no apparent restraint or undue influence is proved to have induced its execution, the will must be sustained, whether the

disposition made of his property is judicious or not. (Estate of McDevitt, 95 Cal. 17.)

55. The right of a testator to dispose of his estate depends neither on the justice of his prejudice nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust. (Estate of Spencer, 96 Cal. 448.)
Cited 99 Cal. 670.

56. Not to divide the property of a testator equally among nephews and nieces does not make his will undutiful or inequitable. An uncle is under no obligation, ordinarily, to provide for his nephews either when living or by his will. (Estate of McDevitt, 95 Cal. 17.)

Instructions as to natural rights of heirs. See post, X, 9, g.

Unnatural bequest as evidence of insanity. See post, VII, 3.

3. Want of Testamentary Capacity.

57. An allegation by the contestant of a will that the mind of the decedent was weak, debilitated, and deranged to such an extent as to incapacitate him from making or undertaking a will or codicil tenders an issue as to "the competency of the decedent to make a last will and testament" within the meaning of section 1312 of the Code of Civil Procedure. (Estate of Kohler, 79 Cal. 313.)

58. It is sufficient to state, as ground for contest of will, that the deceased, at the time of making it, was not of sound and disposing mind; but when the grounds embrace conclusions of law, as menace, duress, or the like, the facts relied upon to show such conclusions must be pleaded. (Estate of Gharky, 57 Cal. 274.)
Cited 59 Cal. 561; 67 Cal. 446; 77 Cal. 481.

59. Capricious and arbitrary likes and dislikes are not evidences of insanity, nor does evidence that a testatrix was a spiritualist constitute any proof that she was insane, especially where it does not appear that any views she may have had on the subject of spiritualism had anything to do with the making of her will. (Estate of Spencer, 96 Cal. 448.)
Cited 99 Cal. 670.

60. Upon the trial of a contest of a will, which is determined upon an issue as to the testamentary capacity of the deceased, it is not error to admit the opinion of a witness as to the mental sanity of the deceased, when there is considerable evidence to the point of his intimacy, although the showing of intimacy may not be very strong. The determination of the question of intimacy, where such evidence is admitted, is in the discretion of the court. But there is a distinction between the admission and the rejection of such evidence, and it is error for the court to refuse to allow the opinion of the witness as to the mental sanity of the deceased to be given, when the showing of intimacy is sufficient. (Estate of Carpenter, 79 Cal. 382.)

61. Subdivision 10 of section 1870 of the

Code of Civil Procedure, which makes competent "the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given," excludes such evidence by others than intimate acquaintances, who are, by unreserved intercourse, familiar with the varying moods and temperaments of the person whose soundness is questioned; but the statutory rule is necessarily more or less indefinite, and a large discretion must be conceded to the trial court, and if the conclusion reached is one that can be reasonably entertained consistently with the idea of intimacy of acquaintance, it will not be reviewed by the appellate court. (Estate of Carpenter, 94 Cal. 406.)

62. The capacity of a testator to make a will involves a question of law as well as of fact, and is for the jury to determine, under instructions from the court; and the opinion of a witness as to such capacity is not admissible in evidence upon the hearing before a jury of a petition to annul the probate of a will on the ground of the alleged incompetency of the testator. (Estate of Taylor, 92 Cal. 564.)

63. It is competent for a witness to give his opinion as to the mental soundness of a testator, in connection with the facts upon which the opinion is based. (Estate of Taylor, 92 Cal. 564.)

64. Where the only evidence as to the declarations of the testator about his sister is to the effect that "if he knew where his sister was he would go and see her and visit her," a hypothetical question to a medical expert on the subject of mental sanity, in which it is assumed that he referred to a sister whom he knew to have been dead nearly thirty years, rather than to his living sister, should be disallowed. (Estate of Carpenter, 94 Cal. 406.)

65. In proceedings to revoke the probate of a will on the ground of the mental incapacity of the testatrix at the time of its alleged execution, where a physician who had attended the testatrix for a long time prior to the making of the will testified that the winter before the will was executed, and while he was her attending physician, she was in litigation with her sons respecting property which she had conveyed to them, and that he acted as her agent during that litigation, and that during that time he saw no evidence of failing mind or memory, and in his opinion both were good, and that she was competent to make a will, it is error for the court to sustain an objection to questions asked the witness, upon cross-examination, as to whether he had not asked another person to testify, in the action between the mother and sons, that she was not in her right mind, and had not said to that person that she was not in her right mind, and had not himself intended so to testify in that action. (Wixom v. Goodcell, 90 Cal. 622.)

66. The declarations of a testator, while of unsound mind, to the effect that he was of unsound mind, and under undue influence at the time of the execution of a will, does not prove or tend to prove the truth of the matters declared by him. (Estate of Lang, 65 Cal. 19.)

67. It being claimed that the will was invalid by reason of the insanity of the testator at the time of its execution, evidence was admitted as to his sanity at other times during the course of a progressive disease supposed to have affected his mind. Held, that the evidence was properly admitted. (*Estate of Dalrymple*, 67 Cal. 444.)

68. In passing upon the mental condition of a testator family differences should not be considered by the jury, except as they may bear upon the testator's mental capacity at the time of the execution of the will. (*Estate of Lang*, 65 Cal. 19.)

69. An instruction stating, in effect, that if the testator was mistaken in his belief that his relatives had mistreated him, and therefore made no provisions for them, he was of unsound mind, is erroneous. The fact of such mistaken belief does not, as matter of law, amount to an insane delusion. (*Estate of Carpenter*, 94 Cal. 406.)

70. It is error, upon the trial of a contest of a will, to refuse to allow a witness to testify whether or not there had been any change in the mental condition or capacity of the deceased, provided the witness was asked for facts about the change, and not for a conclusion. A marked change in a man's habits of thought is strong evidence of mental unsoundness, and the absence of such change is evidence of the contrary. (*Estate of Carpenter*, 79 Cal. 382.)

71. An instruction that if the jury find that the testator's feelings toward his relatives had undergone a radical change they should inquire whether there was good reason for the change, but not limiting the inquiry to whether it was caused by an insane delusion, is erroneous. People may hate their relatives for bad reasons, and yet not be deprived of testamentary power. (*Estate of Carpenter*, 94 Cal. 406.)

72. Where unsoundness of mind is relied on to defeat a will the question of drunkenness, being mere evidence, should not be submitted as a special issue to the jury. (*Estate of Gharky*, 57 Cal. 274.)
Cited 67 Cal. 445, 446.

73. Upon the trial of an issue as to the mental competency of a testator it is for the jury to say whether the will of a bachelor giving his property to the children of his business partner, instead of to his brothers and their children in the eastern states, was unnatural; and an instruction characterizing such will as unnatural is improper and prejudicial. (*Estate of Carpenter*, 79 Cal. 382.)

74. A special verdict showing that the deceased, at the time of making the will, was of unsound mind, and that he failed to make provision for the contestants by reason of an insane delusion, is sufficient to sustain an order vacating the probate of the will, and where there is some evidence tending to support the verdict upon these issues only errors of law in trying them can be considered upon appeal. (*Estate of Carpenter*, 94 Cal. 406.)

75. In a proceeding for the revocation of the probate of a will, on the ground that at

the time of its execution the testator was of unsound mind, the admission in evidence on behalf of the contestant of a part of the great register of the county, for the purpose of showing that the testator was not of the age as stated in the will, is a prejudicial error warranting a new trial. (*Estate of Crozier*, 74 Cal. 180.)

Evidence as to amount and condition of estate, admissibility of. See post, 91.

Revocation of will by one of unsound mind. See post, XII.

Testimony of attending physician as to testator's sanity. See *Insanity*, II, 4.

Mental capacity, opinion of witness, error in admitting, presumptions. See *Appeals*, 2764.

Exclusion of testimony of physician as to sanity. See *Evidence*, 12.

Judicial determination of insanity, effect on capacity to make will. See *Insanity*, 83.

4. *Fraud or Undue Influence.*

76. Where a will, devising the bulk of the estate of the testator to the children of his copartner, who were upon intimate and friendly relations with the testator, who had declared his intention to make some of them the objects of his bounty, is contested by relatives living in another state, who were not provided for by the will, evidence that the father of the children stated to a witness that the testator had said he had been badly treated by his relatives, and would not give them any part of his property, without proof of the communication of the statement to the testator, does not prove that he fraudulently started or circulated the report, or suggested it to the disordered fancy of the testator, or show undue influence exercised by him over the mind of the testator, it appearing that some of the testator's witnesses testified to similar assertions by the testator which antedated the interview with the father of the devisees. (*Estate of Carpenter*, 94 Cal. 406.)

77. The support of the family of the copartner by the partnership of which the testator was a member, with his presumed knowledge and consent, would not constitute fraud, and, if he were actually defrauded thereby, would not tend to induce a will in favor of the children of the copartner. (*Estate of Carpenter*, 94 Cal. 406.)

78. Where the suppression, by the copartner, of the letters of the testator from his relatives is not one of the charges specifically averred, and there is no proof that he received or suppressed them, beyond a suspicion that he might have done so, under the evidence of one of the testator's brothers as to the sending of certain letters which were not returned from the dead-letter office or found among the testator's effects, such evidence does not prove fraud exercised by the copartner in the procuring of a will in favor of his children. (*Estate of Carpenter*, 94 Cal. 406.)

Jurisdiction of equity to set aside will for fraud. See post, X, 9, c.

79. Undue influence by any person is ground for setting aside a will. It is not necessary that it should be by one who is

benefited by the will. (Estate of Cahill, 74 Cal. 52.)

80. The provisions of section 1575 of the Civil Code apply to undue influence generally, and are applicable to wills as well as to contracts. The same is true of the provisions of section 1572 of the same code, relative to fraud. (Estate of Kohler, 79 Cal. 313.)

81. General influence, not brought to bear directly upon the testamentary act, however strong or controlling, is not undue influence, such as will afford ground for the setting aside of a will of a person of sound mind. There must be evidence, either direct or circumstantial, that pressure was brought to bear directly upon the testamentary act, and there is no presumption against the will, except in cases where the beneficiaries, or parties instrumental in having the will executed, sustain a confidential relation to the testator, or where the testator is weak, physically and mentally, and those having exclusive access to him have procured an unnatural will. (Estate of McDevitt, 95 Cal. 17.)

82. A contest of a will on the ground of undue influence, which alleges acts of undue influence, and importunity continued for a long time prior to the making of the will, sufficiently connects the alleged undue influence with the testamentary act, by alleging that at the date of the will, and while in an enfeebled condition of mind and body, and unable to resist the importunities of one of the residuary legatees, deceased made his mark to said pretended will. (Estate of McDevitt, 95 Cal. 17.)

83. The principal beneficiary under a will was the partner of the testator, at the time of the testator's death and for many years previous. Held, that this did not per se raise a presumption of undue influence. (Estate of Brooks, 54 Cal. 471.)

84. The fact that his copartner had more influence than the testator in the management of the partnership business would not tend to prove that he influenced the testamentary disposition. (Estate of Carpenter, 94 Cal. 406.)

85. While circumstantial evidence may be sufficient to prove undue influence upon the testamentary act, it must do more than raise a suspicion, and has the force of proof only when the circumstances proved are inconsistent with the claim that the will was the spontaneous act of the testator. It does not amount to proof if the circumstances are equally consistent with the theory of undue influence and with the hypothesis that the will was the free act of an intelligent mind, especially if other circumstances are wholly inconsistent with the hypothesis of undue influence. (Estate of McDevitt, 95 Cal. 17.)

86. If the probating of a will is contested on the ground that its execution was obtained by undue influence, evidence that the testator was intoxicated when it was executed is admissible in connection with other circumstances to show "undue influence"; and, if such testimony is introduced, the court cannot take away from the jury the right to find

on the issue. (Estate of Cunningham, 52 Cal. 465.)

87. In a contest over the probate of a will, upon the ground of undue influence upon the part of the devisee in procuring the execution of the will, the admission of evidence upon the part of the contestant to prove that the devisee, who was the wife of the decedent, at a time prior to her marriage to him, when he was not divorced from his first wife, accompanied the decedent upon a camping excursion and was introduced as his wife, is prejudicial error, where it appears that the will was executed nine years after such event and three years subsequent to his marriage to the devisee, and the isolated event proved does not appear to be connected with the execution of the will by any chain of subsequent events. (In re Flint, 100 Cal. 391.)

88. Expressions of the deceased as to his testamentary intentions, though admissible to prove a friendly feeling toward the persons in regard to whom they are used, yet do not tend to prove that a will conforming to such expressions was procured through undue influence, unless made so near the time of the execution of the will as to constitute a part of the *res gestæ*; and where the testator is, beyond question, of sound mind, they are entitled to no weight at all in the absence of proof of influence as to the very testamentary act. (Estate of McDevitt, 95 Cal. 17.)

89. Upon the contest of a will, by one of two children of the testator who had been excluded from its provisions, the contestant introduced evidence tending to show that the testator executed the will under undue influence, and a witness of proponent in reply testified that by the direction of the testator he made a draft of his will, and that, upon reading it to him, the testator objected to the names of the contestant and the other excluded child, and said he would not have them in, which testimony was, upon the motion of contestant, stricken out. Held, that the declarations of the testator, if made, constituted part of the *res gestæ*, and that the court erred in excluding them. (Nelson v. McClanahan, 55 Cal. 306.) Cited 81 Cal. 243.

90. The testator, soon after the execution of the will, told the proponent that he would some day tell him what he wished to have him do with some of his property, and, before his death, directed him to pay certain persons and charitable institutions certain sums. Held, that while, in a proper case, the courts would compel a devisee to carry out such directions, the fact of such directions having been given and assented to was not evidence that the execution of the will was procured by undue influence. (Estate of Brooks, 54 Cal. 471.)

Distinguished 79 Cal. 427.

91. Evidence respecting the amount and condition of the estate is admissible in favor of the supporters of a will, in a contest over its probate, upon issues as to undue influence and mental unsoundness of the testator, for the purposes of showing a fair and reasonable allotment of his property to the parties entitled to his bounty, as indicating mental

soundness, and a mind entirely free from all improper influences. (In re Flint, 100 Cal. 391.)

92. Where the evidence is insufficient, as matter of law, to justify a verdict or decision that a will was executed under undue influence, it is ground for a new trial. The evidence in this case reviewed, and held insufficient in law to sustain such a verdict. (Estate of McDevitt, 95 Cal. 17.)

Verdict on question of undue influence, certainty of. See Verdict, III.

VIII. When Take Effect.

93. Under the Mexican law a will takes effect as a conveyance upon the death of the testator. (Tevis v. Pitcher, 10 Cal. 465.)

94. A will takes effect on proof of its execution, in the absence of a statute requiring it to be probated. (Castro v. Castro, 6 Cal. 158.)

95. Will only becomes executed upon death of the testator. (Grimes' Estate v. Norris, 6 Cal. 621.)

Execution of olographic will before the adoption of the Civil Code. See ante, V.

IX. Wills as Evidence.

96. A will is not a conveyance within provisions of act concerning conveyances, which can be read in evidence upon the certificate of proof, or of acknowledgment by a notary. (Carpentier v. Gardiner, 29 Cal. 160.)

Evidence, testamentary instruments as. See Evidence, III, 4.

Declarations in as evidence. See Evidence, VI, 1, g.

Invalid will, declaring that deed was upon trust, effect of. See Deeds, 368.

Evidence, will is not without proof of probate. See Jurisdiction, 123.

Estoppel by statements in. See Estoppel, V, 2.

X. Probate of Wills.

1. Wills Executed Before Passage of Statute; Herein of Wills Under Mexican Law.

97. The several statutes of this state relating to wills do not apply to wills executed previous to their passage. There is no provision for the probate of such wills, and they must rest for their validity upon the laws under which they were made. (Tevis v. Pitcher, 10 Cal. 465.)

Cited 24 Cal. 123; 33 Cal. 423; 37 Cal. 89, 91; 66 Cal. 108, 112; distinguished 28 Cal. 505.

98. The will of a testator, dying before the organization of the state government, did not require to be probated under the then existing laws. (Grimes' Estate v. Norris, 6 Cal. 621.)

Cited 10 Cal. 477; 12 Cal. 579; 24 Cal. 123; 28 Cal. 505; 33 Cal. 422, 423; 37 Cal. 89, 91; 66 Cal. 108, 112.

99. Our Statute of Wills not only fails to require the probate of wills executed before its passage, but it must, from its terms, be concluded that the legislature actually intended to exclude such wills from the operation of the statute altogether, leaving their validity to depend upon the laws under which they were

made, and not disturbing rights which had grown up under the former system. (Grimes' Estate v. Norris, 6 Cal. 621.)

100. A will only becomes executed upon death of the testator, and, therefore, this construction does not affect wills made before the passage of the statute, where the testator did not die till after its passage. (Grimes' Estate v. Norris, 6 Cal. 621.)

101. It seems that there never was a probate court in California prior to the organization of this state, and that probate of a will was unknown. (Castro v. Castro, 6 Cal. 158.)

Cited 6 Cal. 625.

102. Under the Mexican law, as enforced in California, such a proceeding as the probate of an open will was unknown. The will took effect as a conveyance upon the death of the testator. It was valid if made in the presence of three witnesses; and, by the custom which prevailed in California and obtained the force of positive law, two witnesses were sufficient. (Tevis v. Pitcher, 10 Cal. 465.)

Cited 37 Cal. 89.

103. Proof of such custom in force in California previous to the formation of the state government is admissible. (Tevis v. Pitcher, 10 Cal. 465.)

Cited 31 Cal. 522.

2. Jurisdiction Over.

Probate courts have exclusive jurisdiction over proof of. See Jurisdiction, 123.

104. Jurisdiction in proceeding to probate a will depends upon certain facts which the court, on reviewing the will, must inquire into and determine; and the mere possession of the will vests the court with all the authority necessary for that purpose. (Matter of Estate of Howard, 22 Cal. 395.)

Jurisdiction over lost or destroyed wills. See post, X, 5.

Presumption as to, from recitals in decree admitting will to probate. See post, 113.

3. Petition for, Citation, Notice.

105. No petition is required as the foundation of a proceeding to probate a will; a petition is only necessary under the statute where the executor named therein accepts the trust, and then not for jurisdictional purposes. (Matter of Estate of Howard, 22 Cal. 395.)

106. Under section 1300 of the Code of Civil Procedure it is not essential that the petition for the probate of a will should state whether it is an olographic or other species of will, nor does any defect of form or in the statement of the jurisdictional facts actually existing invalidate the probate. (Estate of Learned, 70 Cal. 140.)

Petition on probate of lost or destroyed will. See post, X, 5.

107. Citation to heirs to show cause against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. (Abila v. Padilla, 14 Cal. 103.)

108. If one only of two or more executors

named in a will petitions for its admission to probate, and no citation is served on the others named as executors, and it does not appear that such others are residents of the county where the petition is filed and therefore are required to be cited, it will not be assumed, for the purpose of invalidating the proceedings admitting the will to probate, that such others were residents of the county where the petition was filed. (*McCrea v. Haraszthy*, 51 Cal. 146.)

109. The question not decided whether, on a petition by one of several named as executors in a will, for its admission to probate, the failure to cite the others, where they reside in the county, leaves the court without jurisdiction to probate it. (*McCrea v. Haraszthy*, 51 Cal. 146.)

110. The probate court cannot hear the petition for the probate of a will without proof of service of notice upon the heirs, as required by the Code of Civil Procedure. (*Estate of Cobb*, 49 Cal. 599.)

111. Notice of an application to admit to probate an alleged will under section 13, or a copy of such will, with an authenticated probate thereof, under section 28, of the Probate Law, is not "a summons, notice, or advertisement" required to be published in the "state paper" under the act of March 29, 1870. (*Estate of Daniel Miller*, 39 Cal. 550.)

112. If the statute fixes the number of days that a notice of the time of application to the probate court for probating a will and issuing letters testamentary shall be published, the order directing the publication of such notice need not direct how often the notice shall be published, if it requires the publication to be made according to the statute. (*McCrea v. Haraszthy*, 51 Cal. 146.)

113. Recitals in an order admitting a will to probate and appointing an executor, that due proof was made to the satisfaction of the court "that notice has been given of the time appointed for proving said will and for hearing said petition, and that citations have been duly issued and served, as required by the previous order of this court, and it appearing to this court that notice has been given according to law to all parties interested," etc., are sufficient, in the absence of any other record evidence of an order that a citation issue to the heirs residing in the county, as required by section 14 of the Probate Act of 1851, or of the issuance and service of such citation, and in the absence of any evidence that the order and citations were insufficient, to warrant the presumption that such order had been regularly made, and that the citations had been duly issued and served, and that the probate court acquired jurisdiction to probate the will and to issue letters testamentary to the executor. (*Moore v. Earl*, 91 Cal. 632.)

Failure to admit will on day fixed in notice. See post, X, 8.

Presumption as to existence of petition for probate not on file. See Presumptions, 25.

Petition for probate, sufficiency of answer, objection, when to be taken. See Appeals, 2336.

4. Appointing Attorney for Minor Heirs.

114. The appointment by the probate court of an attorney to represent minor heirs who reside in the county and were not served with citations to appear, and the appearance of the attorney for such minor heirs, are nullities, and do not give the court jurisdiction. (*Randolph v. Bayue*, 44 Cal. 366.)

115. Provisions in relation to guardians ad litem for minor defendants, in the chapter on parties to civil actions, do not apply to probate proceedings. The special proceedings as to attorneys for minors govern the matter. (*Carpenter v. Superior Court*, 75 Cal. 596.)

116. An attorney for minor defendants, appointed by the probate judge, after service of citation, to represent the minor upon a contest as to the validity of a will, is, to all intents and purposes, a guardian ad litem, although not called by that name. (*Carpenter v. Superior Court*, 75 Cal. 596.)

5. Lost or Destroyed Wills, Probate of.

117. Jurisdiction of probate court to establish will is exclusive, even though the will has been lost or destroyed, or has been fraudulently suppressed; and a court of equity has no jurisdiction to grant relief in such a case, either directly or as incident to jurisdiction over other matters, even though the relief is sought by an alleged devisee against the spoliator, and it appears that the latter is one of the two witnesses whose testimony would be necessary to prove the will under section 1339 of the Code of Civil Procedure. (*McDaniel v. Pattison*, 98 Cal. 86.)

118. In an application for the probate of a lost will, if the will was lost or destroyed after the death of the testator it must be alleged and proved to have been in existence at the time of the death; if it was lost or destroyed before death it must be alleged and proved to have been fraudulently destroyed during the lifetime of the testator. (*Estate of Kidder*, 57 Cal. 282.)

119. On an application to have a lost will admitted to probate, under section 1339 of the Code of Civil Procedure, the provisions of the will must be clearly and distinctly proved by at least two credible witnesses. (*Estate of Kidder*, 66 Cal. 487.)

120. The petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator must specifically state the facts and circumstances constituting the fraud. Whether there was a fraudulent destruction is a question of fact to be proved. (*Estate of Kidder*, 66 Cal. 487.)

121. The evidence showed that at the time of the destruction of the will the testatrix was very ill in bed, and in a semi-comatose condition; her attendant handed her the will, and immediately afterward she saw it in the fire, but made no attempt to rescue it. Whether the will was thrown into the fire by the testatrix, or accidentally fell there, was not shown. Held, that the evidence did not prove a fraudulent destruction of the will by the attendant. (*Estate of Kidder*, 66 Cal. 487.)

6. Uncertainty of Bequest. Effect of; Questions of Construction of Will.

122. A will, otherwise effective, should not be refused probate because certain bequests contained therein are void for uncertainty. (Estate of Shillaber, 74 Cal. 144.) Distinguished 79 Cal. 427.

123. If an instrument is offered for probate as a will, which is testamentary in its character, questions concerning the construction to be placed upon it cannot be raised for the purpose of preventing it from being admitted to probate. Such questions cannot be considered until after it is probated. (Estate of Cobb, 49 Cal. 598.) Cited 11 Mont. 108.

7. Evidence and Jury Trial.

124. It is necessary, before court can admit will to probate, to require proof of all the acts requisite to constitute the execution of a valid will; but the proof of the acts, as to which the contest is not addressed, will be heard and passed upon by the court alone, and is not to be submitted to or passed upon by the jury. Held, accordingly, that the judgment was sufficiently supported by the finding of the court, recited therein, that the will was executed in all respects according to law. (Estate of Cartery, 56 Cal. 470.) Cited 57 Cal. 279; 70 Cal. 142.

125. Subscribing witness who has no recollection of the execution of an instrument, but who recognizes the signatures, may be asked whether, taking into consideration his recognition of the signatures, it was his belief that the paper was executed as therein stated. (Estate of Gharky, 57 Cal. 274.)

Evidence of execution of will. See ante, 39.

Evidence on question as to whether an instrument is a will. See ante, I.

Probate, calling but one witness, objection first raised on appeal. See Appeals, XI, 14, j.

8. Admission to Probate and Proceedings on; Validity and Conclusiveness; Setting Aside.

126. Failure to make order admitting will to probate on day specified in notice, or to fix, by adjournment of the proceedings, a subsequent day for the order, is a mere irregularity, and does not affect the jurisdiction. (Matter of Will of Warfield, 22 Cal. 51.)

127. It is not necessary to validity of probate that formal judgment or decree that the will is admitted to probate or is proved should be entered; a direct statement that the will is proved, although entered in the minutes as part of and preliminary to an order directing letters to issue, is sufficient. (Matter of Will of Warfield, 22 Cal. 51.)

128. It is immaterial whether the stamp required on probate of wills is affixed to the will upon its being admitted to probate, or to the certificate of proof thereof attached, or to the letters testamentary with the will annexed. (Satterlee v. Bliss, 36 Cal. 489.)

Stamp attached on probate, value cannot be questioned collaterally. See Judgments, 730.

129. Omission by probate court of San Francisco in its proceedings in probating wills previous to 1855, to attach to the will and file with it for record the certificate mentioned in section 24 of the act concerning estates of deceased persons, is not a fatal defect, invalidating the probates of that period. (Matter of Will of Warfield, 22 Cal. 51.)

130. The record of a probate court admitting a will to probate is admissible as evidence to show the death of the testator, if it contains all the necessary recitals to show that the court acquired jurisdiction. If, however, it is made to appear that there were minor heirs living in the county who were not served with citations to appear, the court does not acquire jurisdiction and the record does not prove the death. (Randolph v. Baynet 44 Cal. 366.)

131. The record of a probate court, consisting of a last will and testament, testimony of the subscribing witnesses, petition of the executor, and order admitting will to probate, are admissible in evidence for the purpose of proving the will, even if no letters have issued. (Larco v. Casaneuava, 30 Cal. 560.)

Recitals in decree as to service of citations and notice. See ante, 113.

132. A will, having been once admitted to probate, must, so long as the probate stands, be recognized and admitted in all courts to be valid. (State v. McGlynn, 20 Cal. 233.)

133. A decree of the probate court, admitting a will to probate, not reversed by the appellate court, is final and conclusive, and is not liable to be vacated or questioned by any other court, either incidentally or by a direct proceeding for the purpose of impeaching it. (State v. McGlynn, 20 Cal. 233.) Cited 72 Cal. 594; 86 Cal. 102; 87 Cal. 147; 1 Ariz. 220; 11 Mont. 206.

134. The probate of a will, until revoked, is conclusive of its validity in all collateral proceedings; and its rejection by the probate court is also conclusive of its invalidity. (Castro v. Richardson, 18 Cal. 478.) Cited 20 Cal. 273; 11 Mont. 106.

135. A judgment admitting a will to probate, made upon a petition stating all the necessary facts, and after the publication of due and legal notice of the application or probate, is conclusive of the validity of the will when called in question in any collateral proceeding or action. (Rogers v. King, 22 Cal. 71.) Cited 86 Cal. 102; 87 Cal. 148.

136. Where the probate court acquires jurisdiction to probate a will by the presentation to it of a proper petition for that purpose, and the publication of notice of time of proving the will, and afterward in such proceeding admits the will to probate, its determination is final, except upon a direct proceeding by appeal or otherwise to reverse it, and cannot be questioned collaterally. (Matter of Will of Warfield, 22 Cal. 51.) Cited 22 Cal. 73; 87 Cal. 178; distinguished 33 Cal. 53.

137. The probating of a will is not a proceeding to decide a contest between parties, but a proceeding in rem, to determine the

character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment; and therefore the decree of probate is conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts. (State v. McGlynn, 20 Cal. 233.)

138. The danger which might be apprehended from holding as conclusive, upon so important a matter as the probate of a will, the decree of a single court, and that not of the highest jurisdiction, is guarded against by the right of appeal to the supreme court, and by the statutory provision allowing the decision to be opened and the validity of the will to be again contested in the same court by any one interested, within one year from the admission to probate. (State v. McGlynn, 20 Cal. 233.)

139. Whether the exception in regard to probate decrees be found in good reason or otherwise, it has become too firmly established to be disregarded; and at the present day it would not be a greater assumption to deny the general rule that courts of chancery may set aside judgments procured by fraud, than to deny the exception to that rule in the case of probate decrees. (State v. McGlynn, 20 Cal. 233.)

140. In the United States the courts have uniformly held that the principles established in England apply and govern the cases arising under the probate laws of this country, and that whenever, in any state, the power to probate a will is given to a probate or surrogate's court, the decree of such court cannot be set aside or vacated by the court of chancery on the ground that it was obtained by fraud, or on any other ground. (State v. McGlynn, 20 Cal. 233.)

Judgment refusing probate for mental unsoundness, conclusiveness. See Judgments, 845.

Probate, appeal from refusal of, judgment on. See Appeals, 3077.

Foreign probate of will, conclusiveness of. See post, XIV.

Validity of admission of will to probate, presumption as to residence of executors. See ante, 108, 113.

141. An order of a probate court admitting a will to probate, there being no contest of the will, is not a conclusive determination of its validity as against minor heirs. (Samson v. Samson, 64 Cal. 327.) Cited 64 Cal. 331.

142. Parties represented upon contest of will by attorney appointed by the court are not parties to the contest so as to be barred by the adjudication; but may (under section 1327 of the Code of Civil Procedure), within a year after the probate, contest the probate or validity of the will; and, at the hearing, the court (under section 1829 of the Code of Civil Procedure) must proceed to try the issues of fact joined, in the same manner as in the original contest of the will. (Estate of Cunningham, 54 Cal. 556.)

143. A proceeding by petition to the probate

court to obtain an order that a former probate of a will therein be adjudged void, on the ground of want of jurisdiction, and that the will be admitted anew to probate, is not a direct proceeding to set aside the former probate, but a collateral proceeding, in which such former probate can only be attacked for want of jurisdiction, and not for irregularity. (Matter of Will of Warfield, 22 Cal. 51.)

144. A petition to revoke the probate of a will, if the parties are under no disability, must be filed within a year after the entry of the decree admitting the will to probate. The clerk of the court is the only person with whom the petition can be filed, and it must be delivered to him before the year expires. Presenting it to the judge out of court for the purpose of having a citation issued upon it is not enough. It must be filed with the clerk, and, if not so filed prior to the expiration of the year, the decree becomes conclusive and absolute. An order subsequently made by the court directing the clerk to file it as of a day within the year cannot be sustained. (Estate of Sbarboro, 63 Cal. 5.) Cited 70 Cal. 149.

145. Under section 1333 of the Code of Civil Procedure, a party interested in the estate of a testator, who was under no disability at the time of the admission of the will to probate, cannot contest its validity, or the validity of any of its items, in the proceedings for the settlement of the estate, after the expiration of one year from the time the will was probated. (Estate of Maxwell, 74 Cal. 384.)

146. In a proceeding commenced by the state in a district court, for the purpose of setting aside a decree of the probate court establishing the validity of a will, it is not important to decide whether the period of one year fixed as the time within which persons interested may appear and contest the probate is a limitation which runs against the state, as the only effect of holding that it does not, would be to authorize the state to institute such proceedings in the probate court, but not to confer any new jurisdiction upon the district court. (State v. McGlynn, 20 Cal. 233.) Cited 74 Cal. 386.

147. In a proceeding to set aside the probate of a will and to revoke the letters testamentary issued to the person named therein as executor, the executor is a necessary party, and as such has a right to defend and support the will, and it is his duty to do so under his trust. If the court denies the executor such right, a judgment in favor of the contestant, annulling the will, will be reversed. (Estate of Whetton, 98 Cal. 203.)

148. In a proceeding to set aside the probate of a will, where only part of the material issues made by the pleadings are submitted to a jury, the court should, if requested, hear testimony and make findings as to the remaining issues. (Sanders v. Simcich, 65 Cal. 50.)

149. On a contest for the revocation of the probate of a will, where a verdict is rendered determining its invalidity, a judgment should be entered entirely annulling the probate, and revoking the powers of the executors; and a

judgment entered in pursuance of a stipulation of the parties to the contest, whereby the probate is annulled merely as to the contestant, and to the extent to which she is interested in the estate, is void. (*Estate of Freud*, 73 Cal. 555.)

Jurisdiction of equity to set aside wills for fraud. See post, X, 9, c.

Annuling decree admitting will to probate because of insanity. See ante, VII, 3.

Verdict, judgment, and findings on contest of probate of will. See post, X, 9, h.

Order admitting will to probate, certiorari to review. See *Certiorari*, 68.

Order after refusal to admit will to probate is not appealable. See *Appeals*, 144.

Appealability of orders and decrees in probate proceedings. See *Appeals*, II, 5.

Appeal, who may appeal in probate proceedings. See *Appeals*, III, 4.

Appeal, time within which to be taken. See *Appeals*, IV, 4.

Appeal, orders in probate proceedings, how presented on. See *Appeals*, VII, 28.

Appeal, effect of on order revoking probate. See *Appeals*, VIII, 8.

9. Contest of.

a. Nature of; Who may Contest; Time for; Duty of Executors.

150. A contest arising upon the probate of a will is a civil action within the meaning of subdivision 4 of section 1881 of the Code of Civil Procedure. (*In re Flint*, 100 Cal. 391.)

151. Taking of a legacy by wife under will of husband will not prevent her from contesting the validity of the will, so far as it disposes of the half interest in the common property to others. (*Beard v. Knox*, 5 Cal. 252.)

Cited 77 Cal. 315.

Proceedings by minor to contest, appointment of guardian ad litem. See *Infancy*, 70.

Within what time contest of probate to be filed. See ante, X, 8.

Acquiescence in will as a bar to a contest. See post, XI, 19.

Contesting probate by public administrator. See *Executors and Administrators*, XV, 4.

Contest of administration, duty of executor on. See *Executors and Administrators*, VI, 3, k.

b. Contestants are Plaintiffs.

152. Contestants of probate of will are plaintiffs in the matter, and it devolves upon them to allege all facts necessary to sustain a claim that the will was not properly signed and witnessed, and a statement in the language of the statute, or of the evidence of the facts, is not sufficient. Allegations that the will was procured to be signed and witnessed under a mistaken belief of the testator as to its provisions, and while he was under the absolute control and dominion of his wife, do not present an issue as to the signature and attestation of the will by two witnesses at the request and in the presence of the testator, while he was mentally capable of recognizing the act and actually conscious of the transaction. (*Estate of Burrell*, 77 Cal. 479.)

153. In a contest as to the probate of a will,

the contestants are plaintiffs, and have the affirmative of all the issues raised by the contest. (*Estate of Dalrymple*, 67 Cal. 444.) Cited 77 Cal. 481.

c. Jurisdiction.

154. In England, it is well settled by a long series of decisions that the comprehensive jurisdiction exercised by courts of chancery in setting aside instruments obtained by fraud does not extend to wills, and that those courts have no power to determine the validity of a will of either personal or real property. (*State v. McGlynn*, 20 Cal. 233.)

155. Courts of chancery in England, in their efforts to defeat fraudulent practices, have, in some cases, deprived parties of the benefit of the fraudulent will by decreeing that such parties should hold the property under their will in trust for the parties who would have been entitled to it if such will had not been probated, but in all such cases they have disclaimed any power to set aside the will or the probate. (*State v. McGlynn*, 20 Cal. 233.)

d. Stating Grounds of Opposition; Answer to; Striking Out Opposition.

156. On a contest to the probate of a will, the right of the contestant to object to the probate is limited to such matters as are presented in the written grounds of opposition. (*Estate of Kile*, 72 Cal. 131.) Cited 11 Mont. 107.

157. A decree having been entered, admitting a will to probate, a new trial was granted on the ground that the findings were insufficient to support the decree, in this, that there was no finding that the deceased declared the document to be his will; but this objection was not covered by the grounds of opposition to the probate of the will filed by the contestant. Held, that as the contestant did not address his contest to this point, an issue upon it was properly omitted by the court in framing the issues for the jury, and that it was error to grant a new trial on the ground stated. (*Estate of Cartery*, 56 Cal. 470.)

Ground of contest not included in the issues. See post, X, 9, e.

158. Where the written opposition to the petition for the admission of a will to probate simply controverts the material averments contained in the petition, a failure on the part of the proponent to file an answer thereto, as provided by section 1312 of the Code of Civil Procedure, is not an admission of the allegations in the written opposition that the will was not made, signed, or published by the deceased; and a finding on such a contest that the will was properly executed is not a decision "against law," within the meaning of section 656 of the Code of Civil Procedure, for which a new trial may be had. (*Estate of Doyle*, 73 Cal. 564.)

Pleadings on contest of will. See ante, X, 9, b.

Allegations as to want of testamentary capacity. See ante, VII, 3.

Allegations as to undue influence. See ante, VII, 4.

159. If the written opposition of the contest of a will is in proper form, and sets forth

facts which, if true, establish the invalidity of the asserted will, and an admission of service thereof by the attorneys of the executor who petitioned for the probate of the will is indorsed thereon, it is error for the court to refuse to consider proofs of service of the written opposition upon other parties, upon the ground that they were filed too late, and to strike the written opposition from the files, and to proceed to probate the will, and issue letters testamentary to the executor named therein, without a hearing of the matters alleged in the opposition. (In re Stewart, 100 Cal. 246.)

160. There being a full showing as against the executor, at least, that the will was invalid, and that he had no rights in the premises, the court should not have refused to give the contestant an opportunity to prove the averments of the written opposition, although there was not at the time appointed for the hearing sufficient proofs of service on the other parties, and the court should have ordered that contestants furnish proper proof of service on other parties who were residents of the county interested in the estate, and that the latter should have proper time in which to demur or answer to the opposition as provided by the code. (In re Stewart, 100 Cal. 246.)

161. A subsequent order vacating the order striking out the opposition, and giving the contestant certain time to serve the same, is no answer to an appeal from the order admitting the will to probate, and appointing the executor, where the court refused to set aside that order. Contestant had a right to be heard before the will was probated and the executor appointed. (In re Stewart, 100 Cal. 246.)

Contest of probate, reservation of ruling on motion to amend petition. See Pleading and Practice, 654.

e. Trial of Issues on.

162. In a contest as to the probate of a will, where a jury was impaneled to try the issues, the contestants were not prejudiced by the action of the court in submitting to the jury certain issues proper in themselves, but amounting substantially to a repetition of others presented by them and allowed by the court, and on which the jury found against them. (Estate of Dalrymple, 67 Cal. 444.)

163. Where a question affecting the validity of the will is not included in the issues submitted to the jury, the court may proceed to determine it upon the evidence. (Estate of Dalrymple, 67 Cal. 444.)
Cited 11 Mont. 108.

164. Where the contestants to the probate of the will of T. raised as an issue in the probate court, among others, that T. was not of a sound and disposing mind at the time the will was made, which, being certified to the district court, in conformity with sections 20 and 294 of the Probate Act, for trial, was returned to the probate court, coupled with the evidence taken at the trial in the district court, but it appeared that the jury did not find upon the issue either way, whereupon the probate court, upon said evidence, assumed

to determine the issue against contestants, and admitted the will to probate, held, (1) that the probate court had no jurisdiction to try said issue; (2) that the probate court had no authority to determine the same upon evidence which had been taken at a trial in the district court; and (3) that said issue was material, and it was error to admit the will to probate without a lawful determination of the same. (Estate of Tomlinson, 35 Cal. 509.)

Jury trial. See ante, X, 7.

Submitting question of drunkenness on issue of insanity. See ante, 72.

Contest framing issues to district court, costs on. See Costs, 34.

f. Evidence.

165. In general, it would be more orderly for the court to confine the proofs (especially where a jury is sitting) to the points in controversy, and, after the jury has found upon such points, to hear proofs, addressed to the court alone, as to the uncontested acts; but a different course held not to be erroneous. (Estate of Cartery, 56 Cal. 470.)

166. Upon a contest of a will, the issue as to the validity of the will must be determined solely upon the evidence introduced at the trial; and the court cannot properly consider any facts not occurring at the trial, and which were stated for the first time in the argument of counsel. (Estate of Man Wo Chan, 87 Cal. 155.)

167. A nurse's record of the events transpiring at the sick bed of the decedent while she was present may be consulted to refresh her memory as a witness, but cannot be admitted in evidence independently. (In re Flint, 100 Cal. 391.)

168. Upon the trial of the contest of a will, a witness testified to some remarks made a few days before the execution of the will, by the proponent, who was also the principal beneficiary, as to the condition of the testator; and the court said: "That is not evidence. Declarations of the proponent before the date of the will . . . are not evidence in this case," to which the contestant excepted, but neither side moved to strike out the evidence. Held, (1) that this did not amount to a ruling to exclude the testimony, and (2) that the evidence was objectionable as hearsay. (Estate of Brooks, 54 Cal. 471.)

Contestants are plaintiffs and have affirmative of the issue. See ante, X, 9, b.

Evidence on petition to revoke probate. See ante, 148.

Fraud, evidence as to. See ante, VII, 4.

Undue influence, evidence on issue of. See ante, VII, 4.

Insanity, evidence of. See ante, VII, 3.

Presumption of law in absence of all proof. See ante, VII, 1.

Heir cannot waive privilege on contest of probate. See Privileged Communications, 37.

g. Instructions.

169. In a contest over the probate of a will, where the execution of the will is fully and clearly proven, and there is no evidence to the contrary, a charge to the jury that there

is no evidence tending to show that the will was not executed and attested according to law is not prejudicial error, even if it be construed as a charge upon a matter of fact. (*Estate of Spencer*, 96 Cal. 448.)

170. Where the court, in a contest over the probate of a will, instructed the jury as to the manner in which the estate of the decedent would have been succeeded to and distributed in the absence of a will, and that in determining whether the paper in question was intended by the decedent as his will they must take into consideration his mental and physical condition at the time the paper was written, who his relatives were and the claims they naturally had upon his bounty, any prior declarations which he may have made going to show his intentions as to the disposition of his property after death, and the circumstance, if it existed, that before the date of the paper he had formed in his mind a settled purpose to dispose of his property in a manner different from what the paper purported to do, and also, all of the testimony bearing upon the question, including the contents of the paper itself, the action of the court in striking out of an instruction asked by the contestant a clause that "as to the paper the rule of law is that where an instrument is susceptible of two interpretations, one in favor of natural rights, and the other against it, the interpretation favoring natural rights is to be adopted," and that if the testator had made no will, "the natural rights of his brothers and sisters, and of the children of any deceased brother or sister, would entitle them to a share of his estate," and in striking out part of another instruction that the proponent of the will must prove by a preponderance of evidence that the paper was intended as a will, and that in this connection the jury might consider certain specified testimony, is not prejudicially erroneous. (*Mitchell v. Donohue*, 100 Cal. 202.)

Instructions as to mental competency. See ante, VII, 3.

h. Verdict, Judgment, and Findings.

171. Under sections 1312 and 1314 of the Code of Civil Procedure, on a contest of the probate of a will, the jury must return a special verdict upon the issues submitted to them; and a general verdict in favor of the contestant, which is not supported by the findings on the special issues, is unauthorized, and a judgment entered thereon denying the probate may be set aside, on the motion of the proponent, within a reasonable time after its entry. (*Estate of Langan*, 74 Cal. 353.)

Cited 11 Mont. 108; distinguished 75 Cal. 598.

172. A decree annulling a will, upon an application made by a minor heir, operates upon the interest of the applicant only. It does not act in favor of those heirs who have lost their right to contest the will by lapse of time. (*Samson v. Samson*, 64 Cal. 327.)

173. A decree annulling a will, made after the distribution of the estate, upon the application of one of several heirs, does not render the decree of distribution void. It is valid and binding as to subsequent bona fide pur-

chasers from the distributee. (*Thompson v. Samson*, 64 Cal. 330.)

174. When the probate of a will has been annulled upon a contest initiated by an heir subsequent to the entry of a decree of distribution the heir may pursue the property in the hands of the distributee, but not in the hands of a purchaser in good faith and for value from the distributee prior to the revocation, and at a time when the proceedings were valid and binding. (*Thompson v. Samson*, 64 Cal. 330.)

175. Where the probate of a will is contested, and the court by whom the contest is tried finds against the contestants on all the issues raised by them, a further finding that the will is valid as an olographic will, although not necessary to sustain the judgment admitting it to probate as such, is not erroneous, notwithstanding no issue as to its validity as an olographic will was raised by the contest. (*Estate of Learned*, 70 Cal. 140.) Cited 11 Mont. 107.

176. In a contest of a probate of a will a negative finding on a special issue as to whether the instrument offered for probate had been declared by the testatrix to be her last will, and had been attested as required by law, is a finding of a mere conclusion of law. (*Estate of Langan*, 74 Cal. 353.)

Findings on petition to revoke. See ante, 148.

l. Counsel Fees or Costs.

177. Costs or counsel fees in probate proceeding cannot be allowed to counsel; if allowed at all, they must be awarded directly to the parties themselves. (*Henry v. Superior Court*, 93 Cal. 589.)

Costs. See Costs, 3, 4.

XI. Construction of Wills; Rights and Liabilities of Legatees and Devisees.

1. Statutes Governing.

178. A will made before present codes took effect is to be construed under the statutes in force at the time it was made. (*Estate of Pfuelb*, 48 Cal. 643.)

179. A will made in Texas, operating upon property there situated, must be interpreted by the law of that state. To that law reference must be had to determine the capacity of the testator, the extent of his power of disposition, and the conditions upon which the power of alienation vested in the guardian of his children, appointed by the will, is to be exercised. (*Norris v. Harris*, 15 Cal. 226.)

2. Jurisdiction to Construe Wills; Action to Construe.

Jurisdiction of district court to construe. See Jurisdiction, 79, et seq.

180. The superior court, as a court of equity, has power in proper cases to hear and determine questions relating to the rights and duties of executors and beneficiaries under wills which have been admitted to probate. (*Williams v. Williams*, 73 Cal. 99.) Cited 73 Cal. 562.

181. Conceding that the superior court has jurisdiction in a proper case of an action

brought to construe a will which has been duly admitted to probate, still it is not bound to entertain such an action, and should not do so except in a case where there is some special reason for seeking its interposition other than a mere desire to obtain the opinion of a court of equity as to the proper construction of the will. (*Siddall v. Harrison*, 73 Cal. 560.)

182. The act of the executor of will in petitioning the court for the construction of certain clauses therein, after the probate of the will and before the sale of the property, and to determine how the estate should be distributed, and what property should be sold to pay the bequests to the different orphan asylums, upon which the court refused to pass upon the question as to the power of the executor to sell the property, upon the ground that the proper time for acting thereon would be upon an application for distribution, and limited its judgment to matters other than those affecting the land sold by the executor, does not render the title to the lands sold by him under the will so uncertain as to absolve the purchaser from taking the same, or render it necessary for the court to refuse to confirm the sale. (*Estate of Pearsons*, 98 Cal. 603.)

3. Construction is Question for Court; Effect of Precedents.

183. The construction of a devise, like that of a contract in writing, is always a matter of law, and is therefore never to be submitted to a jury. (*Bruck v. Tucker*, 42 Cal. 346.)

184. Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike. (*Rosenberg v. Frank*, 58 Cal. 387.)

4. Liberal Construction; Intent to Govern; Giving Effect to Every Part.

Cy pres, doctrine of. See *Charitable Uses*, 8.

185. Wills are to be liberally construed so as to effectuate the intention of the testator. (*Welch v. Huse*, 49 Cal. 506.) Cited 94 Cal. 531.

186. Wills are to be liberally construed so as to give effect to the intention of the testator, and the intention of the testator as expressed in the will must prevail, provided it be consistent with the rules of law. (*Estate of Rogers*, 94 Cal. 526.)

187. In the exposition of a will, the intention of the testator expressed in his will must prevail, provided it be consistent with the rules of law. (*Estate of Whitcomb*, 86 Cal. 265.)

188. A will is to be construed according to the intention of the testator, and if his intention cannot have effect to its full extent it must have effect as far as possible. (*Rhoton v. Blevin*, 99 Cal. 645.)

189. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. (*Rhoton v. Blevin*, 99 Cal. 645.)

Word repugnant to clear intent. See post, XI, 6.

5. Evidence of Surrounding Circumstances; Declarations of the Testator.

190. In the construction of a will parol evidence as to the attending circumstances is admissible; and obviously omitted words will always be supplied wherever the word omitted is apparent, and no other word will supply the defect. (*Mitchell v. Donohue*, 100 Cal. 202.)

191. Where a testator refers in his will to an actually existing state of things at the time of its execution, the language must be held to refer to the date of the will, and not to that of his death, and its provisions must be construed with reference to the circumstances by which he understood himself to be surrounded, and the conditions present to his mind when the will was written. (*Estate of Pearsons*, 99 Cal. 30.)

192. Declarations of a testator made to his executor just before his death, and more than five years after the date of the will, as to what was intended by the will, and who wrote it, constitute no part of the res gestae, and are not admissible in evidence. (*Estate of Gilmore*, 81 Cal. 240.)

Evidence as to the intent of the testator. See post, 207, 208.

6. Particular Words; Repugnancies; "Children," When Means "Grandchildren."

193. The word "money," used in making a devise in a will, will be construed to include both personal and real property, if it appears from the context and on the face of the instrument that such was the intention of the testator. (*Estate of Miller*, 48 Cal. 165.)

194. If word in will is repugnant to the clear intention manifested in other parts of the instrument, it may be regarded as surplusage, or restricted in its application. (*Estate of Wood*, 36 Cal. 75.) Cited 100 Cal. 208.

195. Though the term "children" must ordinarily be presumed to have been used in a will in its primary and natural sense, yet where the will on its face, taken as a whole, clearly indicates an intent in the mind of the testator at the time of making of the will to use the terms in an enlarged sense, so as to include the issue of deceased children, it will be so interpreted. (*Rhoton v. Blevin*, 99 Cal. 645.)

196. A testator by his will, after devising the net income of his estate to his brother for life, bequeathed to each of the children of his deceased sister the sum of two thousand dollars, to be paid them when they should have arrived at majority, or as soon thereafter as his brother should die. The will further provided that, if the children of his sister should die before the death of the brother, leaving lawful issue, such issue should receive their parent's share. At the time the will was made the sister had been dead for forty-two years, and the last of her children for seven years, and the testator knew of their deaths. One of her children left issue who were minors when the will was made. Held, that the

word "children," in the bequest to the children of his sister, should be construed to mean "grandchildren." (*Estate of Schedel*, 73 Cal. 594.)
Cited 99 Cal. 649.

Words "common property" do not mean "separate property." See post, 211.

Devise to one and his "heirs." See post, 213, et seq.

7. *Erroneous Construction, Correcting on Distribution.*

197. An erroneous order construing a will, and declaring certain parties entitled to a legacy bequeathed thereto is not conclusive, and may be corrected by the court on making final distribution. (*Estate of Casement*, 78 Cal. 138.)

8. *Specific Devises and Legacies.*

198. A devise of all the real estate of which the testator may die seized, made in pursuance of the provisions of section 22 of the act of the state of California concerning wills, is a general, not a specific, devise. (*Estate of Woodworth*, 31 Cal. 595.)

199. Under the common law, every devise of real estate was regarded as specific. Under the statutes of California a devise of real estate may be general. (*Estate of Woodworth*, 31 Cal. 595.)

200. A specific bequest of personal property is the bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, or money in purse. (*Estate of Woodworth*, 31 Cal. 595.)

201. The testator, a resident of San Francisco, by his will there executed on the nineteenth day of May, 1883, bequeathed to certain of his relatives residing in Germany one thousand shares of the stock of the Bank of California, the same to be sold by his executors and the proceeds divided among them in stated proportions. The will provided that any advancements that the testator might "hereafter personally make to the above-named legatees, or to either of them, shall be deemed a partial satisfaction of said legacy, equal in amount to the sum so advanced." Subsequent to the execution of the California will the testator went to Germany, and there executed a supplemental will, or codicil, in which, after expressly ratifying the former will, and directing that the testamentary dispositions thereof should remain unchanged, he bequeathed to the same relatives and to others a large sum of money which he had arranged to have sent from California. Held, that the bequests of the bank stock were specific legacies, and that the legacies given by the codicil were cumulative and not substitutionary, and were not advancements within the meaning of that term as used in the former will. (*Estate of Zeile*, 74 Cal. 125.)

Legacies and devises are all general when. See *Estates of Deceased Persons*, 267.

Specific bequests, liability of for debts. See *Estates of Deceased Persons*, 270.

Specific bequest, what is not. See *Estates of Deceased Persons*, 271.

9. *What Passes by Devise or Bequest; Rule in Shelley's Case.*

202. If testator in his lifetime conveys or contracts to convey part of tract of land devised by him, the will, upon his death, operates only upon so much of the land as legally and equitably belonged to him at his death. (*Bruck v. Tucker*, 32 Cal. 425.)

203. A devise of all the interest of the testator in a block of land, excepting a portion thereof held jointly with his aunts, which in a previous provision of the will he had bequeathed to them, only conveys his interest in that portion of the block owned by him in severalty at the date of the will, and does not include his interest in a part of the block in the income of which his aunts were jointly interested with him during their lives, they having a life charge upon the income of an undivided half thereof, though the aunts died prior to the death of the testator, there being a bequest over by him to charitable purposes of the property bequeathed to them in the event of their death before his own. (*Estate of Pearsons*, 99 Cal. 30.)

204. A devise in a will made to executors in trust for heirs of all the testator's property, real and personal, wheresoever situated, includes the homestead of the testator and his family. (*Etcheborne v. Auzeais*, 45 Cal. 121.)

205. If testator devises his "flour-mill, with the land pertaining thereto, a half league, more or less," and he owns a large tract of land around the mill, and there is no inclosure around the mill, and no portion of it has any special relation to the business carried on at the mill, the entire tract of land passes by the will to the devisee upon the death of the testator. (*Bruck v. Tucker*, 32 Cal. 425.)
Cited 66 Cal. 87.

206. If the whole tract of land around the mill which belongs to the testator in such case is less than half a league, it will be assumed that he intended to give the whole tract. (*Bruck v. Tucker*, 32 Cal. 425.)

207. If the testator devises his "flour-mill, with the land pertaining thereto, a half league, more or less," and several witnesses testify, some that he applied the term "mill tract" to all the land at one time, and others that at a different time he applied the same name to only a part of the land, it is not a case of conflict of testimony. (*Bruck v. Tucker*, 32 Cal. 425.)

208. Such testimony only shows that the testator applied the name "mill tract" sometimes to a part of the land, and sometimes to all, and the devisee, to recover the land, is not obliged to prove the boundaries of the land intended to be devised. (*Bruck v. Tucker*, 32 Cal. 425.)

209. A will which declares that the testator's lands are for the benefit and property of the testator's daughter, Dolores, and of the sons of a deceased son, Domingo, and then declares that whereas the widow of a deceased son, José Maria, has a house on a portion of the land called "Chino," that it is the will of the testator that she be permitted to remain in permanency in her house, with liberty

to raise her cattle, and cultivate it, passes the fee to Dolores and the sons of Domingo, subject to an estate for life in the widow of José Maria to the part called "Chino." (Bernal v. Wade, 46 Cal. 663.)

210. A will directing the payment of all the decedent's debts and giving to his wife all of the remainder of his property, real, personal and mixed, wherever the same may be situated, "to have, use, and expend as she may see fit during her lifetime, with full power to sell, transfer, or dispose of the whole, or any portion thereof, as she may deem proper," and giving to her "full power to convey a fee simple title" to any real estate owned by him at the time of his death, or bequeathed to her under the will, and providing that "after the death of the wife from any money remaining" to his estate certain legacies should be paid, does not confine the wife to the mere use of the property during her lifetime, nor limit her to such disposition or change of form of the property as would enable her to better enjoy it, but she has power to dispose of it as she sees fit, and where she has executed a trust deed thereof no vested interest arises in favor of the subsequent legatees. (Hovey v. Walbank, 100 Cal. 192.)

211. The will in question contained a provision as follows: "I give and bequeath to my said husband the use and income of all my property of which I may die possessed, to his sole use and benefit, as long as he remains my widower; provided, however, and it is hereby made an express condition, that he shall not be authorized to sell, convey, or dispose of, or mortgage or in any way encumber, any of such property. But in case he should marry again, then I direct that my share in the common property shall go to my children." At the time of her death, the testatrix had no property that was not her separate estate. She left surviving her husband and four children. Held, that the term "common property," as used in the will, could not be construed to mean "separate property"; that the husband took under the will a determinable life estate only, and that, there being no devise to the children by implication, as to all the estate except such determinable life estate, the decedent died intestate, and the same should be distributed, one-third to the husband, and the remaining two-thirds to the children. (Estate of Reinhardt, 74 Cal. 365.)

212. When a legacy is given to a person to be paid at a future time, it vests immediately; but when it is not given until a certain future time, or when the time is annexed, not to the payment only, but to the gift itself, it does not vest until that time; and, if the legatee dies before, it is lost. (Estate of Rogers, 94 Cal. 526.)

213. The "rule in Shelley's case," when applied to wills, is confined to cases in which, after a freehold is devised to one, the remainder is to go in terms to the "heirs" of the first taker, and does not apply to a devise to a mother and to her "children." (Estate of Uts, 43 Cal. 200.)

214. If by the terms of a will the estate is devised to "A" to have and to hold during his lifetime, and then to go to his heirs, if the word "heirs" is used in a general sense to

indicate those to whom by law the property would pass by descent, and not in a special or restrictive sense to designate certain particular individuals, the whole estate vests in "A" in fee simple, notwithstanding the language of the will limits him to a life estate. (Norris v. Hensley, 27 Cal. 439.)

215. The following was the language of the bequest in the will: "I bequeath to Dr. Van Canaghen one-third of my property on California street, and one-third to my son, and one-third to my brother, each and all of them to have and to hold their lifetime, and then to go to their heirs and assigns. But never to sell." Held, that, by the terms of the will, the three devisees named took a fee simple estate in the property devised. (Norris v. Hensley, 27 Cal. 439.)

216. The testatrix by her will bequeathed to her niece her "piano, sewing-machine, finger-rings (save the diamond ring I habitually wear), and so many of my books, pictures, and ornaments (not otherwise bequeathed specifically) as she shall choose to take." Held, that the bequest of "ornaments" included the jewelry used by the testatrix for personal decoration. (Estate of Traylor, 75 Cal. 189.)

217. A will which devises a certain number of cattle and sheep, and also bequeaths to the devisee the right, during his natural life, to pasture the cattle and sheep on land of the testator devised to another, is to be construed as giving to the devisee the right to graze on the land, during his life, the number of cattle and sheep bequeathed, even if not the identical livestock bequeathed. (Welch v. Huse, 49 Cal. 506.)
Cited 54 Cal. 24.

What interest passes on particular bequests. See post, XI, 17.

Title of legatee or devisee where estate given in trust. See post, 243, 244.

Part payment of legacy. See Estates of Deceased Persons, 558.

Time for payment of legacy. See Estates of Deceased Persons, 545.

Legacies, decree of distribution is conclusive as to. See Estates of Deceased Persons, 576, 577.

Devises, judgment, effect of on. See Judgments, X, 10, j.

Devises, complaint by. See Estates of Deceased Persons, 495.

Suits against devisees on ancestor's obligation. See Estates of Deceased Persons, 490, 491.

Cancellation of deed of decedent at suit of devisees. See Equity, 43.

Devisee in possession may maintain trespass. See Trespass, 17.

Purchaser from devisee may sue to quiet title. See Quieting Title, 5.

Suit by purchaser from devisee to quiet title, presumption as to payment of claims. See Quieting Title, 140.

Pretermitted child, deed by. See Trusts and Trustees, 57, 58.

10. Title of Devisee or Legatee.

218. The legal title to real estate devised by will passes to the devisee, subject only to the

payment of the claims of creditors against the estate and the expenses of administration. (*Jordan v. Fay*, 98 Cal. 284.)

219. A will by which interests in real estate were devised to certain infants, provided that the devisees might each "take out" one-half of his share when he should come of age, and the other half not until all the other children should come of age, and it was objected to the validity of a sale made by the guardian of the devisees, under order of the probate court, that the above provision of the will so controlled the disposition of the property, that it was not the subject of sale by the guardian. Held, that whatever effect this provision might have in controlling the use of the property, the title to it, the estate of the devisees vested in them upon the death of the testator, and this estate was the subject of sale under the provisions of the statute, and the effect of its sale was to transfer whatever estate the wards had to the purchaser. (*Fitch v. Miller*, 20 Cal. 352.)

220. Where instrument purporting to be a will recites previous donations to the testator's sons, and expressly ratifies the donations, these recitals give title to the sons by way of ratification of the previous gift, and the intention of the instrument is to vest the title immediately in the sons, and not to make a testamentary disposition of the lands. (*Adams v. Lansing*, 17 Cal. 629.)

Contingent devisees, rights of. See post, XI, 17.

Indefinite restraint on alienation after absolute estate given. See post, XI, 13.

11. Interest on Legacy.

221. The Probate Act, prior to the adoption of the Civil Code, did not allow interest on a general legacy, payable in money. (*Dunne v. Mastick*, 50 Cal. 244.)

222. A legacy which was due when the sections of the Civil Code allowing interest on legacies went into effect drew interest from that time forward. (*Dunne v. Mastick*, 50 Cal. 244.)

223. A legacy which the testator directs to be paid out of the first money realized from the estate, when the amount shall come into the hands of the executors after the payment of all of the testator's debts and funeral expenses, does not become due and payable, and consequently does not bear interest, until after the debts and funeral expenses have been paid. (*Estate of James*, 65 Cal. 25.)

Devisee of land charged with legacy, liability of for interest. See post, XI, 18.

Endowment fund, interest on. See Interest, VIII.

Trust deed, interest under. See Trusts and Trustees, 41.

12. Abatement or Lapsing of Legacies or Devises; Preferences Between.

224. For purposes of distribution, demonstrative legacies to kindred are not preferred to like legacies to strangers. All stand upon an equality; and if the fund out of which they are payable be insufficient, all must abate proportionately. It is only in cases where such legacies have to be restored to

for payment of debts that legacies to kindred are preferred. (*Estate of Apple*, 66 Cal. 452.)

225. Where the will of testator gave to his grandson a sum of money, to be paid only after the death of the testator's wife, and provided that the income of such sum should be paid him from the time he was fifteen years old until he was twenty-one years, when he was to be paid one-half of the bequest, and thereafter the income from the other half until he reached the age of twenty-five, when the balance was to be paid, and that if he should die before arriving at the successive ages above named, then such portion of the bequest as had not theretofore been paid, together with the income thereon, was to be distributed as the other portions of his estate shall be or shall have been distributed, the latter clause of the will clearly shows that it was the intention of the testator not to make an absolute bequest, but a conditional one, to take effect only if the grandson should reach the ages named for its payment; and he having died before the age of fifteen, this legacy did not vest in him, or pass to his mother as his heir, but should be distributed under the will. (*Estate of Rogers*, 94 Cal. 526.)

226. Word "relation," in the statute, providing that a devise to a relation shall not lapse by the death of the devisee during the lifetime of the testator, if the devisee leaves lineal descendants, includes only relations by blood, and not by affinity. (*Estate of Pinelb*, 48 Cal. 643.)

227. When a testator makes a specific devise of a tract of land, and then sells a portion of the tract, and afterward repurchases that portion, the whole tract will pass to the devisee on the death of the testator, if it is manifest from the terms of the will that it was the intention of the testator to dispose of all the property which he might own at the time of his death. (*Estate of Hopper*, 66 Cal. 80.)

228. Property specifically devised or bequeathed cannot be charged with the payment of general legacies. (*Estate of Neistrath*, 66 Cal. 330.)

Specific bequests, liability for debts. See Estates of Deceased Persons, VI, 11.

13. Perpetuities.

229. Section 1313 of the Civil Code contains no reference to the provisions of the code guarding against perpetuities or defining certain trusts, and this silence may be treated as an implied legislative construction of those provisions. (*Estate of Hinkley*, 58 Cal. 457.)

230. Will does not create a perpetuity, or unlawfully suspend the power of alienation, where all the persons beneficially interested in the will were living at the death of the testator (save one child, who died a minor and unmarried), and the accumulations were lawful, being only for the benefit of minors, to end with their minority or marriage. Accumulations of income, on an invested fund, are not forbidden because they tend to a perpetuity. A child born after the death of the testator, who is specified as one of the legatees, having come into existence during the life of its father, one of the lives in being at

the creation of the interest would take an interest under the will vested in right when born, and in possession contingent on attaining majority or marriage, within twenty-one years after its father's death, which event would not render the interest devised void. *Goldtree v. Thompson*, 79 Cal. 613.)

231. A provision in a will bequeathing a sum of money absolutely, with directions that it be distributed to the legatee upon the expiration of a specified time after the death of the testator, creates a vested interest in fee in the legatee, postponed merely in enjoyment; and a further provision indefinitely restraining the right of the legatee to alienate the subject matter of the bequest is void. (*Williams v. Williams*, 73 Cal. 99.)

Trust to accumulate income, validity. See post, 238, 239.

14. Uncertainty as to Property Conveyed or as to the Person Who is to Take.

232. Where a deviser, having but one flour-mill, made a devise in these words: "To my daughter, Lolita, the flour-mill with the land appertaining thereto—a half league, more or less," held, that the language was sufficiently accurate in expression and certain in its application to the subject of the devise. (*Bruck v. Tucker*, 42 Cal. 346.)

233. A provision in a will requiring the executor to purchase, "at a price not exceeding \$—, a tract of land at or near the residence of said Wilsons at Santa Barbara for a cattle pasture, the free and exclusive use of which the said Wilsons shall have during their lifetime and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter," is void for uncertainty. (*Estate of Traylor*, 81 Cal. 9.)

234. Upon a contest over a bequest to the Old Ladies' Home of San Francisco, between the Protestant Episcopal Old Ladies' Home, the Old People's Home, and the Sisters of Mercy, each of which has a home for old ladies, it seems that the Protestant Episcopal Old Ladies' Home comes more nearly within the provisions of the will than either of the other claimants, and that the court might properly distribute the money to it, under the liberal rule of construction applicable to legacies to charitable institutions. (*Estate of Casement*, 78 Cal. 136.)

235. The will in question contained a residuary bequest to the "Old Ladies' Home, at present near Rincon Hill, at St. Mary's Hospital." The respondent, a corporation named "The Sisters of Mercy," conducted an establishment near the place indicated, generally known as St. Mary's Hospital, one department of which was called the Old Ladies' Home, which was devoted to the care and protection of old ladies. The Old Ladies' Home was originally in the same building with the hospital, but had been recently removed into another building, erected by the corporation on its lot near the hospital. The expenses of the Old Ladies' Home had always been paid by the corporation, and it was under its control. No other institution of the kind was near the place indicated. Held, that the corporation known as the "Sisters of

Mercy" was entitled to take the bequest. (*Estate of Gibson*, 75 Cal. 329.)

Bequest, uncertainty as to legatee, conclusiveness of findings. See Appeals, 2626.

Uncertainty of bequest, effect of on right of admission of will to probate. See ante, X, 6.

15. Condition in Bequest as to Divorce.

236. A condition in a will that each of the daughters of the testator shall receive a certain portion of the estate in the event of becoming a widow, or otherwise becoming lawfully separated from her husband, is not void as against public policy, or as holding out an inducement for an unlawful separation of the daughter from her husband, but will be enforced as lawful and valid. (*Born v. Horstmann*, 80 Cal. 452.)

16. Bequests on Trust; Precatory Trusts; Legatee as Trustee.

237. A will, in which the testator devises his lands to his executors nominated in the will, to be held by them in trust for purposes named in the will, gives the fee of the land to the executors to be thus held in trust. (*Estate of Delaney*, 49 Cal. 76.)
Cited 49 Cal. 495; 50 Cal. 99; 11 Nev. 450.

238. The testatrix, by her will, devised certain real estate in trust, with directions to the trustee to apply the rents, issues, and profits thereof: (1) To the payment of a certain mortgage; (2) to the payment of certain legacies to her daughters; and (3) to the payment of a legacy for a charitable purpose. The will further provided that after such payments had been made the whole of the income of the property should be given to her son James, during the term of his natural life, and, after his death, the same to vest in another person in fee. Held, that under sections 857 and 863 of the Civil Code a valid express trust was created for the purposes specified therein; that the entire estate was vested in the trustee, subject to the execution of the trust; and that the son, James, did not acquire any life estate in the property or right to its possession. (*Estate of Dolan*, 79 Cal. 65.)

239. A devise of the residue of the personal estate of a testator to certain trustees in trust to be invested and to divide the accumulations of income thereof in certain proportions to certain persons named during life, and to the surviving husband or widow of each until remarriage, and to their children during minority or until marriage, and to pay to such children the residuum of the estate in certain proportions, when attaining age or marrying, creates a valid trust if accepted by the trustees, under the provisions of sections 2221 and 2222 of the Civil Code. (*Goldtree v. Thompson*, 79 Cal. 613.)

240. Upon an appeal from an order of distribution assigning to the trustees named in the will of the testator the property devised to them, that the bequest set out in the opinion of the court was valid, subject to the limitation that it should not exceed one-third of the distributable assets of the testator; and that if the probate court had not the machinery for ascertaining these values, it

might distribute the property to the trustees, to hold the legal title to an undivided interest in the property equal to one-third of the distributable assets, and the remainder, if any, in trust for heir. (*Estate of Hinckley*, 58 Cal. 457.)

Validity of trust. See post, 244.

Declaration of trust in, effect on of revocation of will. See *Trusts and Trustees*, 245.

Trustees under as witnesses. See *Witnesses*, V, 8, c, K.

241. The testator, when he devises his lands in trust, may nominate the trustee or any other person his executor; and if he devises the lands to the same person that he appoints executor, the executor will take and hold the lands in the same manner and capacity that a trustee would. (*Estate of Delaney*, 49 Cal. 76.)

242. If the testator devises all his lands to his executor in trust, and makes provision in the will for the support of his wife, and she renounces her rights under the will, and the probate court sets off to her an undivided one-half of the property, because it was common property, this does not extinguish the trusts declared in the will, nor divest the executor of the fee in the remaining portion of the property. (*Estate of Delaney*, 49 Cal. 76.) Cited 79 Cal. 68.

243. Where the will devises the testator's estate in trust to be invested, and to pay the income to certain persons named in certain proportions during their lives, and to their surviving husbands or widows until remarriage, and after that event the same proportions in trust in equal shares for their children by the first marriage who shall attain the age of twenty-one years or marry, and during the minority of any legatee to apply the income of their respective shares toward his or her support or advancement in the world, the life devisees take only the income, and no part of the corpus of the residuary estate, but the corpus of the trust property will pass to the children, to be paid over to them in the proportions specified when they arrive at majority or marry, there being no provision for a continuance of the trust thereafter. (*Goldtree v. Thompson*, 79 Cal. 613.)

244. C., in his will, devised a portion of his property to trustees in trust, to be held and managed for the benefit of a son, in such manner as the trustees should judge for the interest of the son; and to pay over to the son such part of the income as they might think best, until he arrived at the age of thirty years, and then, if they thought he possessed such habits of prudence and economy as to render it proper, to transfer it to him, but otherwise to retain it in trust, and still manage it for his benefit; and at his decease, if still in their hands, to transfer it to his heirs. Held, that the son, by the devise, took no interest in the property which he could assert in an action against the trustees, even after he arrived at the age of thirty years, and that the title to the property vested in the trustees; held, further, that the trust was valid in law, and that its duration could not extend beyond the lifetime of the son, and might terminate sooner, if, in the opinion

of the trustees, it was prudent to transfer the property to the devisee. (*Cutter v. Hardy*, 48 Cal. 568.)

245. A will devising real property, and recommending the devisee to leave his portion thereof, after his death, and that of his wife, in trust for his son, and the children or descendants of such son, if any be alive at his death, and, if there be none so alive, to Harvard College, does not make such recommendation obligatory, or limit the estate, or create a trust in favor of Harvard College, it appearing that the testator was a lawyer who understood fully what was necessary in order to vest a trust estate, and what he desired done with his property, and it further appearing from the whole of the will, taken together, that when he intended trusts to exist, he said so in plain language, and when he gave persons property and made recommendations concerning it, he meant to leave them free to act upon his advice or not, as they saw fit, but did not intend in any way to limit the estates he had bequeathed them. (*Estate of Whitcomb*, 86 Cal. 265.)

246. The testator charged the bequest of his estate with the "support and education" of a minor illegitimate child, without naming any amount therefor. It was held that, in determining what should be the style and manner of education and support, the conclusion must be arrived at by reference to the will, and on a fair and just interpretation of its provisions, considering all the circumstances which surrounded the testator, and the motives which probably actuated him. (*Williams v. MacDougall*, 39 Cal. 80.)

247. If the testator, after making a will in which he devises all his property absolutely, writes a letter to the legatee, stating the trusts upon which the testator intended to devise the estate, and explaining how the legatee was to execute the trusts, and the legatee, during the lifetime of the testator, accepts in writing the terms of the trust, and promises to execute it faithfully, a trust is created as expressed in the letter, and a court of equity will compel the legatee to execute it. (*De Laurencel v. De Boom*, 48 Cal. 581.) Cited 50 Cal. 603; 79 Cal. 427.

248. Where a testator by his will bequeaths property in trust to a legatee without specifying in the will the purposes of the trust, and at the time of the execution of the will, or subsequently verbally communicates to the legatee the purposes of the trust, and the legatee, either expressly or impliedly, promises to perform the trust, or silently acquiesces therein, equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them. (*Curdy v. Berton*, 79 Cal. 420.)

Bequest on trust. See post, XI, 17.

17. Particular Bequests, Construction of.

249. Where a devise was made "to my youngest daughter, Margaret Utz, and to her children," held, that Margaret's children became devisees as well as herself, and that the devise passed an estate in common to all. (*Estate of Utz*, 43 Cal. 200.)

250. Where a devise was made "to Margaret Utz and to her children," on condition that Margaret would take care of the testator during his lifetime, which she did, held, that there was nothing in the condition to show an intention on the part of the testator that Margaret alone should have the benefit of the devise. (*Estate of Utz*, 43 Cal. 200.)

251. When a will provides that the income of the estate is to be paid to the children of the testator during their natural lives, and in the event of the death of any of them one-fifth part of the residue of the estate shall go to the lawful issue of such child, and in the event of a daughter becoming a widow, or otherwise lawfully separated from her husband, one-fifth part shall go to such daughter, the children of a married daughter have an interest in the property, and are entitled to have it remain undisposed of by their mother until the conditions of the will are complied with, and to inherit the same upon the death of the mother before such condition shall happen. (*Born v. Horstmann*, 80 Cal. 452.)

252. A testator bequeathed to three sisters of the full blood one hundred thousand dollars each, and to two sisters of the half blood fifty thousand dollars each, and to a trustee in trust for three children of a deceased sister of the full blood one hundred and fifty thousand dollars, and "after other bequests, bequeathed the residue of his estate to be divided" pro rata between his sisters and the children of his deceased sister above mentioned (naming them). Held, that the words "pro rata" were evidently intended to be "pro rata," and implied that the distribution was to be made in accordance with some rate previously indicated; that the sums mentioned in the first bequests furnished the rate or proportion referred to, and that the residuum should be distributed between the several legatees therein named in the proportion existing between special bequests to them. (*Rosenberg v. Frank*, 58 Cal. 387.)

253. Will in particular case construed and held to warrant the distribution of three-fourths of the estate to the wife, and one-fourth only to the executors upon the trusts set forth in the will and codicil, instead of one-half thereof, as claimed by appellants. (*Estate of Ladd*, 94 Cal. 670.)

254. R. died, leaving property, principally cash, in California, and also real estate in Nevada; and by his will, after making certain money legacies, directed his executors to deposit in some bank or other secure place in San Francisco all rents from the property in Nevada, and all the rents and profits derived from his estate, and that the same should be applied to the payment of an annuity to his mother and to the education of certain nephews and nieces, and devised and bequeathed the residue of his estate to his nephews and nieces generally. Held, that the intention of the testator was that the money legacies should look first to the California assets for payment, and that the proceeds of the Nevada property should, at least for the present, be reserved for the annuity and the education of the nephews and nieces. (*Estate of Radovich*, 54 Cal. 540.)

Bequest of partnership interest to copartner, debt due firm. See *Partnership*, 301.

Equitable conversion. See *Equitable Conversion*.

Duty of executor on bequests for accumulation. See *Executors and Administrators*, VI, 3, j.

Lick trust, allowance of fees for attorneys. See *Trusts and Trustees*, 188, et seq.

18. *Acquiescence in; Effect of; Acceptance of Devise, Charged With Legacy of.*

255. After twenty years' acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law which had never any force in California. (*Castro v. Castro*, 6 Cal. 158.)

256. Where a devisee of lands charged by the will with the payment of certain legacies accepts the devise he thereby assumes the burden imposed by the testator, and becomes personally liable to the payment of the legacies. (*Dunne v. Dunne*, 66 Cal. 157.)

257. Land was devised, subject to a charge for the payment of ten thousand dollars to each of two legatees, but with the proviso that the devisee might, at his option, satisfy the legacies by the payment of ten thousand dollars to each legatee, or by conveying to each a tract of land of the value of ten thousand dollars, or by investing these sums for the legatees in lands of equal value. The devisee received the rents of the lands for a series of years. The estate was never finally distributed by the probate court. Held, that the devisee exercised his option by an acceptance of the devise and receipt of the rents, and that he was liable to the legatees for the money bequeathed to them; (2) that under the circumstances of the case the devisee was liable for simple interest only upon the amount of the legacies. (*Dunne v. Dunne*, 66 Cal. 157.)

Confirmation of disposition of another's property by acceptance under the will. See *ante*, 17.

Taking legacy under will does not prevent wife from contesting. See *ante*, X, 9, a.

Election of widow, effect of. See *post*, XI, 20.

Acceptance by widow of bequest, effect of as an election. See *post*, XI, 20.

Bequest to infant, presumption of acceptance. See *Infancy*, IV.

19. *Bequest in Payment of Services, Renunciation by Action.*

258. The action was brought to recover the value of services rendered by one of the plaintiffs as nurse to a deceased person. The decedent by his will bequeathed to the plaintiff a sum of money in consideration and in payment for the care and attention of the plaintiff during his last sickness. Held, that the action was a renunciation of the bequest, and an election by the plaintiff not to rely upon it as a payment for the services. (*Smith v. Furnish*, 70 Cal. 424.)

20. *Election of Widow.*

259. If, by a just construction of the will, it appears that the testator did not intend to

dispose of his wife's share of the common property, her acceptance of a bequest or devise under the will will not operate as an election to relinquish her right to one-half of the common property. (*Morrison v. Bowman*, 29 Cal. 337.) Cited 74 Cal. 101.

260. Under a will giving legacy to a wife, she is entitled to her own share of the common property, and entitled to the legacy out of the share of the husband. (*Beard v. Knox*, 5 Cal. 252.) Cited 81 Cal. 243.

261. The surviving wife, by acting and taking under the will in this case, will not be deemed to have renounced her rights in the common property. (*Estate of Frey*, 52 Cal. 658.) Cited 77 Cal. 315; 81 Cal. 243.

262. If, in his will, the testator devises to his wife a portion of his property, provided she elects to accept the bequest in lieu of what the law may set aside to her, and the wife accepts the devise, she and her grantees are estopped from setting up title to a homestead which the law would have set aside to her. (*Etcheborne v. Auzeais*, 45 Cal. 121.)

263. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome the presumptions against such a devise that the widow can be put to her election to take under the will, or to take what she is entitled to by law. When there is no such manifest intent the widow may claim and take both what the law gives her in the community property and also what the will of the husband gives her in the portion thereof subject to his testamentary disposition. (*Estate of Gilmore*, 81 Cal. 240.)

264. A testator, by his will, devised and bequeathed certain real and personal property to his wife, and to his two sons "all of the real property in Butte county, California," of which he might die seised. The real property in Butte county was community property. Held, that the will did not put the widow to an election, and that she was entitled to one-half of the real property in Butte county, as survivor of the community. (*Estate of Gwin*, 77 Cal. 313.)

265. Upon a review of the language of the will in question, and of the circumstances under which it was made, held, that it was the intention of the testator to dispose of the entire community property as his own, to the exclusion of any claim therein by his wife, and that she was put to an election between the provisions of the will and her right as his surviving wife to one-half of the community property. (*Estate of Stewart*, 74 Cal. 98.) Cited 81 Cal. 243.

266. A widow is not estopped to make an election to take under the law by causing the will of her husband to be probated, and by becoming the executrix thereof. (*Estate of Gwin*, 77 Cal. 313.)

267. If the husband, by his will, undertakes to dispose of the wife's half of the common property, as well as his own, to her and others, and she elects to accept the benefits in-

tended and provided for her by the will, she thereby becomes divested of her title in and to the undivided half of the common property, provided an assertion of her community right and interest would necessarily defeat the objects of the will. (*Morrison v. Bowman*, 29 Cal. 337.)

Cited 54 Cal. 209; 74 Cal. 104; 81 Cal. 243.

268. An election by a widow to take the share of the community property to which she is entitled, and not to take under the will of her husband, is not in effect a contest of the will, or of its probate. (*Estate of Gwin*, 77 Cal. 313.)

Election, widow when not put to. See *Estoppel*, 10.

Bequest as bar to right of homestead. See *Homesteads*, 449.

Renunciation by widow, effect of on trust. See *ante*, XI, 17.

XII. Alteration or Revocation of; Effect of Marriage on.

269. It is not necessary that a second will, altering a former one, should state in terms that it is intended thereby to alter such former will. (*Clarke v. Ransom*, 50 Cal. 595.)

270. Where it appears that the signature has been torn from an olographic will after it had been executed and placed in a valise in which the decedent kept his papers, with a declaration to the executor named therein that he would know where to find it when required, and which was found in the valise after his death minus the signature, a verdict to the effect that the signature was canceled and destroyed by the decedent before his death, with intent to revoke the will, will not be disturbed, though it appears that others may have had access to the will, if there is evidence that decedent declared during his last illness that he destroyed it, and ought to do something about a will, though very sick and weak at the time, and if the evidence as to his mental condition is so conflicting that a finding that he was of sound mind could not be disturbed. (*King v. Ponton*, 32 Cal. 420.)

271. When it is admitted upon the contest of such will, before the court and in the presence of the jury, that the will had been properly executed by the decedent, and that he had sufficient reasons for signing it, and the single issue is submitted to the jury, whether the signature was destroyed by the decedent with intent to revoke the will, under an oral stipulation not entered on the minutes of the court that the jury might render a general verdict for either party, the rendition of such a verdict for the contestant without objection to its form, and the entry of judgment thereon without any special findings of fact, is waiver of such findings, and an irregularity which must be disregarded as not affecting the substantial rights of the parties. (*King v. Ponton*, 32 Cal. 420.)

272. Where a testator who tears his name from a will is of unsound mind at the time, the intent with which the act was performed does not constitute an element of revocation. (*Estate of Lang*, 65 Cal. 19.)

273. Where an unmarried man has made a will and afterward marries, the marriage operates, in case of the survival of the wife or children of the marriage, as a revocation of the will, unless some specific provision has been made by the will itself, or by a marriage contract, for the surviving wife, or by some settlement or provision for the surviving children. If no such provision or contract is made, the law conclusively presumes a revocation of the will from the act of marriage. (*Sanders v. Simcich*, 65 Cal. 50.)

274. The term "marriage contract," as used in section 1299 of the Civil Code, concerning the revocation of a will by marriage of the testator, unless provision is made for the wife by marriage contract, etc., refers to and designates only such a contract or settlement between husband and wife as expressly purports in its terms to be a marriage contract, and to make provision for the wife in lieu of a testamentary provision for her, and does not include a postnuptial agreement which merely purports to settle property rights between them in view of a separation. (*Corker v. Corker*, 87 Cal. 645.)

275. When an antenuptial will is offered for probate, the surviving wife need only show the subsequent marriage, in order to defeat the probate; and the burden is then cast upon the proponent of the will, if he relies upon a marriage contract to prevent a revocation of the will, to prove the contract and show by its terms that it purports to make provision for the wife, and that such provision was intended to take the place of a testamentary provision for her. (*Corker v. Corker*, 87 Cal. 645.)

276. Upon the contest of an antenuptial will by a surviving wife, no evidence can be adduced by the proponent of the will respecting what is claimed to be a marriage contract, other than the instrument itself, with proof of its execution if denied; and if the instrument does not purport upon its face to be a marriage contract within the meaning of the code, the court cannot receive any other evidence that such was the intention of the parties. (*Corker v. Corker*, 87 Cal. 645.)

277. Where an antenuptial will is shown to have been revoked by marriage, and no marriage contract is proved, the power of the probate court is limited to denying probate to the will, and determining who has a right to administer upon the estate, and it has no jurisdiction to inquire into any facts affecting the consideration, validity, or operation of a deed of separation between the testator and his wife. (*Corker v. Corker*, 87 Cal. 645.)

Revocation of will, effect of on trust. See *Trusts and Trustees*, 250.

XIII. Codicils.

278. There may be an olographic codicil to a will in the handwriting of a person other than the testator. (*Estate of Soher*, 78 Cal. 477.)

279. An attestation in the following form, "Witness, George Penlington, 123 O'Farrell street," written in the handwriting of another, does not show an uncompleted intention to make an attested codicil, or prevent

the codicil from being olographic. (*Estate of Soher*, 78 Cal. 477.)

280. The execution of a codicil has the effect to republish the whole will, as modified by the codicil, as of the date of the codicil, and its effect is not limited to a republication of the only clause which the codicil purports to modify. (*Estate of Ladd*, 94 Cal. 670.)

281. The codicil to a will operates as a republication of the will, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil. (*Payne v. Payne*, 18 Cal. 291.)
Cited 94 Cal. 673; 11 Mont. 106.

282. It must be assumed that the testator, at the time of making the codicil, used the terms therein with reference to the provisions of the will as they would be construed under the facts then existing, and with a knowledge of what property the will provided that the executors should hold in trust, and that he intended that no further change should be made in his will than that expressly declared in the codicil. (*Estate of Ladd*, 94 Cal. 670.)

283. The whole of the original will and codicil are to be construed as a single instrument executed at the date of the codicil, and of which all the parts are to be construed so as, if possible, to form one consistent whole; and the codicil will not be construed to disturb the dispositions of the will further than is absolutely necessary to give effect to the codicil; nor will a clear disposition made by the will be revoked by a doubtful expression or inconsistent disposition in the codicil. (*Estate of Ladd*, 94 Cal. 670.)

284. A determination expressed in a codicil to make an alteration in the will in one particular negatives by implication any intention to alter it in any other respect. (*Estate of Ladd*, 94 Cal. 670.)

Construction of what passes under will and codicil in particular case. See ante, XI, 17.

Codicil and will are to be construed together. See *Estates of Deceased Persons*, 527, et seq.

Legacies given in codicil are cumulative and not substitutionary, when. See ante, 201.

XIV. Foreign Wills.

285. The question as to whether or not a will had been duly proved and allowed in a foreign country or state, as expressed in section 1322 of the Code of Civil Procedure, is a fact which a court of this state entertaining jurisdiction to admit such will to probate must find from the evidence, and if the court found this fact upon insufficient evidence, or without proper authentication of the foreign probate of the will, or without competent evidence, and thereupon proceeded to exercise jurisdiction, the action of the court in this respect is not void, but merely erroneous, and subject only to direct attack upon appeal, and is not open to collateral attack in an action of ejectment in which the probate proceedings had in this state upon proof of such foreign probate are introduced in evidence to show title under the will. (*Goldtree v. McAllister*, 86 Cal. 93.)

286. Conceding that the authentication of the foreign probate of such will is a jurisdictional fact, yet it belongs to that class of jurisdictional facts which the court must find from the evidence, and its decision thereon, whether erroneous or not, is conclusive as against a collateral attack. (*Goldtree v. McAlister*, 88 Cal. 93.)

Failure to probate, effect of. See *Vendor and Vendee*, 114.

Foreign, who entitled to administer. See *Executors and Administrators*, II, 6.

By what law governed. See *ante*, XI, 1; *Executors and Administrators*, II, 6.

WITNESSES.

I. Subpoenas; Disobedience of; Issuing Bench Warrant; Striking out Answer.

II. Compelling Attendance of Prisoner.

III. Requiring Undertaking for Appearance.

IV. Swearing Witness.

V. Competency of Witnesses.

1. *Religious Belief; Understanding Nature of Oath.*

2. *Husbands or Wives; Waiver of Objection to.*

3. *Children as Witnesses.*

4. *Jurors or Attorneys as Witnesses; Interpreters.*

5. *Disqualification of Witnesses Because of Color.*

6. *In Actions Against or by Executors.*

7. *Power of State to Regulate, and Construction of Statute Regulating.*

8. *Interest; Disqualification for.*

a. *Rules as to.*

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c. *Particular Persons or Parties, Disqualification of.*

A. *Parties; Notice of Intent to Testify.*

B. *Agents, Brokers, Servants, or Deputies.*

C. *Assignors; Herein of Assignors for Creditors.*

D. *Fraudulent Transferee.*

E. *Sellers or Vendors.*

F. *Lessor.*

G. *Parties to Notes.*

H. *President or Stockholders of of Corporations.*

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2. *Privilege of Witnesses.*

3. *Manner of Conducting Examination.*

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5. *Cross-examination.*

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8. *Right to Explain Testimony; Illustrating Testimony by Diagram.*

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2. *Contradiction of Witness by Proving Different Statements or Declarations.*

3. *Laying Foundation.*

4. *Impeachment on Collateral Matters.*

5. *By Statements of Third Persons.*

6. *By Evidence of Specific Immoral Acts; or Arrest or Conviction for Misdemeanor or Felony.*

7. *By Evidence of Character or Reputation for Truth and Veracity.*

8. *By Showing Animus, Motive, or Hostility of Witness.*

9. *By Showing Impeachment on Former Trial.*

10. *Want of Religious Belief.*

11. *Objection to; New Trial for; Remarks of Judge, What Improper.*

VIII. Sustaining Reputation or Character of Witness.

IX. Credibility of Witnesses.

1. *General Rules as to; Credibility a Question for Jury.*

2. *Witness Falsely Swearing in Part.*

3. *Party as Witness, Credibility of.*

4. *Where Relatives of Party Testify.*

5. *Impeached Witness; Witness Convicted of Felony; Inmate of Low Resort.*

X. Exclusion of Witnesses from the Court.

XI. Expenses and Fees of.

Duty to obey process while in attendance on court. See *Process*, 7.

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One not intimate may testify as to rational appearance. See *Criminal Law*, 1248.

Intimate acquaintance. See *Appeals*, 2193; *Insanity*, 50, 51.

Notary, certifying acknowledgment, is a competent witness. See *Notaries*, 3.

Who incompetent to prove value of legal services. See *Attorney and Client*, 127.

Who may testify as to boundaries. See *Boundaries*, II, 8, a.

Mistake as to competency of witness, new trial for. See *New Trial*, IV, 8.

Pardon, whether removes disability. See *Criminal Law*, 1142.

Grand jury, witnesses before. See *Jury and Jurors*, XVII, 8.

Refusal to testify before grand jury. See *Jury and Jurors*, XVII, 6.

Grand jury, witness, power of to question validity. See *Jury and Jurors*, 369.

Inference from failure to call. See Criminal Law, 2403.

Instruction as to defendant's failure to testify. See Criminal Law, XVIII, 18, h.

Convenience of as ground for granting or refusing change of venue. See Venue, II, 6, c.

Confronting with. See Criminal Law, XVIII, 14, j.

Subornation of, civil action for. See Perjury.

Legislature, power of to summon. See Legislature, 8, et seq.

Absence of as ground for continuance. See Continuance, I, 5.

Mistake of witness, new trial for. See New Trial, IV, 16.

Experts. See Evidence, V.

Opinions of witnesses. See Evidence, V.

Appealability of order requiring witness to ascertain fact. See Appeals, II, 20.

I. Subpoenas; Disobedience of; Issuing Bench Warrant; Striking Out Answer.

Mandamus to compel issuance of subpoena. See Mandamus, II, 11, d.

Subpoena, quashing. See Depositions, VII.

Subpoena, duty to obey. See Depositions, VII.

Subpoena, disobedience of. See Contempt, IV, 4.

Subpoena duces tecum, refusal to obey. See Contempt, 42.

Non-attendance of witnesses. See New Trial, 175, et seq.

1. On the trial, certain witnesses for the defendant, who had been served with subpoenas out of the county in which the action was tried, did not appear when called to testify. The defendant thereupon asked for a bench warrant to enforce their appearance. The court denied the application. It did not appear by affidavit or other sworn statement what was sought to be proved by the witnesses, or that their testimony would have been material to the defendant, or that they were within immediate reach of the process of the court. Held, that the action of the court was proper. (*People v. Marseiler*, 70 Cal. 98.)

2. An order of the trial court that the answer of the defendant be stricken from the files because the defendant has disobeyed a subpoena duces tecum is not a judgment for contempt, but, if erroneous, constitutes an error of law occurring during the trial of the action, which, if excepted to, may be corrected on appeal from the judgment and order denying a new trial. (*Frazer v. Lynch*, 88 Cal. 621.)

3. The provision of section 1991 of the Code of Civil Procedure, that in case of disobedience of a subpoena, "if the witness be a party, his complaint or answer may be stricken out," is intended for the protection of the adverse party, whose substantial rights are or may be affected by such disobedience, as well as a punishment for the contempt itself. (*Frazer v. Lynch*, 88 Cal. 621.)

4. The power conferred upon the court to strike out an answer should be exercised with guarded discretion, with a view to promote substantial justice; and it is error for the

court to strike defendant's answer from the files because of disobedience of a subpoena duces tecum, where the disobedience is by an illiterate person, without the advice of counsel, and where defendant's counsel, before the making of the order, offer to admit everything that could be shown by the papers sought to be produced. (*Frazer v. Lynch*, 88 Cal. 621.)

II. Compelling Attendance of Prisoner.

5. The court may, on a proper showing in a criminal action that the witness is material and necessary, make an order for the attendance upon the trial of a prisoner confined in the state prison, whether the application be for the defendant or for the prosecution; and further, when satisfied that the examination of a witness on behalf of a defendant is necessary, may order that he be examined conditionally; but no deposition can be taken on behalf of the prosecution, as the defendant has the right to be confronted with the witnesses against him. In neither case does the order issue as a matter of right; but the court is clothed with discretion to determine whether necessity exists for the order, which discretion, though subject to review upon appeal, in case of abuse, cannot be controlled by mandamus. Thornton, J., dissenting. (*Willard v. Superior Court of Santa Barbara County*, 82 Cal. 456.) Cited 92 Cal. 485, 492.

6. Although under section 1567 of the Penal Code a defendant in a criminal case is allowed the right to have the process of the court to compel the attendance of a convicted prisoner as a witness in his behalf, whether such prisoner is in the state prison or the county jail, yet the power conferred by that section should be exercised under the same circumstances and with the same restrictions under which the common-law courts were accustomed to issue the writ of habeas corpus ad testificandum. (*People v. Willard*, 92 Cal. 482.)

7. The order for process to compel the attendance of a convicted prisoner as a witness should not be made, except upon a very strict showing of the materiality of the testimony, and the necessity of securing the attendance of the prisoner as a witness, and upon previous notice to the state of the application; but when such notice has been given, and a case of materiality of the evidence and apparent necessity is made out, and the good faith of the applicant also appears, the court ought, in the exercise of its discretion, to make the order for the attendance of the prisoner as a witness. (*People v. Willard*, 92 Cal. 482.)

8. The legislature has power to limit compulsory attendance of prisoners confined in the state prison to cases of necessity, the existence of which is to be ascertained by the court. Thornton, J., dissenting. (*Willard v. Superior Court of Santa Barbara County*, 82 Cal. 456.)

Discharging prisoner that he may be witness. See Criminal Law, XVIII, 15.

III. Requiring Undertaking for Appearance.

9. The petitioner was committed to prison for not complying with an order of the su-

perior court which required him to give an undertaking with sureties to appear and testify in a criminal action therein pending. Held, the court was not authorized to exact from a witness, who was not examined before the committing magistrate, such an undertaking. The power to require undertakings in such cases is confined to witnesses who are examined before the committing magistrate. (Ex parte Shaw, 61 Cal. 58.)

Unreasonable detention, discharge on habeas corpus. See Habeas Corpus, II, 7.

IV. Swearing Witness.

10. Sections 2095 and 2096 of the Code of Civil Procedure are not mandatory, but merely permissive at the discretion of the court to adopt a peculiar mode of swearing a witness who regards such mode as more solemn or obligatory, or according to the peculiar ceremonies of his religion; and in order to show an abuse of the discretionary power conferred, in refusing to administer a peculiar oath to a Chinese witness, it must be made to appear that the court was informed that the witness regarded some other form more obligatory than the form adopted in this state, and perhaps that he did not consider the latter at all obligatory. (People v. Green, 99 Cal. 564.)

Refusal to be sworn or testify. See Contempt, IV, 3.

V. Competency of Witnesses.

1. Religious Belief; Understanding Nature of Oath.

11. Practice Act, section 392, providing "that no person offered as a witness shall be excluded on account of his opinion on matters of religious belief," and the fourth section, article I, of the constitution, to the same effect, mean that a witness is competent without respect to his religious sentiments or conviction, the law leaving his competency to legal sanctions, or, at least, to considerations independent of religious sentiments or convictions. (Fuller v. Fuller, 17 Cal. 605.) Cited 43 Cal. 34.

12. No person is to be held incompetent to be a witness in this state on account of his opinions on matters of religious belief. This rule applies to dying declarations. The common-law rule in this respect is abrogated. (People v. Sanford, 43 Cal. 29.) Cited 51 Cal. 599.

Witness cannot be impeached for want of religious belief. See post, VII, 10.

13. Where a witness, being sworn, stated that he was fourteen years old and a Chilenio, and did not know "the obligation of an oath," whereupon the judge explained to him the nature of such obligation, and he was then permitted to testify, the other party objecting that he did not know the obligation of an oath, held, that the witness was competent. (Fuller v. Fuller, 17 Cal. 605.)

2. Husbands or Wives; Waiver of Objection to.

14. The incompetency of a wife to testify for or against her husband in a criminal case

is limited to cases in which one or both are parties. (People v. Langtree, 64 Cal. 256.)

15. Where two persons are charged by separate informations with the same offense, the wife of the one not on trial is a competent witness for the other touching matters implicating her husband. The incompetency of a wife to testify for or against her husband in a criminal case is limited to cases in which one or both are parties. (People v. Langtree, 64 Cal. 256.)

16. The amendment to section 422 of the Civil Practice Act, allowing parties to be examined as witnesses in their own behalf, did not, prior to the amendment to section 395 in 1863, permit husband or wife to be witnesses for or against each other. (Dawley v. Ayers, 23 Cal. 108.)

17. In an action by a husband against the personal representative of the deceased debtor to recover the wife's earnings, the wife is a competent witness for her husband. (Moseley v. Heney, 66 Cal. 478.)

18. A woman who is living with defendant as his wife, but not married to him, is a competent witness against him. (People v. Alviso, 55 Cal. 230.)

19. Where a witness is called and objected to by the opposite party, on the ground that she is the wife of the party objecting, and he then proves by other witnesses that the two had cohabited together for a long time as husband and wife, had passed in society as such, and had represented each other as husband and wife, and the party calling the witness introduces no testimony to the contrary, the witness should be rejected by the court. (People v. Anderson, 26 Cal. 129.) Cited 82 Cal. 447, 448, 450.

20. If a witness is objected to on the ground that she is the wife of the party against whom she is called, and the party objecting proves by other witnesses facts sufficient to show that they are husband and wife, without proving an actual marriage, and the court then erroneously allows the witness to testify, and on cross-examination the party objecting draws out the fact that the witness is not the lawful wife of the party objecting the party calling out this statement on cross-examination is concluded by it, and the previous error of the court is cured. (People v. Anderson, 26 Cal. 129.)

21. A party, by the examination of her husband as a witness on her behalf, waives her objection to his examination by the opposite party upon any of the issues in the action. (Steinburg v. Meany, 53 Cal. 425.)

22. On a trial for murder, error in permitting the wife of the defendant to testify in favor of the prosecution, against his objection, is cured if the defendant subsequently voluntarily testifies to substantially the same effect. (People v. Ketchum, 73 Cal. 635.)

Interest of wife, whether disqualifies husband as a witness. See post, V, 8, a.

3. Children as Witnesses.

23. There is no precise age within which children are excluded from giving testimony. Their competency is to be determined, not by

their age, but by the degree of their understanding and knowledge. (*People v. Bernal*, 10 Cal. 66.)

Cited 9 Or. 459.

24. It is essential that children should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath. (*People v. Bernal*, 10 Cal. 66.)

25. It is for the court to decide the question of the competency of children when they are offered as witnesses. (*People v. Bernal*, 10 Cal. 66.)

26. If over fourteen years of age, the presumption is that children possess the requisite knowledge and understanding to be witnesses; but, if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn. (*People v. Bernal*, 10 Cal. 66.)

27. A child of nine years of age was examined as a witness on the part of the prosecution. His testimony was taken without a preliminary examination as to his competency, but at the close of his testimony, and before he left the witness-stand, the court examined him in the presence of the defendant and the jury, touching his competency, and found him to be competent. On a previous trial of the case the witness had been examined, and his competency established before he was permitted to testify. Held, that no error prejudicial to the defendant had been committed. (*People v. Welsh*, 63 Cal. 167.)

28. That a child, for an assault upon whom defendant is being tried, not having sufficient capacity to be a witness, was sworn and questioned but withdrawn before she had testified to any material fact, is no ground for granting a new trial. The suggestion that her appearance was calculated to excite the sympathy of the jury and influence their judgment, is not entitled to any consideration. (*People v. Graham*, 21 Cal. 261.)

4. Jurors or Attorneys as Witnesses; Interpreters.

29. Juror is not disqualified from becoming a witness in a proper case. (*People v. Doyell*, 48 Cal. 85.)

30. A person appointed to act as an interpreter on the trial of a criminal action is not disqualified by reason of the fact that he was a witness for the prosecution. (*People v. Fong Ah Sing*, 70 Cal. 8.)

Grand jurors as witnesses. See *Jury and Jurors*, XVII, 8.

Prosecuting attorney as witness. See *Criminal Law*, XVIII, 14, 1.

Attorney becoming witness, right to argue. See *Pleading and Practice*, XX, 5.

5. Disqualification of Witnesses Because of Color.

31. Indictment of color is not an infallible test of competency of a witness, under the acts

excluding blacks, mulattoes, and Indians from testifying for or against white persons. (*People v. Elyea*, 14 Cal. 144.)

32. It may be a sufficient test in many cases, but only when it is so decided as to leave no doubt of the race to which the witness belongs—as a negro or Indian. But it cannot be presumed that all persons having tawny skins are within that case. (*People v. Elyea*, 14 Cal. 144.)

33. Section 394 of the Civil Practice Act provides: "No Indian or negro shall be allowed to testify as a witness in any action in which a white person is a party." (*People v. Hall*, 4 Cal. 399.)

34. Section 14 of the Criminal Act provides: "No black or mulatto person or Indian shall be allowed to give evidence in favor of or against a white man." Held, that the words "Indian, negro, black and white," are generic terms, designating race. That therefore Chinese and all other people not white are included in the prohibition from being witnesses against whites. (*People v. Hall*, 4 Cal. 399.) Cited 13 Cal. 73; 14 Cal. 146.

35. *People v. Hall*, 4 Cal. 399, affirmed. But it cannot be presumed that all persons having tawny skins are within that case. (*People v. Elyea*, 14 Cal. 144.)

36. The words "in favor of or against any white person," in the act prohibiting persons of one-half or more of Indian blood, or Mongolian or Chinese, from giving evidence, refer to the defendant alone in a criminal action. Per Sanderson, C. J. (*People v. Awa*, 27 Cal. 638.)

37. In a criminal action against a white person, a black or mulatto person, though the injured party, cannot, under the statute, be a witness for or against the defendant. (*People v. Howard*, 17 Cal. 63.)

38. The testimony of a Chinese or Mongolian witness is not admissible under existing law against a white person. After the 1st of January, 1873, when the codes take effect, no witness will be excluded in any case on account of nationality or color. (*People v. McGuire*, 45 Cal. 56.)

39. A defendant in a criminal case who is a Chinaman is entitled to introduce Chinese witnesses in his behalf. (*People v. Awa*, 27 Cal. 638.)

40. Chinese witnesses excluded in suits to which white persons are parties. (*Speer v. See Yup Co.*, 13 Cal. 73.)

41. W., who was a mulatto, born within the United States, and not subject to any foreign power, was indicted for the crime of robbing Ah Wang, a Chinaman. The indictment was found exclusively upon the testimony of Chinese witnesses. No other testimony against W. was procurable by the district attorney for the purposes of a trial under said indictment. The court below, on W's motion, set aside the indictment and discharged him without day. On appeal from said orders, taken by the people, this court affirmed the judgment of the court below. (*People v. Washington*, 36 Cal. 658.)

42. The fourteenth section of the statute of this state, "concerning crimes and punish-

ments," which provides that "no Indian, or person having one-half or more of Indian blood, or Mongolian, or Chinese, shall be permitted to give evidence in favor or against any white person" (Stats. 1863, p. 69), so far as it discriminates against persons, on the score of race or color, born within the United States and not subject to any foreign power, excluding Indians not taxed, has, by the force and effect of the "Civil Rights Bill," become null and void. (*People v. Washington*, 36 Cal. 658.)

Disapproved 40 Cal. 215.

43. The fourteenth amendment to the constitution of the United States does not conflict with the power of the legislature in the exercise of its discretion to exclude Chinaman from the right to testify in the state courts. (*People v. Brady*, 40 Cal. 198.) Cited 45 Cal. 57; 8 Mont. 282.

6. In Actions Against or by Executors.

44. The word "representative," used in the three hundred and ninety-third section of the Practice Act, as amended in 1863, applies to the executor or administrator of the estate of a deceased person, and also to the person or party who has succeeded to the right of the deceased, whether by purchase or descent, or operation of law. (*Davis v. Davis*, 26 Cal. 23.) Cited 33 Cal. 446; 13 Nev. 283, 284.

45. Before a party in interest can be prevented from testifying to matters which occurred prior to the death of another, on the ground that the opposite party claims under, or is the representative of, such deceased person, it must be shown clearly that the opposite party occupies such position. (*Marquart v. Bradford*, 43 Cal. 528.)

46. A witness who acknowledges that he has an interest in a claim in suit against the estate of a decedent, to the extent of a certain commission expected for his services as an agent of plaintiff, and who has acknowledged in writing that he is jointly interested with plaintiff in the contract sued upon, is disqualified from testifying to facts occurring before the death of the decedent. (*Uhlhorn v. Goodman*, 84 Cal. 185.)

47. Where by agreement the assignee is to pay the fees of the assignor's attorney, the attorney in an action against the assignee's administrator cannot testify against the administratrix of the deceased assignor to an agreement made between the assignor, the assignee, and the plaintiff, to the effect that the plaintiff should continue to prosecute the suit upon the assigned note as attorney for the assignor, and be paid a reasonable fee out of the proceeds of the judgment, if collected, nor can he testify to any matters of fact occurring before the death of the assignor. (*Tyler v. Mayre*, 95 Cal. 160.)

48. The statute prohibiting a party from being a witness "where the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person," etc., extends to all cases, even where there was no privity or connection between him and the plaintiff, or those through whom he claims. (*Satterlee v. Bliss*, 36 Cal. 489.)

49. Section 1880 of the Code of Civil Procedure, which prohibits parties to an action or proceeding against an executor or administrator upon a claim against the estate from being witnesses, applies not only to parties who have an interest adverse to the estate, but to all nominal parties to the action. (*Blood v. Fairbanks*, 50 Cal. 420.) Cited 51 Cal. 620; 96 Cal. 487, 489.

50. Action to enforce resulting trust against the personal representatives of a deceased trustee is not founded upon a claim or demand against the estate of the deceased, within the meaning of section 1880 of the Code of Civil Procedure. In such an action the original cestui que trust may testify to facts occurring prior to the death of the trustee. (*Myers v. Reinstein*, 67 Cal. 89.) Cited 88 Cal. 44.

51. Action to enforce mechanic's lien is in the nature of a proceeding in rem, in which no personal judgment can be recovered against the estate of the deceased owner payable in due course of administration, and the lien is not a "claim" against the estate within the meaning of subdivision 3 of section 1880 of the Code of Civil Procedure. (*Booth v. Pendola*, 88 Cal. 36.)

52. An action by an indorsee of a firm, one of the members of which is deceased, and who was also a payee and indorser of the note, against a copayee and coindorser of the note, upon his liability as indorser, is not an action against the legal representative of the deceased upon a claim against the estate of the decedent, and the defendant is a competent witness to testify to facts occurring before the death of the decedent. (*McPherson v. Weston*, 85 Cal. 90.)

53. When a plaintiff prosecutes a joint action for the value of services rendered by his assignor upon a demand against the representatives of a decedent and a codefendant, the plaintiff's assignor, though not a competent witness against such representatives to prove his employment by the decedent, is competent to testify against the codefendant against whom a several judgment might be rendered. (*Shain v. Forbes*, 82 Cal. 577.) Cited 21 Nev. 156.

54. In an action against two joint obligors, one of whom has died after suit brought, and whose administrator has been substituted in his place, and has answered, denying the obligation, neither the plaintiff nor the surviving obligor, against whom judgment by default has been rendered, is competent as a witness, upon the trial of the issues raised by the administrator, to prove the obligation, or to testify to any facts which occurred prior to the death of the deceased obligor. (*Moore v. Schofield*, 96 Cal. 486.)

55. The third subdivision of section 1880 of the Code of Civil Procedure, providing that "parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of the deceased," cannot be witnesses, has no application to a party claiming a family allowance. (*Estate of McCausland*, 52 Cal. 568.) Cited 88 Cal. 43; distinguished 67 Cal. 92.

56. Section 1880 of the Code of Civil Procedure, prohibiting parties to an action against an executor or administrator upon a claim or demand against the estate of the deceased from being a witness as to any matter of fact occurring before the death of the deceased, does not prevent the plaintiff in such an action from testifying as to the correctness of books of account which had been wholly kept by him, preparatory to their introduction in evidence; and the introduction of such books in evidence, upon the testimony of a third person who had no personal knowledge as to their correctness, is error. (*Roche v. Ware*, 71 Cal. 375.)
Cited 86 Cal. 166.

57. Under section 1880 of the Code of Civil Procedure, providing that parties to an action or proceeding against an executor or administrator upon a claim or demand against the estate of a deceased person cannot be witnesses therein as to any matter of fact occurring before the death of such deceased person, the incompetency is only limited and partial, and the parties may testify as to any facts occurring subsequent to the death of the deceased. (*Fox v. Tay*, 89 Cal. 339.)

58. Section 1880 of the Code of Civil Procedure, which prohibits parties to an action in which a claim is made against an estate from testifying, is not to be construed as prohibiting an executor or administrator from calling a party to the action to testify in behalf of the estate. (*Chase v. Evoy*, 51 Cal. 618.)

59. If one party offer himself as a witness, and the other object, because the objector is the representative of a deceased person, and the court decides to take the evidence, with leave to the other party to move to strike it out, the motion to strike out must be made when the direct examination is closed. By cross-examining the witness generally, the other party waives the motion to strike out. (*King v. Haney*, 46 Cal. 560.)
Cited 62 Cal. 145.

60. In an action by the personal representative of a deceased person to enforce a demand due the estate of the decedent, the defendant is a competent witness as to transactions between himself and the decedent. (*McGregor v. Donnelly*, 67 Cal. 149.)

61. The section of the Code of Civil Procedure which prohibits parties in whose favor an action is prosecuted against an estate from being witnesses, does not prohibit a person against whom an action is prosecuted by an executor on a claim in favor of an estate from being a witness in their own favor. (*Sedgwick v. Sedgwick*, 52 Cal. 336.)
Cited 85 Cal. 97; 96 Cal. 488.

Claim of attorney against decedent, attorney as witness. See *Attorney and Client*, 134.

Claimant of mechanic's lien, competency of. See *Mechanics' Liens*, 364.

Action against administrator, application for family allowance. See *Estates of Deceased Persons*, 21.

7. Power of State to Regulate, and Construction of Statute Regulating.

62. State legislature has power to declare who shall be competent to testify, and to

regulate the production of evidence in the courts of the state. (*People v. Brady*, 40 Cal. 198.)

63. Restriction upon competency of witness must be strictly construed in favor of life, liberty, and public justice. (*People v. Awa*, 27 Cal. 638.)

8. Interest, Disqualification for.

a. Rules as to.

64. Tendency of modern decisions, with reference to the competency of witnesses, is to relax rather than to extend the rule of exclusion. (*Smith v. Richmond*, 19 Cal. 476.)

65. Under our statute, no person can be excluded as witness on account of interest in the event of the action, unless he may be a party, or one for whose immediate benefit the action is prosecuted or defended. (*Tomlinson v. Spencer*, 5 Cal. 291.)

66. Under the statute a witness is not excluded on the ground of interest, unless he comes within one of its exceptions. (*Johnson v. Carry*, 2 Cal. 33.)

67. To make testimony of witness admissible, he must be competent at time of taking his deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him. (*Kimball v. Gearhart*, 12 Cal. 27.)

68. The interest which renders a party incompetent as a witness is a legal interest in the event of the suit; and it is the fact of interest, not the supposition of the party that he is interested, which incapacitates him. (*McCabe v. Hand*, 18 Cal. 496.)

69. The liability of a witness to either party, in case of a certain result of the suit, must be legal, and not moral, and the consequent interest present, certain, and vested, in order to exclude the witness. (*Jones v. Love*, 9 Cal. 68.)

70. A witness is not disqualified because of a mere expectation of deriving from a suit some advantage to which he is not legally entitled. (*Coghill v. Boring*, 15 Cal. 213.)

71. Sections 392 and 393 of the Practice Act are to be construed so as to exclude testimony when the witness would be directly benefited by it. (*Jones v. Post*, 4 Cal. 14.)
Cited 4 Cal. 408.

72. Where the defeat of plaintiff would inevitably result in S. obtaining the fund in controversy, held, that S., although not a party to the suit, was incompetent as a witness. (*McEwen v. Johnson*, 7 Cal. 258.)

Mere speculative interest will not disqualify. See post, 141.

73. Ejectment for a quarter section of land. Defendant disclaimed as to all except the north half of the section, eighty acres, within which he had thirty acres inclosed and called the "Old Field." Defendant offered his brother A. R. Whitesides as a witness to prove defendant's prior possession of that part of the north half of the section outside of the "Old Field." Witness on his voir dire said he lived with defendant, was interested in the crops which were in the "Old Field" only, and had no interest whatever in the balance of the land. Held, that the wit-

ness was competent; that his being interested in farming within the "Old Field" did not make him interested in the result of the litigation as to the land outside of that field. (*Hicks v. Whitesides*, 18 Cal. 700.) Cited 35 Cal. 152; 42 Cal. 656.

74. In an action of foreclosure of a mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness, whose wife is a sister and heir of the deceased, is incompetent, upon the ground of interest. (*Lisman v. Early*, 12 Cal. 282.)

75. A and B, married women, as sole traders, each had suits pending against C, a sheriff, for seizing on execution their personal property. A's suit was tried first, and it was stipulated that B's suit should abide the event of A's. On the trial of A's suit, she offered as a witness the husband of B. Held, that the legal interest of the witness was adverse to the party calling him, and that he was a competent witness. (*Abrams v. Howard*, 23 Cal. 388.)

76. Von S., deputy United States surveyor was called as a witness, on behalf of plaintiff, in ejectment on a patent, to prove that the premises in controversy were within the calls of the patent, and in the occupation of the defendant, and on his voir dire stated that he was married to a daughter of plaintiff's, and had, about two years previously, and after the patent was issued, purchased, in his own name, land covered by the grant, upon the confirmation of which the patent issued. Defendant objected to the witness, as interested in the grant as part owner, and on the ground that his wife was interested, and hence that he was disqualified. Held, that the ownership of the witness in parcels of land covered by the grant other than the premises in controversy did not disqualify him; that he could not, from such ownership gain or lose by the direct legal operation and effect of the judgment, nor could the judgment be legal evidence for or against him in any other action. (*Mott v. Smith*, 16 Cal. 533.)

77. One whose interest is equally balanced between plaintiff and defendant is a competent witness. (*Elgin v. Hill*, 27 Cal. 372.)

Witness whose interest is equally balanced. See post, 141, 162.

b. Objection When Taken and Proof of; Who to Decide Question of.

78. An objection to the competency of a witness, on the ground of interest, should be made at the time his interest is first shown, or it will be deemed waived. (*Bear River etc. Co. v. Boles*, 24 Cal. 359.) Cited 20 Nev. 120.

79. Where the interest of a witness is disclosed during the examination in chief, an objection to his competency must be taken before the cross-examination. The opposing party cannot take the chances of a cross-examination and then move to strike out. (*Brooks v. Orosby*, 22 Cal. 42.) Cited 46 Cal. 562.

Waiver of objection to witness by cross-examination. See ante, 59.

80. If a party objects to a witness as incompetent, and then resorts to the testimony of other witnesses to prove the alleged incompetency, but fails because his testimony is rejected as inadmissible, he may still resort to an examination of the witness upon his voir dire. (*People v. Anderson*, 26 Cal. 129.)

81. If a party has two grounds of objection to the competency of a witness, he may examine him on his voir dire as to one ground, and call other witnesses to prove the other ground of alleged incompetency. (*People v. Anderson*, 26 Cal. 129.)

82. A party who objects to a witness called by the opposite party, on the ground of incompetency, may adopt either of two modes to show that incompetency. He may examine the witness upon his voir dire as to the alleged incompetency, or he may object to the witness on the ground of the alleged incompetency, and prove it by other witnesses. (*People v. Anderson*, 26 Cal. 129.)

83. A party who questions a witness on his voir dire as to his competency is concluded by his testimony, and cannot then introduce other witnesses to show the alleged incompetency, unless the answers of the witness on his voir dire leave the question in doubt. (*People v. Anderson*, 26 Cal. 129.)

84. Where a witness is examined on his voir dire as to his interest, it is error to refuse to allow the party offering him to cross-examine the witness to such interest. (*Beach v. Covillaud*, 2 Cal. 237.)

85. It is the duty of the court to decide upon the admissibility of a witness objected to for interest; and it is error to refer the question to the jury, upon the evidence, with instructions to disregard it if they believe the witness interested. (*Tabor v. Staniels*, 2 Cal. 240.)

Disqualification of particular persons because of incompetency. See post, V, 8, c.

Appeal, error in allowing witness to testify, how presented on. See Appeals, VII, 9.

Codefendant as, error in rejecting, how shown. See Appeals, 1393.

c. Particular Persons or Parties, Disqualification of.

A. Parties; Notice of Intent to Testify.

86. The right of a party to an action to testify therein on his own behalf depends entirely upon the statute. (*Reddington v. Waldon*, 22 Cal. 185.)

87. The act of 1861, amending section 422 of the Practice Act, so as to permit parties to testify on their own behalf, was approved May, 1861, but by a general law did not go into effect until sixty days after its passage. In an action tried on the thirteenth day of July, 1861, the defendants were admitted as witnesses on their own behalf, in accordance with the provisions of the amendment, to which plaintiffs excepted. Held, that this was error, for which a judgment in favor of defendants must be reversed. (*Reddington v. Waldon*, 22 Cal. 185.)

88. The provisions of section 422 of the

Practice Act, authorizing parties to be examined as witnesses on their own behalf, are applicable to justices' courts. (*Bradley v. Kent*, 22 Cal. 169.)

89. The rule which excludes the testimony of parties has reference to the matters in issue, and not to incidental questions involving matters auxiliary to the trial of the cause, which are addressed solely to the court. Upon these incidental questions the oath of parties is received, and its admissibility, though generally placed on the ground of necessity, to prevent a failure of justice, does not always, or even in the greater number of instances, depend upon that circumstance. (*Bagley v. Eaton*, 10 Cal. 126.)
Cited 71 Cal. 379.

90. Whatever may have been the reason originally assigned, the true ground upon which the testimony of parties is admitted to prove the destruction of written instruments is this: that the testimony relates to matters preliminary and incidental, is addressed solely to the court, and does not affect the issue to be tried by the jury. Upon such matters the rule as to the incompetency of parties and interested persons does not apply. The testimony proves nothing in the cause; it only prepares the way for the introduction of proof. The existence and contents of the instruments must be established by distinct and competent evidence. (*Bagley v. Eaton*, 10 Cal. 126.)
Cited 14 Cal. 575; 17 Cal. 573.

91. One of the parties in an action to recover possession of land cannot make himself a witness in his own behalf on the trial of the same, for the purpose of defeating the title of the adverse party to the land in dispute, if the adverse party is the grantee of a person no longer living, and the facts he offers himself to prove transpired before the death of the grantor of the adverse party. (*Davis v. Davis*, 26 Cal. 23.)
Cited 36 Cal. 512; 46 Cal. 562.

92. A plaintiff who, at the time of the alleged fraudulent conveyances, was the wife of the client who sold the property which is the subject of the litigation, and whose sole interest in the property is derived through the will of her husband, who died before suit commenced, was not a competent witness on the trial in her own behalf, under the three hundred and ninety-second section of the Practice Act as amended in 1863. (*Kisling v. Shaw*, 33 Cal. 425.)
Cited 36 Cal. 512.

93. The provision of section 418 of the Practice Act, authorizing the examination of parties, was not intended as an exception to the general statutory rule, which declares all persons incompetent who have a direct and immediate interest in the event of the action. (*Easterly v. Bassignano*, 20 Cal. 489.)

94. It is the interest of the witness, and not his position upon the record, that controls his competency. (*Easterly v. Bassignano*, 20 Cal. 489.)

95. The result of the permission given by statute to parties to action to testify in their own behalf has not been to blend in one the different characters of parties and witnesses,

nor to obliterate the distinction between admissions of parties against interest and statements of witnesses out of court contradictory of their testimony at the trial. (*Hall v. Bark Emily Banning*, 33 Cal. 522.)

96. A notice, under section 422 of the Practice Act, of the intention of a party to be examined as a witness in his own behalf, need not state each particular fact, or all the evidence in full, which the party intends to state in his testimony. It is sufficient if it states the several subjects, or each particular subject matter, respecting which the party is to be examined. (*Bond v. Dorn*, 22 Cal. 113.)

97. Thus, in an action for the diversion of water, the notice for plaintiffs to testify, stated the points upon which they would be examined with about the same definiteness and particularity as is required in making issues in a pleading. Held, that the notice was sufficient, and that the refusal to permit the plaintiff to be examined was error, for which a new trial would be granted. (*Bond v. Dorn*, 22 Cal. 113.)

98. Where notice was given of a party's intention to testify in his own behalf, and the notice specified with sufficient particularity some points pertinent to the issues upon which he would give evidence, and also stated generally that he would testify to other facts relative to the issues, and on the trial a general objection was interposed to his giving any testimony under the notice—which objection was overruled, and the record does not set out the testimony, held that it will not be presumed that the party gave testimony on any matters except those particularly specified in the notice, and that the objection was properly overruled. (*Leet v. Wilson*, 24 Cal. 398.)

99. Under such notice a party has a right to testify on such matters as are specified in the notice, and a general objection to his giving testimony as a witness is not well taken. (*Leet v. Wilson*, 24 Cal. 398.)

100. A notice for a party to testify, under section 422 of the Practice Act, while it need not set forth all the evidence, or each particular fact, upon which the party intends to be examined, must specify each particular subject matter respecting which he intends to testify with a reasonable degree of certainty and particularity. It is insufficient to merely refer to the issues or the allegations of the pleadings. (*Bradley v. Kent*, 22 Cal. 169.)

101. A notice for a party to testify, stated the points as follows: "And the points upon which it is intended to examine said Charles Kent, defendant, on said trial will be on every issue made by complaint and answer now on file in said cause, and every allegation contained in plaintiff's said complaint denied by defendant's answer, and particularly concerning the matters alleged by plaintiffs on transfer of note to Charles Kent by Vandiven, also all the allegations made by plaintiffs concerning protest, demand, presentment, and notice, and averred waiver of demand, denied by defendant," held, that the notice was too uncertain and indefinite to authorize any examination of defendant on his own behalf. (*Bradley v. Kent*, 22 Cal. 169.)

Notice of intent to testify by assignor. See post, 142.

Assignor who is party in interest, necessity of notice of intent to testify. See post, 143.

102. A defendant or plaintiff cannot testify in behalf of his codefendants or plaintiffs. (*Lucas v. Payne*, 7 Cal. 92.)

Cited 8 Cal. 579; 9 Cal. 103; 10 Cal. 124.

103. A defendant, whose testimony must inure to his own benefit, cannot be examined for his codefendant. (*Hotaling v. Cronise*, 2 Cal. 60; *Sparks v. Kohler*, 3 Cal. 299, cited 22 Cal. 574, distinguished 1 Nev. 27; *Buckley v. Manife*, 3 Cal. 441.)

104. A defendant may be examined on behalf of his codefendants if their interests are divisible (*Beach v. Covillaud*, 2 Cal. 237.)

105. Where the evidence of one defendant is as available to himself as to his codefendant, this court has always held that one is incompetent to testify for the other. And the same rule prevails under like circumstances where the declaration is in tort and the defendants are charged as joint tortfeasors. (*Johnson v. Henderson*, 3 Cal. 368.)

106. Where a codefendant was called generally as a witness, and he was clearly incompetent on one of the issues, held, that the court below properly rejected him. (*Sparks v. Kohler*, 3 Cal. 299.)

107. A codefendant would be a competent witness to show that his codefendant was not his partner, for this, in a legal point of view, would be against his interest. (*Sparks v. Kohler*, 3 Cal. 299.)

108. Where in an action against two defendants for an alleged indebtedness plaintiff seeks, against the separate denial of one of them, to establish their joint liability by showing a partnership between them, one of the defendants is not a competent witness for plaintiff to prove the fact of partnership against his codefendant. (*Easterly v. Basignano*, 20 Cal. 489.)
Cited 22 Cal. 570, 574.

109. Where one partner sues for an injury to the partnership property, and makes his copartner a defendant because of his refusal to join, in such a case the partner recovering is liable to account to his copartner defendant; and the latter, being immediately interested in the event of the suit, is not, therefore, a competent witness for the plaintiff. (*Nightingale v. Scannell*, 6 Cal. 506.)

110. Where the joint interest is established or admitted, the testimony of one defendant, the same as his admissions, may be used against his codefendant; but this cannot be done where the fact of the joint interest is the point in controversy. (*Easterly v. Basignano*, 20 Cal. 489.)

111. A defendant who has not been served with process is not a competent witness for his codefendants. (*Gates v. Nash*, 6 Cal. 192, cited 8 Cal. 579; *Buckley v. Manife*, 3 Cal. 441.)

112. If party be improperly joined as defendant, the court or jury, upon application, should first pass upon his case, and after he is discharged he could then be examined as

a witness for the other defendant. (*Domingo v. Getman*, 9 Cal. 97.)

113. Defendant who has suffered default is not a competent witness to prove that he was authorized by his codefendant to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. (*Washburn v. Alden*, 5 Cal. 463.)

114. In an action to recover the price of personal property where one of two defendants make default, and the other answers denying the purchase, the defaulting defendant is not a competent witness for the plaintiff to show that his codefendant was his partner, and as such jointly with him purchased the property. (*Fairchild v. Amsbaugh*, 22 Cal. 572.)

115. One of several defendants is properly admitted as witness for plaintiff. (*Dupuy v. Leavenworth*, 17 Cal. 262.)

116. Plaintiff may call as witness any one of adverse parties to action, under our statute, where there are several and they are sued as joint tortfeasors. He is not bound to call all if he call one. (*Rosenbaum v. Hernberg*, 17 Cal. 602.)

117. Where party is called as witness by the other side, and on his cross-examination testifies to new matter, his opponent may be called on his own behalf, in rebuttal of this new matter. (*Jones v. Love*, 9 Cal. 68.)

118. Where the defendant calls plaintiff as a witness, after his examination in chief, he has a right to testify in his own behalf generally as to matters in issue. (*Tuolumne County Water Co. v. Columbia etc. Co.*, 10 Cal. 395; *Drake v. Eakin*, 10 Cal. 312; cited 10 Cal. 396.)

119. The party who calls on an adverse party to testify makes him a witness, and waives his incompetency to be heard for himself, or for his codefendant, or coplaintiff. (*Turner v. McIlhaney*, 8 Cal. 575.)

120. Where the defendant calls the plaintiff as a witness, and the latter testifies to new matter not responsive to the inquiries put to him by the defendant, the defendant may offer himself as a witness on his own behalf, in respect to such new matter, but his testimony must be limited to an explanation or contradiction of such new matter. (*Dwinelle v. Henriquez*, 1 Cal. 387.)

Party to action as witness. See Conspiracy, 9.

Parties to action after judgment. See post, 163.

Right of party to testify to loss of instrument. See Evidence, 57.

B. Agents, Brokers, Servants, or Deputies.

121. Agent is competent witness to testify as to his authority in the performance of acts for his reputed principal. (*Tomlinson v. Spencer*, 5 Cal. 291.)

122. That agent appears by his own testimony to be secret partner with the principal, will make no difference as to his competency to testify to his authority. (*Tomlinson v. Spencer*, 5 Cal. 291.)

123. Where party assuming to act as agent for payee and indorser of a note waived de-

mand and notice for his principal, and was the only person from whom a knowledge of the transaction could be obtained, held, that that he is ex necessitate a competent witness for the holder of the note in suit against the maker and indorser. (*Mills v. Beard*, 19 Cal. 158.)

124. In such cases the fact of interest does not exclude the witness, his competency constituting an exception to the general rule of exclusion on the ground of interest. (*Mills v. Beard*, 19 Cal. 158.)

Interest, agents as witnesses. See post, 171.

125. A broker, whose commissions or compensation depends on his principal's recovery, is incompetent as a witness on the ground that he is directly interested in the event of the suit. (*Shaw v. Davis*, 5 Cal. 466.) Distinguished 7 Cal. 42.

126. In an action where the defense set up is the negligence of the servant of plaintiff the servant is not a competent witness for his employer. (*Finn v. Vallejo Street Wharf Co.*, 7 Cal. 253.)

127. A witness, in an action for a disputed mining claim, who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. (*Live Yankee Co. v. Oregon Co.*, 7 Cal. 40.)

128. In trespass for taking goods against a sheriff who justified under a writ of attachment against a third person, he called as a witness his deputy, who stated that he served the attachment, and related certain conversations between himself and the plaintiff. On cross-examination he stated that "he was deputy sheriff, and under bonds to the sheriff." Whereupon plaintiff moved to strike out his testimony on the ground of interest. Held, that the motion was properly denied, as from the answer it was not certain that the character of his bonds was such as to make him interested. (*Towdy v. Ellis*, 22 Cal. 650.)

129. Held, further, that, the plaintiff having testified, the deputy, even if interested, was a competent witness under section 422 of the Practice Act. (*Towdy v. Ellis*, 22 Cal. 650.)

C. Assignors; Herein of Assignors for Creditors.

130. Assignor of claim is incompetent as witness in favor of claim when his assignee is a formal party to the record, and equally so when the suit is prosecuted for the immediate benefit of his assignee, though not a party. (*Adams v. Woods*, 8 Cal. 306.)

131. In suit by the assignee of a book account, the assignor is a competent witness to prove to the court the loss of the book of original entries, as preliminary to the introduction of secondary evidence of its contents. (*Caulfield v. Sanders*, 17 Cal. 569.) Cited 7 Cal. 273.

132. Where the plaintiff was the assignee of a claim, the written contract upon which it is

founded having been destroyed by the assignor before the assignment, held, that it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. (*Smith v. Truebody*, 2 Cal. 341.)

133. Assignor of agreement to pay a certain sum to a defendant if he would withdraw his defense to a suit is a competent witness in an action by the assignee to recover the amount, as the action is not for an unliquidated demand. (*Gray v. Garrison*, 9 Cal. 325.)

134. B. commenced an action against S. on a promissory note indorsed by A. to B., and procured an attachment, by virtue of which the sheriff levied on goods and chattels as the property of S. P., who claimed that the property levied on belonged to him, and brought suit against B. and the sheriff to recover possession of the same. On the trial, B. offered A. as a witness on behalf of himself and the sheriff. Held, that A. was a competent witness, and that he was not the assignor of a thing in action, within the meaning of the four hundred and twenty-second section of the Practice Act, as amended in 1861. Held, further, that A. had not such a "present, certain, and vested interest" in the result of the suit as disqualified him under the three hundred and ninety-first section of the Practice Act. (*Peterie v. Bugbey*, 24 Cal. 419.)

135. The status to which the four hundred and twenty-second section of the Practice Act applies only exists where the thing in action or contract assigned is the subject matter, or a part thereof, of the suit pending, and in which the assignor is offered as a witness. (*Peterie v. Bugbey*, 24 Cal. 419.)

136. Assignor of demand for money loaned or advanced at various times on an open account, the return of which depends on future conditions, is not a competent witness for the plaintiff in an action by the assignee to recover the amount. (*Allen v. Citizens' Nav. Co.*, 6 Cal. 400.)

137. Such a claim cannot be called a liquidated demand, as it lacks the necessary quality of specific recognition or express promise to pay. (*Allen v. Citizens' Nav. Co.*, 6 Cal. 400.)

138. Where goods are seized by the sheriff on an execution against G., and the owners of the goods, so in the sheriff's hands, assign them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a chose in action, but a sale of specific goods. (*Coghill v. Boring*, 15 Cal. 213.)

139. Assignors of unliquidated demands are not placed, with reference to incidental matters auxiliary to the trial of a cause, in any worse position than the parties to the record. (*Caulfield v. Sanders*, 17 Cal. 569.)

140. In action by one creditor against another to whom debtor made absolute assignment of property, the assignor is a competent witness for plaintiff to prove that the defendant, at the time of the assignment and, in consideration thereof, agreed to pay to plaintiff the debt due him from the assignor out of the

proceeds of the property, and that plaintiff's debt had priority. (*Lockwood v. Canfield*, 20 Cal. 126.)

141. The interest of the witness is equally balanced as between his two creditors, and if this were not so, his interest in favor of plaintiff is a mere speculative and not a disqualifying interest, inasmuch as a recovery by plaintiff against defendant would not affect the liability of witness for plaintiff's debt until the judgment should be satisfied. (*Lockwood v. Canfield*, 20 Cal. 126.)

142. In an action by the assignee of an account, unliquidated demand, or thing in action, not arising out of express contract, the assignor cannot be made competent as a witness for the plaintiff by giving the notice of intention to testify, provided for in section 422 of the Practice Act as recently amended. The clause in the latter section which speaks of an assignor of a thing in action or contract includes only such persons as were permitted to testify under the provisions of section 4, and not those prohibited by it. The amendments to section 422 do not in any way extend the right of examining an assignor. (*Wilkins v. Stidger*, 22 Cal. 231.)

143. A person who assigns a demand of his own to another for the purpose of enabling that other person to bring a joint action upon a demand of his own, and upon the one assigned, the assignor paying his proportion of the costs and sharing in the proceeds of the recovery, is a party in interest within the meaning of the four hundred and twenty-second section of the Practice Act as amended in 1861, and if an attachment is issued in said action, and the sheriff seizes goods by virtue of the same, and a suit is brought against him for damages for the seizure, and the plaintiff offers himself as a witness on his own behalf, upon notice given, the person who made the assignment may offer himself as a witness on behalf of the sheriff upon the same points without giving notice. (*Brodek v. Ellis*, 26 Cal. 145.)

144. In suit by assignee for benefit of creditors to recover goods belonging to the assignor from consignees holding the same under a claim for advances and commissions, the assignor is incompetent as a witness for the assignee. (*Griffin v. Alsop*, 4 Cal. 406.)

Assignor, competency of. See *Reward*, 1.

D. Fraudulent Transferee.

145. On the trial of an opposition by creditors to an insolvent's discharge, on the ground of fraud in transferring his property to A, A is a competent witness for the insolvent as against the objection of interest. (*Shaw v. His Creditors*, 19 Cal. 597.)

146. In such case the record would not be legal evidence in favor of A in an action by the creditors to recover from him the property obtained from the insolvent. (*Shaw v. His Creditors*, 19 Cal. 597.)

E. Sellers or Vendors.

147. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. (*Howe v. Scannell*, 8 Cal. 325.)

148. The vendor of personal property is not a competent witness for his creditors to impeach a sale made by him, or to prove the sale fraudulent, in a contest respecting it between his creditors and his vendee. (*Waugenheim v. Childs*, 23 Cal. 444.)

149. If action concern title to personal property, vendor is competent witness for a second or any subsequent vendee, the objection going only to his credibility. (*Blackwell v. Atkinson*, 14 Cal. 470.)

Assignor of goods wrongfully seized by sheriff is competent. See ante, 138.

Release of vendor of wheat on implied warranty of title. See post, V, 8, c, L.

150. Vendor by quitclaim deed is a competent witness in an action of ejectment by the vendee against a third party to recover possession of the premises. (*Johnson v. Parks*, 10 Cal. 446.)

151. Generally a vendor with warranty of title is not a competent witness for his vendee in a controversy concerning the title. (*Blackwell v. Atkinson*, 14 Cal. 470.) Cited 22 Cal. 603.

152. In real estate the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. (*Blackwell v. Atkinson*, 14 Cal. 470.)

153. A witness will not be presumed to be interested because he is shown to have executed a deed to the party calling him of the land in controversy, where the deed itself is not produced, and no proof is made as to the covenants which it contained. The court will not presume that the deed contained covenants of warranty. (*Wright v. Carillo*, 22 Cal. 595.)

154. In an action by a company of miners to recover possession of a mining claim, and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. (*Packer v. Heaton*, 9 Cal. 568.)

155. Where a mining company sues for damages for trespasses committed on their claims during March, April, and May, a person who owned an interest in the claims during January, February, and March, but had sold out to the company on the 1st of April, is not a competent witness for the plaintiffs, even though, when offered, the witness executes an assignment to plaintiffs of his interest in the damages. (*Columbus Co. v. Dayton Co.*, 18 Cal. 615.)

156. In ejectment for mining claims and for damages, defendants' entry being laid October 31, 1859, and the suit brought in March, 1860, plaintiff called as a witness W., who was one of the owners of the claims from the fall of 1858 to February, 1860, when he sold to plaintiff, during which time the damages accrued. Held, that the witness was competent as against the objection that he was interested because a recovery by plaintiff

would not necessarily give a right of action to the witness for damages accruing before the conveyance and recovery; and the record of such recovery would not be conclusive if any proof of his title. (*Grady v. Early*, 18 Cal. 108.)

157. In an action of trespass for injury to a quartz lode, when T. alone was made a defendant, and by his answer took issue upon the title, an owner of a part of the same lode who had since the commencement of the action, but before trial, sold his interest in the lode for a price contingent on the validity of his title thereto, held, to have no interest which disqualified him as a witness for the defense, as it does not appear that the judgment in this action will affect or determine the title to the part thus sold. (*Real del Monte etc. Co. v. Thompson*, 22 Cal. 542.)

158. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners of the ditch was taken by the plaintiff, and subsequently, and before the trial, the witness conveyed, by deed, his interest in the ditch to plaintiff. Held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. (*Kimball v. Gearhart*, 12 Cal. 27.) Cited 18 Cal. 327.

Release of claim by grantor for balance due. See post, V, 8, c, L.

159. In an action of trespass for entering upon the mining ground of plaintiff and digging the same up and converting the gold-bearing earth, the vendor of plaintiff is a competent witness, although a part of the purchase money is still due him. (*Rowe v. Bradley*, 12 Cal. 228.)

160. Under section 422 of the Practice Act, as amended in 1861, the vendee of the defendant and vendor of the plaintiff is, without regard to his interest, admissible as a witness for the plaintiff upon an issue as to the genuineness of the defendant's deed, where the latter has been examined upon that question on his own behalf. (*Wright v. Carillo*, 22 Cal. 595.)

F. Lessors.

161. Lessor of plaintiffs is competent witness in an action for a trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. (*McCormick v. Bailey*, 10 Cal. 230.)

G. Parties to Notes.

162. The maker of a note, after judgment against him, is a competent witness for the indorser, because his interest is equally balanced. (*Vance v. Collins*, 6 Cal. 435.)

163. Nor is the objection valid that he is a party to the action; after judgment against him, the action is ended as to him; he is no longer a party, and then his competency must be tested by his interest. (*Vance v. Collins*, 6 Cal. 435.)

164. In an action against the indorser of a note, where demand and notice are not averred, but where it is averred that the maker paid the indorser the value of the note, and that the indorser agreed to pay it,

the maker of the note is not a competent witness to prove those facts. (*Palmer v. Tripp*, 6 Cal. 82.)

165. In a suit against the maker of a note or the acceptor of a bill the indorser is a competent witness for either party. (*Bryant v. Watriss*, 13 Cal. 85.) Cited 19 Cal. 485; 25 Cal. 189.

166. An indorser of a note is incompetent as a witness to establish the lien of a holder of the note upon the property of the maker, being directly interested to have the lien established. (*Soule v. Dawes*, 6 Cal. 473.)

167. In a suit by an indorsee against the maker of a note, the indorser, not being a party, is a competent witness for the plaintiff where it does not appear that the suit is prosecuted for his immediate benefit. (*Tomlinson v. Spencer*, 5 Cal. 291.)

168. An indorser of a promissory note is a competent witness for either plaintiff or defendant in an action by the indorsee against the maker, and his competency is wholly unaffected by sections 4 and 393 of the Practice Act. (*Priest v. Bounds*, 25 Cal. 188.)

169. In a suit against the maker of a note, the payee or indorser is a competent witness for either party. (*Smith v. Richmond*, 19 Cal. 478.) Cited 25 Cal. 189.

170. A person is a competent witness for defendant where the effect of his testimony is to make himself liable on his guaranty, thus rendering his interest adverse to defendant. (*Mayo v. Avery*, 18 Cal. 309.)

One assuming to act as agent for parties to note, competency of. See ante, 123.

H. President or Stockholders of Corporations.

171. President of corporation, acting as its general agent, is not, if an interested stockholder, a competent witness for the corporation to testify concerning his acts as agent. The exception to the general rule, by which interested agents are sometimes admitted ex necessitate to testify, is, so far as members of a corporation are concerned, confined to keepers and depositaries of corporate documents. (*Blen v. Bear River etc. Co.*, 20 Cal. 602.)

172. A party who permits himself to stand on the books of a water company, incorporated under the statutes of this state, as a stockholder, and holds the office of secretary, to which no person but a stockholder is eligible, is not a competent witness for the company, in an action against it for overflowing plaintiff's mining claim. He is liable for the debts of the company, and, therefore, interested. (*Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319.) Cited 23 Cal. 329.

173. The fact that the stock was held in his name in trust for another, the transfer having been made simply to enable him to become an officer of the company, does not relieve him from responsibility. (*Wolf v. St. Louis Independent Water Co.*, 15 Cal. 319.) Cited 74 Cal. 174.

174. A person who has been a stockholder in an incorporated company, but ceased to be

such holder before suit was brought, is a competent witness in an action in the name of such company. (Tuolumne County Water Co. v. Columbia etc. Water Co., 10 Cal. 193.)

175. In an action against a corporation, a witness, who was a member of the corporation when the liabilities were incurred on which the action is brought, but who had sold out before the commencement of the action, is incompetent for interest. (McAuley v. York Min. Co., 6 Cal. 80.)
Cited 14 Cal. 286; 20 Cal. 615; 23 Cal. 329.

176. A member of the incorporation, at the commencement of a suit brought by it, cannot become a witness for it on the trial by selling out his shares of stock after suit brought. He is personally liable for his proportion of the costs, and his competency as a witness can only be restored by actual payment of the entire costs of the case, those due and those to become due. (Mokelumne Hill Canal Co. v. Woodbury, 14 Cal. 265.)
Cited 20 Cal. 615; 23 Cal. 329.

L. Clerk of Court; Commissioners to Assess Damages.

177. Where clerk of court is called as witness, to prove the records of the court of which he is clerk, it is no objection that he is interested in the result of the suit. (Price v. Dunlap, 5 Cal. 483.)

178. Commissioner appointed to estimate benefits and assess damages to lot owners in the matter of widening a street in a city, is a competent witness on a trial in the county court upon the question of confirming the report of the commissioners when objections are made to it. (Appeal of Brooks, 32 Cal. 558.)

J. Indemnitors.

179. In suit by claimant of attached property against the sheriff, the testimony of a subsequent attaching creditor, who has executed an indemnifying bond to the sheriff, to save him harmless in holding the property, is not admissible. (Landsberger v. Gorham, 5 Cal. 450.)
Cited 12 Nev. 441.

Release of indemnitor. See post, V, 8, c, L.

K. Subscribing Witnesses to, or Trustees Under Will.

180. On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding lands devised therein in trust for a devisee, and without having any interest himself therein. (Peralta v. Castro, 6 Cal. 354.)

181. And where such trustee had executed a covenant of warranty to a purchaser of a portion of such lands, but was fully indemnified against loss thereby by the cestui que trust, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. (Peralta v. Castro, 6 Cal. 354.)

182. Where the deed to the trustee and his covenant of warranty were given in evidence to support the objection to his competency,

by which it appeared that the land was conveyed to him absolutely, and that he had conveyed a part with covenant of warranty, but it appeared from his examination on his voir dire that the trust existed by parol, and that he really had no interest therein, and was indemnified against loss by his warranty, held, that the question as to the admissibility of such parol evidence to contradict or vary the terms of the instrument under seal, could only properly arise in a suit between the trustee and the cestui que trust, upon a denial of the trust by the grantee, and that for the purposes of the examination the evidence on the voir dire is admissible. (Peralta v. Castro, 6 Cal. 354.)

L. Release of Interest or Nonsuit to Render Witness Competent; Effect of.

183. If, in any case, one partner can assign to another partner his interest in a firm claim, and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand within the Practice Act. (Cravens v. Dewey, 13 Cal. 40.)

184. A grantor, to whom his grantee still owes a portion of the purchase money, may remove his interest in the controversy between the latter and a third person as to the title, by executing to the grantee a formal release of all claims for the balance due. (Wright v. Carillo, 22 Cal. 595.)

185. Where vendee of wheat released vendor from damage by reason of implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. (Paige v. O'Neal, 12 Cal. 483.)

186. Would not the nonpayment of the consideration expressed in the release affect the instrument as a valid release? The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action. (Paige v. O'Neal, 12 Cal. 483.)

187. The competency of a witness whose interest has been created by his execution, as surety, of a statutory undertaking made on behalf of one of the parties for the purposes of the action, may be restored on the trial, either by the substitution of another surety upon the undertaking, or by a deposit in court of a sufficient sum of money to cover all liability attaching to the proposed witness by reason of his suretyship. (Klockenbaum v. Pierson, 22 Cal. 160.)

188. The complaint charged a trespass against "C. D. Thompson and the other owners or claimants of the Paul Thompson Quartz Lode." Thompson alone was served with summons, and an answer was filed on behalf of "defendants," without naming them. One Trainovitch was offered as a witness for the defense, and stated that at the time of the commencement of the action he owned an interest in the Paul Thompson lode, and had agreed to pay his proportion of the costs. Held, that Thompson was the only defendant in the action, and that a release from him to the witness rendered the latter com-

petent. (*Real del Monte etc. Co. v. Thompson*, 22 Cal. 542.)

189. Where L., a commission merchant, sued out an attachment against H., and had certain goods seized as the property of H., but which were claimed by C., and L. gave the sheriff an indemnity bond which he accepted, and held the goods under the attachment, and subsequently sold the same to satisfy the attachment, C. brought suit against the sheriff for the value of the goods, the sheriff having released L. from all actions arising out of the seizure and sale of the goods, and having also released him after the commencement of the suit, held, that L. was a competent witness in the suit of C. against the sheriff. (*Perlberg v. Gorham*, 10 Cal. 120.)

190. There was no error in refusing the nonsuit as to one of the defendants, or in refusing first to submit to the jury the question of his complicity with the view to his being a witness for his codefendants if he were acquitted. (*Dreux v. Domec*, 18 Cal. 83.)

191. If a party who has a contract for a conveyance of land from one who has taken the preliminary steps to acquire the title from the government agrees to rescind the contract in order to qualify himself as a witness for the other before the land department, and becomes such witness, and the patent is issued to the other, the contract is rescinded and gone. (*Simpson v. Applegate*, 75 Cal. 342.)

192. Subsequent conversations, in which the right of the party is acknowledged, do not amount to a new contract. (*Simpson v. Applegate*, 75 Cal. 342.)

Conveyance of interest by vendor after cause of action accrued, effect of. See ante, V, 8, c, E.

Ceasing to be stockholder, effect of on competency. See ante, V, 8, c, H.

VI. Examination of Witnesses.

1. Rule Where Party Becomes a Witness.

193. Where, in a civil action, a party becomes a witness in his own behalf, he thereby subjects himself to all the rules regulating the direct and cross-examination of witnesses. (*Clark v. Reese*, 35 Cal. 89.)
Cited 39 Cal. 449; 58 Cal. 213.

Cross-examination of party, extent of. See post, 231, 241.

Privilege of party who becomes a witness. See post, VI, 2.

2. Privilege of Witnesses.

194. Party to action who becomes witness in his own behalf has no greater privilege than any other witness, and may refuse to answer a question when the answer would tend to degrade his character. (*People v. Reinhardt*, 39 Cal. 449.)
Cited 58 Cal. 214; 66 Cal. 604; 78 Cal. 94; 9 Nev. 189.

195. Whether question put is pertinent or not, the witness may decline to answer, on the ground that to do so would tend to criminate him; but where the question is not pertinent, the party introducing him may object thereto, and his objection should be sustained, whether the witness objects to an-

swering or not. Thornton, J., reserves his opinion. (*Sharon v. Sharon*, 79 Cal. 633.)

196. Where the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself. (*Ex parte Rowe*, 7 Cal. 184.)

197. The only case where the witness is privileged from answering a question on the ground that his answer would disgrace him is when it is not pertinent to the issue. (*Ex parte Rowe*, 7 Cal. 184.)

198. The amendatory act of 1855 provides that "the testimony given by such witness shall in no instance be given against himself in any criminal prosecution"; the witness, having thus the protection contemplated by the constitution, is bound to answer. (*Ex parte Rowe*, 7 Cal. 184.)

199. Where the matter to which the question related was one of the facts in issue, the fact that the witness' reply would disgrace or degrade him does not shield him from answering the question. (*Clark v. Reese*, 35 Cal. 89.)

200. A party to an action cannot avail himself of the alleged error of the court in compelling his witness to answer a pertinent question proposed by the opposite party, where the witness had refused to answer on the ground that his reply would disgrace and degrade him. The privilege not to answer being personal to the witness, it is not in any sense the privilege of the party calling him. But, as to a party demanding an answer, the rule is otherwise if the court allows the privilege in a case where the witness fails to bring himself within the rule. (*Clark v. Reese*, 35 Cal. 89.)
Cited 79 Cal. 675.

201. On the trial of an action for a breach of promise of marriage, the character of plaintiff for chastity, as well as the fact of the promise alleged, being among the issues tried, the defendant, who testified as a witness in his own behalf to plaintiff's question on cross-examination if he had ever called, plaintiff his "dear Carrie," or his "dear child," replied, "I decline to answer the questions; when a man takes personal liberties with a woman he should not come on the stand and swear to it." Plaintiff then asked him the further question, "Did you ever take improper liberties with plaintiff?" to which, on defendant's declining to answer, the court enforced an answer, under penalty of committing defendant for contempt; also of striking out his answer and allowing plaintiff to take judgment as prayed in her complaint. Held, (1) that defendant's response to the first question clearly implied that he had taken personal liberties with plaintiff; (2) that plaintiff's last question was proper, and she was entitled to demand an explicit answer; and (3) that under section 409 of the Practice Act the court did not err in the mode of enforcing such answer. (*Clark v. Reese*, 35 Cal. 89.)
Cited 15 Or. 284; distinguished 45 Cal. 115.

202. If a witness discloses a part of a transaction, with which he was criminally con-

cerned, without claiming his privilege, he must disclose the whole. He cannot, after voluntarily testifying in chief, decline to be cross-examined on the ground that his answers may criminate or disgrace him. (*People v. Freshour*, 55 Cal. 376.)

203. Statements of a witness in an action are voluntary if he might have objected to answering the questions which elicited them, on the ground that to do so would criminate him, and failed to make such an objection. (*People v. Wieger*, 100 Cal. 352.)

Defendant in contempt cannot be compelled to testify. See Contempt, 102.

Privilege of, refusal to testify. See Contempt, 35.

3. Manner of Examining Witnesses.

204. It is not an objectionable form of question to request a witness on his direct examination to state only what he knows about the matter. (*Hicks v. Riverside Fruit Co.*, 72 Cal. 303.)

205. Double question, part of which is improper, is properly overruled. (*Davis v. Baugh*, 59 Cal. 568.)

206. It is not competent, upon the examination of medical witnesses, either in direct or cross-examination, to read to them extracts from medical works and ask them whether what is so read corresponds with their own judgment, when it is apparent that the sole object of so doing is to place before the jury the opinion of the author of the books referred to. (*Lilley v. Parkinson*, 91 Cal. 655.)

207. The reading of extracts from medical works, and asking an expert medical witness if he agrees with the author, is not permissible on cross-examination, where the extracts do not contradict the evidence of the witness and are evidently in ended as evidence for the cross-examining party to sustain his theory of the case. Questions as to extracts from such works, on cross-examination, should be strictly limited to the one purpose of testing the competency of the witness as an expert, or the value of his opinions. (*Fisher v. Southern Pac. R. R. Co.*, 89 Cal. 399.) Cited 91 Cal. 656.

208. A question based upon the supposition of a state of facts not proved is improper. (*People v. Graham*, 21 Cal. 261.) Cited 80 Cal. 451.

209. An objection was sustained to the question (addressed to the defendant), "I will ask you, if, with the money you paid, and five hundred dollars damages, whether the whole amount of the contract work and the extra work was paid?" Held, that the question assumed five hundred dollars damages, a matter in dispute. (*Barilari v. Ferrea*, 59 Cal. 1.)

210. On the examination of a witness counsel cannot insert in a question a statement as having been made by the witness which had not in fact been made by him. (*People v. Fong Ah Sing*, 70 Cal. 8.)

Manner of cross-examining, what improper. See post, 246.

Hypothetical questions. See Evidence, V, 3, 509; Insanity, 42, 43; Jury and Jurors, 100.

Repetition of questions. See Evidence, X, 6, c.

Question assuming state of facts not proved. See Evidence, 509.

Failure to object to improper question. See post, 388.

4. Leading Questions.

211. On the direct examination of a witness, leading questions may be allowed by the court in the exercise of a sound discretion, and the action of the court in that respect can only be reviewed so far as to determine whether its discretion has been abused. No abuse of discretion appearing, a new trial cannot be granted on the ground that the court erred in allowing such questions. (*Moran v. Abbey*, 63 Cal. 56, cited 72 Cal. 60; *People v. Fong Ah Sing*, 70 Cal. 8; *Smithers v. Fitch*, 82 Cal. 153; *White v. White*, 82 Cal. 427.)

212. The trial court may in its discretion strike out leading questions put to a witness. (*Morris v. Lachman*, 68 Cal. 109.)

213. In criminal prosecutions it is a matter of judicial discretion to allow the prosecution to put leading questions to its own witnesses. (*People v. Shem Ah Fook*, 64 Cal. 380.) Cited 76 Cal. 349.

214. It is within the discretion of the court to permit the district attorney to put leading questions to his own witness. (*People v. Goldenson*, 76 Cal. 328.)

215. In a criminal prosecution it is not an abuse of discretion for the court to permit leading questions to be asked on the direct examination of a witness who is unfamiliar with the English language, and who had previously testified in substance to the facts embodied in the questions. (*People v. Clary*, 72 Cal. 59.)

Leading questions. See Criminal Law, XXI, 31, i, V.

Leading questions, discretion as to. See Jury and Jurors, 101.

Leading question to impeaching witness. See post, 280.

5. Cross-examination.

216. It is in the discretion of the court to confine a cross-examination of a witness within reasonable limits; and when protracted to an unreasonable extent, the court may prohibit its continuance. (*Reed v. Clark*, 47 Cal. 194.)

217. When both sides of a case are founded upon the same or cognate facts, the cross-examination must be left to the discretion of the judge, and his ruling cannot be regarded as erroneous. (*Thornton v. Hook*, 36 Cal. 223.)

Cited 3 Mont. 440.

218. The right of cross-examination affords the most effective mode of testing the accuracy or credibility of a witness, and should not be restricted beyond the requirements of the statute. (*People v. Gallagher*, 100 Cal. 466.)

219. Great latitude should be allowed, upon the cross-examination of witnesses, for the purpose of testing the knowledge, judgment, or bias of the witness; and the discretion of

the trial court in allowing questions to be put upon cross-examination should not be impugned except for abuse. (*City of Santa Ana v. Harlin*, 99 Cal. 538.)

220. It is not always easy to determine precise point beyond which a cross-examination should not be allowed to proceed. The general rules are that a witness cannot be cross-examined except as to facts and circumstances connected with matters testified to by him on his direct examination. (*Thornton v. Hook*, 36 Cal. 223.) Cited 71 Cal. 32; 74 Cal. 34; 1 Ariz. 136.

221. Party who has not yet opened his own case cannot do so by cross-examination of his adversary's witness. (*Thornton v. Hook*, 36 Cal. 223.)

222. When defendant, on cross-examination of plaintiff's witness, simply aims to disprove, by the witness, the very cause the witness himself has made, the rule of excluding such evidence until defendant opens has no application. (*Jackson v. Feather River Water Co.*, 14 Cal. 18.)

223. The cross-examination of a witness should be confined to matters which have been elicited from him on his direct examination. (*People v. Miller*, 33 Cal. 99; *Landsberger v. Gorham*, 5 Cal. 450, cited 1 Ariz. 135; *Aitken v. Mendenhall*, 25 Cal. 212, cited 1 Ariz. 135; *People v. Jenkins*, 56 Cal. 4.)

224. Cross-examination cannot go beyond the subject matter of the evidence in chief, but should be allowed a very free range within it. (*Jackson v. Feather River Water Co.*, 14 Cal. 18.)

Cited 25 Cal. 213; 33 Cal. 648; 66 Cal. 667; 71 Cal. 32; 1 Ariz. 135, 138; 7 Nev. 390; 12 Nev. 441.

225. Witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue. (*People v. Jenkins*, 56 Cal. 4.)

226. Questions responsive to matters testified to in the direct examination of a witness should be allowed, for the purpose of testing the value of his testimony upon the subject in relation to which he testified in his examination in chief. (*Wixom v. Goodcell*, 90 Cal. 622.)

227. Where a witness has not given any testimony on his examination in chief, with respect to the consideration of the note, it is not proper cross-examination to ask him questions for the purpose of showing that the note was without consideration. (*Brady v. Henry*, 77 Cal. 324.)

228. A defendant in a criminal prosecution, who has become a witness in his own behalf, cannot be cross-examined as to any facts or matters not testified to by him on his examination in chief. If the trial court permit a more extensive cross-examination, the right secured to the defendant by section 13, article I, of the constitution is violated. (*People v. O'Brien*, 66 Cal. 602.)

Cited 75 Cal. 416; 76 Cal. 574; 78 Cal. 93, 94; 14 Or. 311.

229. The plaintiff's vendor having testified as a witness for the plaintiff to the execution of the bill of sale, the defendant on cross-examination proposed to ask him several ques-

tions as to the consideration of the instrument, which were objected to on the ground that they were not responsive to the examination in chief. Held, the objections were properly sustained. (*McFadden v. Mitchell*, 61 Cal. 148.)

230. It is competent to ask any questions on cross-examination of a witness which have a bearing directly or indirectly upon any portion of his testimony in chief, or which test the credibility, knowledge, or recollection of the witness with reference thereto; and it is error for which a new trial may be granted to refuse to allow such questions. (*Sharp v. Hoffman*, 79 Cal. 404.)

231. Cross-examination of party or of expert should be allowed a liberal range, touching all matters testified to in chief, or tending to test the temper, bias, motives, intelligence, accuracy, credibility, or means of knowledge of the witness. (*McFadden v. Santa Ana etc. Ry. Co.*, 87 Cal. 464.)

Medical witness, improper cross-examination of. See ante, VI, 3.

232. Where a plaintiff set up his right to property, by virtue of a conveyance which was shown by the testimony of a witness to be a mortgage, held, that the defendant, on cross-examination, could show that the mortgage had been satisfied. (*Chenery v. Palmer*, 5 Cal. 131.) Cited 7 Cal. 567.

233. Where the plaintiff in an action to replevy property taken from his custody under attachment against a third person who had pledged it to the plaintiff testified in chief that it did not belong to the attachment debtor, and that he had other security for the money due to him from the attachment debtor, a question, upon cross-examination, whether such additional security was not in value twice or three times as much as the money loaned is not subject to the objection of immateriality. (*Barnhart v. Fulkerth*, 93 Cal. 497.)

234. Certain questions asked of the plaintiff on cross-examination, in reference to his alleged payment of taxes on the land in controversy, held, proper. (*Partridge v. Shepard*, 71 Cal. 470.)

235. If a witness has testified, on cross-examination, as to a conversation, the court will not assume that the witness may have omitted a part of the conversation for the purpose of laying the foundation for a further cross-examination on another subject. (*Chamberlin v. Vance*, 51 Cal. 75.)

236. Where a witness testified in chief that a piece of land was assessed for taxes, it is not a cross-examination to ask him the usual way of selling property for taxes, or whether another lot of land was sold for taxes. (*Wetherbee v. Dunn*, 32 Cal. 106.) Cited 1 Ariz. 136; 12 Nev. 441.

237. A witness having testified that he managed certain property as the agent of the plaintiff, his wife, the property having been attached at the suit of Newman, as the property of the witness, was asked on cross-examination: "What was the understanding between yourself and Newman relative to at-

taching these cattle just previous to the commencement of the attachment suit?" Held, that the question was legitimate cross-examination. (*Steinburg v. Meany*, 53 Cal. 425.)

238. If, on an indictment for assault with intent to commit murder by shooting at the prosecutor, a witness for the prosecution testifies that he was near and saw the defendant shoot at the prosecutor, he may be asked, on cross-examination, for the purpose of testing his credibility, whether he did not soon after ask the prosecutor whether the defendant had shot at him. (*People v. Bullard*, 51 Cal. 551.)

239. The witness testified, in response to a question by the district attorney, that she had never been on the witness-stand but once before, and that then she was very much excited. The counsel for the defendant then asked her what she was called to testify for. Held, that the question was immaterial. (*People v. De Witt*, 68 Cal. 584.)

240. Where a witness testified upon the trial of a defendant for perjury, alleged to have been committed during a murder trial, that he was present and saw the deceased shot, that he was not a witness upon the first trial of the person charged with the murder, and had told no one what he knew about the shooting until he was picked up on the street during the second trial of such person, and taken to the district attorney's office, it is error for the court to refuse to allow the defendant to ask the witness, on cross-examination, who took him to the district attorney's office, for the purpose of showing how he came at so late a time to tell what he knew about the case. (*People v. Lem You*, 97 Cal. 224.)

241. A witness may be asked on his cross-examination any question which tends to test his accuracy, veracity, or credibility, and the court should be especially liberal where the witness is a party to the suit. (*Neal v. Neal*, 58 Cal. 287.)
Cited 71 Cal. 32.

242. When a cross-examination is proper as testing the accuracy of the recollection or knowledge of a witness relating to the date and genuineness of a Mexican grant in controversy, concerning which he has testified in chief, the whole evidence must be considered as that of the party calling the witness, and if the date of a collateral grant testified to on such cross-examination bears upon the accuracy of recollection or knowledge of the witness as to matters testified to in chief, it is competent to contradict him by rebutting evidence as to the date of such collateral grant. (*Davis v. California Powder Works*, 84 Cal. 617.)

243. While a witness cannot be impeached by proof of specific wrongful acts, or by contradicting him upon collateral matters, yet where the witness has shown great positiveness of recollection as to the date of his own signature to a grant in controversy, his accuracy of recollection may be tested by inquiry as to the date of his signature to other grants; and if he shows no accurate remembrance of such date, it is competent to show the real date of such other signatures, for the purpose of comparison with the signature in

question, which is alleged to have been antedated. (*Davis v. California Powder Works*, 84 Cal. 617.)

244. When such witness is asked as to the date of his signature to particular grants, concerning which no wrongful act is proven, and no attempt is made to contradict or impeach the witness by any evidence offered in the case, it cannot be presumed that the trial court would be influenced to disbelieve the witness by its knowledge of published decisions of the United States supreme court not in evidence, tending to show that in making such grants the witness was guilty of turpitude. (*Davis v. California Powder Works*, 84 Cal. 617.)

245. The refusal to allow a defendant against whom judgment is rendered to cross-examine a witness for the plaintiff on a material matter is not a prejudicial error if the matter is afterward fully established by the testimony of the defendant. (*San Joaquin Valley Bank v. Bours*, 73 Cal. 200.)

246. When a party whose deposition was taken before the trial becomes a witness at the trial, it is an objectionable mode of cross-examination to read to the witness several questions and answers from the deposition, and ask if each of such answers was correct or true, or what was said when the deposition was taken. The court has the power to stop the continuance of such examination as a useless consumption of time. The opposite party may show any contradictory statements for the purpose of impeachment by offering in evidence the deposition, or any part thereof, as an admission of the party, without first calling the attention of the witness to inconsistent statements; and if the deposition is afterward placed in evidence, any error of the court in stopping the cross-examination would be rendered harmless. (*White v. White*, 82 Cal. 427.)

Waiver of objection to witness by cross-examination of. See ante, 20, 59.

Cross-examination of witness on ground of interest. See ante, 84.

Cross-examination, what proper. See Criminal Law, 763; XXI, 31, i, V.

Cross-examination, what not proper. See Mines and Mining, 287.

Party calling out statement on cross-examination is bound by it. See ante, 20.

Cross-examination of witness on collateral matters for purpose of contradiction. See post, VII, 4.

Cross-examination as to irrelevant matters. See Criminal Law, 2382.

Cross-examining witness as to arrest or conviction of misdemeanor or felony. See post, VII, 6.

Cross-examination of accomplices. See Criminal Law, VIII, 14, r, C.

Cross-examination of witnesses in prosecution for larceny. See Criminal Law, XXI, 36, g, E.

Cross-examination as to adverse user, what proper. See Watercourses, XIV, 2, g, D.

Cross-examination showing hostility or animus of witness. See post, VII, 8.

Cross-examination showing hostile feelings of witness. See Assumpsit, 39.

Cross-examination as to payment of expenses of litigation. See Watercourses, 429.

Cross-examination to show credibility. See Marriage and Divorce, 50.

Cross-examination as to contradictory statements. See Wills, 65.

Cross-examination as to knowledge of fraud, what proper. See Bills and Notes, 301.

Cross-examination of witness claiming he took no part in ouster. See Forcible Entry and Unlawful Detainer, 242.

Pleading superseded by amendment may be used on cross-examination. See Evidence, 217.

Cross-examination, repetition of slanderous words may be shown on. See Slander, 38.

Improper remarks of judge on cross-examination attempting to show discrepancy. See post, VII, 11.

Appeal, discretion as to cross-examination, review of. See Appeals, XI, 13, i.

6. Redirect Examination.

247. There is no abuse of the discretion of the court in refusing to permit a witness, on re-examination, to be further interrogated on a point, concerning which he had already fully testified. (Brumagim v. Bradshaw, 39 Cal. 24.)

248. Upon the cross-examination of the prosecuting witness, the defendants drew out that the witness had consulted one S. in relation to the transaction out of which the indictment grew, and in part developed what had occurred between them. Held, that the plaintiff was entitled to call out all that took place between the witness and S. in the consultation referred to. (People v. Smallman, 55 Cal. 185.)

Appeal, discretion as to re-examination, review of. See Appeals, XI, 13, i.

7. Refreshing Memory.

249. A shorthand reporter who is called to testify as to what a witness on a former trial had then sworn to, may refresh his memory by reading the shorthand notes of the testimony of the witness taken by him on the trial. (Watrous v. Cunningham, 71 Cal. 30.)

250. Witness cannot refresh his memory from affidavit previously sworn to and subscribed by him *ex parte*, unless it be shown that the affidavit was written by him or under his direction, at the time the facts occurred or immediately thereafter, or at some other time when the facts were fresh in his memory, and that he knew the same were correctly stated in the affidavit. (Morris v. Lachman, 68 Cal. 109.)

251. A witness called by the prosecution in a criminal case to prove statements made by the defendant may refresh his memory from written memoranda made by him at the time of the statements. (People v. Le Roy, 65 Cal. 613.)

252. A witness called by the prosecution in a criminal case to prove statements made by the defendant may, while on the stand, refresh his memory by a reference to a written memorandum made by him at the time or soon after. (People v. Cotta, 49 Cal. 166.) Cited 65 Cal. 614.

253. A witness may refresh his memory by reference to a memorandum, although it was not made by him nor at the time the occurrences took place, if made under his directions at any time when the fact was fresh in his memory. (Paige v. Carter, 64 Cal. 489.)

254. A book-keeper, as a witness, has a right to refer to the books kept by him, to refresh his memory. (Treadwell v. Wells, 4 Cal. 260.)

Refreshing memory, nurse's memorandum may be used for. See Wills, 167.

8. Right to Explain Testimony; Illustrating Testimony by Diagram.

255. At the trial the accused, who had been sworn as a witness on his own behalf, was asked, on cross-examination, if he had not made certain statements (which were repeated to him), involving apparently important admissions against himself, to which he answered: "I said words to that effect, but not exactly in that way." It was held to be error to deny to the accused the right to disclose exactly what he did say, and to state the whole conversation at that time, relating to the same subject matter. (People v. Murphy, 39 Cal. 52.)

Child, recalling to allow her to explain discrepancies. See Criminal Law, 2609.

256. It is not error to permit a witness at the trial to use a sketch of a house or other object to explain his evidence as to the position of persons and objects, even though the sketch is not shown to be a correct representation, if the same be not introduced in evidence. (People v. Murphy, 39 Cal. 52.)

9. Recalling Witnesses.

257. When a witness has been once called and examined by a party, it is within the discretionary power of the court to allow him to be recalled and further examined by the same party, even if the other party objects. (Tyler v. Healey, 51 Cal. 191.)

258. The matter of permitting a party who has cross-examined a witness to recall him in order to make a further cross-examination, rests greatly in the discretion of the court, and it is not the practice of the appellate court to disturb the judgment for a refusal to permit a witness to be recalled unless such discretion has been abused. (People v. Keith, 50 Cal. 137.) Cited 65 Cal. 536.

259. Case stated in which it was held the court did not abuse its discretion in refusing to allow a witness to be recalled. (People v. Keith, 50 Cal. 137.)

260. The court refused to permit the defendant to recall a witness who had already been on the stand twice. After considering the circumstances, held, that there was not such an abuse of discretion as warranted a reversal. (People v. Moan, 65 Cal. 532.)

261. When the defendant has called and examined a witness and rested, and the plaintiff has introduced rebutting testimony, it is an abuse of the discretion of the court to refuse to allow the defendant to re-examine the witness if his counsel state that the fact that

the witness would testify to certain material matters has come to their knowledge since the close of defendant's case, and if the recalling of the witness will work no surprise on plaintiff. (*Barry v. Bennett*, 45 Cal. 80.) Cited 87 Cal. 419.

262. The court may, in its discretion, permit the plaintiff to recall one of the defendant's witnesses after his cross-examination has been finished, for a further cross-examination, to lay a foundation for discrediting or impeaching him. (*Reed v. Clark*, 47 Cal. 194.)

263. It is no error to refuse to allow a plaintiff to recall a witness in rebuttal for the sole purpose of contradicting a witness for defendant on a point upon which plaintiff's witness has already testified. (*Phelps v. McGloan*, 42 Cal. 298.)

264. The fact that, in a criminal trial, after the prosecutor has left the witness-stand, another witness called by the prosecution testifies as to certain occurrences, and in his relation of them differs from the account given by the prosecutor when on the stand, does not give the defendant a right further to cross-examine the prosecutor. (*People v. Parton*, 49 Cal. 632.)

Answers of witness recalled to lay foundation for impeachment, how far binding. See post, 317.

265. It is not an abuse of discretion for the court to refuse to allow a witness to be recalled after the case has been continued for argument. (*Briswalter v. Palomares*, 66 Cal. 259.)

266. If the ends of justice require, it is both the right and the duty of the court to permit a witness to be recalled after a party has closed his case. (*Fairchild v. California Stage Co.*, 13 Cal. 599.)

267. If counsel for the defendant, after the prosecution has rested, ask for leave to further cross-examine the prosecutor on new matter, the facts that the people have rested and that the defendant may recall the prosecutor as his own witness are not sufficient reasons for the court to deny the request; but if the request is denied, and the defendant then makes the prosecutor his own witness, and it appears that it was not on new matter that he desired to cross-examine, but on matter inquired into on the former examination, the defendant is not injured. (*People v. Parton*, 49 Cal. 632.)

Recalling. See Evidence, X, 4.

VII. Contradiction and Impeachment of Witnesses.

1. Rule that Party is Bound by Testimony of His Own Witness.

268. If a party offers a witness to prove the sale of a mining claim under which he claims, and the witness says the sale was in writing, the party is bound by the statement of the witness, and must produce the writing or account for its loss. (*Patterson v. Keystone Min. Co.*, 30 Cal. 360.)

269. A party calling out a fact from a witness indorses his credibility, and is concluded by his statement. (*People v. Anderson*, 26 Cal. 129.)

270. Defendant cannot impeach his own witness by evidence of his declarations produced contrary to a stipulation as to the testimony of such witness. (*People v. Hawes*, 98 Cal. 648.)

271. Party is not bound by or held to admit as true statements made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time. (*Wilkins v. Stidger*, 22 Cal. 231.)

272. Party calling witness is not precluded from proving truth of any particular fact in direct contradiction to what the first witness may have testified. (*Norwood v. Kenfield*, 30 Cal. 393.)

273. A witness, whichever party calls him, cannot be impeached unless he has given testimony against the impeaching party. The mere failure of a witness to testify to a fact as expected does not authorize the party calling him to prove that he had elsewhere made the desired statements. It is only when he has given damaging testimony that he can be impeached. (*People v. Mitchell*, 94 Cal. 550.)

274. When a witness who is called by a party does not testify to what the party expected, but does not give testimony against him, the party calling the witness is not permitted to prove that the witness had made statements to others which, if testified to on the trial, would have tended to make out his case. (*People v. Jacobs*, 49 Cal. 384.) Cited 68 Cal. 586, 588; 89 Cal. 164, 224; 94 Cal. 556.

275. Where the prosecution was allowed, on the ground of surprise, to lay a foundation for the impeachment of its own witness by proving that he had made contradictory statements, an objection to such proof, on the ground that if he had made such contradictory statement the testimony should first be read to him, is properly overruled, it not appearing that the contradictory statement was in the shape of testimony. (*People v. Kruger*, 100 Cal. 523.)

276. In response to a question if he saw any one there, the witness testified that he saw some person at a distance, but did not recognize him at the time, and could make no statement as to who the person was. The prosecution then called other witnesses, who testified that the witness had stated to them that he had seen the defendant near the place of the homicide. Held, that the evidence was inadmissible, but that the error was immaterial, since the other evidence conclusively showed that the defendant was at and near the place of the homicide on the night of its commission. (*People v. De Witt*, 68 Cal. 584.)

Estoppel of party calling witness to strike out evidence. See Evidence, 648.

Answers of witnesses on collateral matters are conclusive, and not subject of contradiction. See VII, 4.

2. Contradiction of Witness by Proving Different Statements or Declarations.

277. When the proper foundation is laid by the cross-examination of the witnesses as to

the supposed contradictory statements, they are admissible in evidence for the purpose of impeaching his credit. (*Hall v. Bark Emily Banning*, 33 Cal. 522, 524.)

278. If the defendant calls a witness to prove the terms of a parol contract, the plaintiff may, in rebuttal, to impeach the witness, prove by another witness declarations made by defendant's witness as to what the contract was. (*McCarger v. Rood*, 47 Cal. 138.)

279. In a criminal case the prosecution may show, by other witnesses, that a witness for defendant had given a different account of what occurred at the time the offense was committed from that testified to by the witness on the stand. (*People v. Nyland*, 41 Cal. 129.)

280. Where a witness has been asked, on cross-examination, if he had not used particular expressions for the purpose of laying a foundation for contradicting him, and has denied that he has done so, the witness called to contradict him may be asked if he did not make the particular statement in question. (*People v. Lee Ah Yute*, 60 Cal. 95.)

281. When one who had acted as interpreter and attorney, in relation to the execution of a deed by the grantor and defendant in the action, on being called by the plaintiff as a witness, testified that he had read the deed to the grantor, and what passed at the time of the execution, and who subsequently received a conveyance of a part of the land from the plaintiff, it was held that the defendant might prove that this witness had made to other persons a different statement of the facts in relation to the transaction from that which he had given under oath, and that it was error in the court below to reject such evidence when offered by the defendant. (*McDaniel v. Baca*, 2 Cal. 326.)

282. In a prosecution for an assault with intent to commit murder, where the wife of the defendant was asked on cross-examination whether she had not told another woman named that her husband had intended to shoot the deceased some weeks previous, which question she answered in the negative, a question by the district attorney to such other woman asked for the purpose of impeaching the defendant's wife, "what did she tell you about the shooting?" is improper, as not being within the foundation laid upon the cross-examination. (*People v. Nonella*, 99 Cal. 333.)

Cross-examination as to contradictory statements is not irrelevant. See post, 319.

283. Evidence that a witness for the prosecution made statements in his examination before the police court different from those made on the trial is admissible for the purpose of impeachment. (*People v. Lee Ah Chuck*, 66 Cal. 662.)

284. Where a defendant has offered himself as a witness in the case, a statement made by him at the coroner's inquest is admissible in evidence for the purpose of contradicting his testimony. (*People v. Hong Ah Duck*, 61 Cal. 387.)

285. When a witness for the prosecution in a case of homicide testifies inconsistently with

the testimony given by him at the coroner's inquest, it is proper to call his attention to what he had testified to before the coroner, and, upon his denial of such testimony, to prove by the coroner that he did so testify. (*People v. Bushton*, 80 Cal. 160.)

286. The deposition of a witness given before a coroner's jury, and certified and returned by the coroner to the district court as required by the statute, is admissible in evidence for the purpose of contradicting the statement of the witness, made under oath, on the trial of the person accused of having murdered the deceased. (*People v. Devine*, 44 Cal. 452.)

Cited 57 Cal. 346.

287. The refusal to allow the deposition of the prosecuting witness, taken at the preliminary examination, to be read in evidence for the purpose of contradicting him, is not error, if the deposition fails to show any material contradiction of his testimony as given at the trial. (*People v. Kalkman*, 72 Cal. 212.)

288. Affidavits or letters of a witness which tend, although in a slight degree, to contradict his testimony, are admissible for that purpose. (*Empire etc. Co. v. Bonanza etc. Co.*, 67 Cal. 406.)

289. Upon the cross-examination of a witness for the prosecution, an affidavit made by the witness was offered by the defendant for the purpose of impeaching her testimony. Held, that the circumstances under which the affidavit was made, and the conversation had by the witness with the person at whose instance it was made, were admissible as parts of the transaction. (*People v. Smallman*, 55 Cal. 185.)

290. The trial court properly permitted the prosecution to read in evidence, upon cross-examination of the defendant, an affidavit made and used by him upon a motion for a new trial in a civil action instituted against him by the prosecutrix, where it appeared that the affidavit tended to contradict the statements made upon his examination in chief, and properly refused to allow the defendant to read certain affidavits therein referred to, which were not admissible for any purpose. (*People v. Samonset*, 97 Cal. 448.)

291. To impeach the testimony of F., a witness for plaintiff, by showing that on a former occasion he had sworn differently, defendant offered in evidence a statement on motion for new trial, and on appeal, in a former suit between the parties, purporting to contain all the evidence, and agreed to as correct by the attorneys therein, in which statement there appeared the testimony of F. on that trial. Held, that the statement was not admissible; that it was made for a particular purpose, and was not proof except for that purpose, certainly not to impeach F., who neither made nor signed it. (*Payne v. Treadwell*, 16 Cal. 220.)

292. Map of survey made for purpose of partition of lands purchased by a witness and others is admissible in evidence, on cross-examination, for the purpose of contradicting the witness. (*Judson v. Molloy*, 40 Cal. 299.)

293. Entries in book of charges, made against person who is witness on the trial, may also be received in evidence to impeach the witness. (*Sill v. Reese*, 47 Cal. 294.)

294. It may be shown on cross-examination that a witness who gives his opinion as to the value of the property formerly entertained a different opinion. (*San Diego etc. Co. v. Neale*, 88 Cal. 50.)

295. The error of refusing to allow a witness to be asked on cross-examination whether he had not formerly made different statements from what he then does is not cured because his testimony is corroborated by other witnesses. (*People v. Robles*, 29 Cal. 421.)

296. Where a proper foundation has been laid for the purpose of impeaching a witness, it is error to sustain an objection to the testimony offered for that purpose before any further question has been asked. (*Valensin v. Valensin*, 73 Cal. 106.)

Laying foundation. See post, VII, 3.

Contradictory statements of witness out of court, effect of. See Evidence, VI, 1, h.

Impeachment, contradicting deposition. See Depositions, 76.

Impeachment of witness by shorthand reporter's notes. See Shorthand Reporters, 6.

3. Laying Foundation.

297. A witness cannot be impeached by evidence of contradictory statements until a proper foundation has been laid for its admission by asking the witness if he had made the statements claimed to be contradictory. (*Young v. Brady*, 94 Cal. 123.)

298. The cross-examination of a witness as to statements made by her inconsistent with her examination in chief, without having first laid the proper foundation for impeachment as required by section 2052 of the Code of Civil Procedure, is not error, when no attempt is afterwards made to contradict the witness. (*People ex rel. Clough v. Levy*, 71 Cal. 618.)

Question is not within the foundation laid, when. See ante, 282.

Showing contradictory statements in depositions without laying foundation. See ante, 246.

299. For the purpose of impeaching a witness, evidence of prior declarations made by him contradictory of his testimony on the trial is inadmissible, unless the attention of the witness has first been called to such declarations. (*Barkly v. Copeland*, 74 Cal. 1.)

300. A witness cannot be impeached by proof that he has made statements out of court contrary to what he has testified to on the trial, unless the witness was asked as to the statements made out of court, and the time when, place where, and person to whom, made. (*People v. Garnett*, 29 Cal. 622; *People v. Devine*, 44 Cal. 452, cited 57 Cal. 346, 70 Cal. 121, 75 Cal. 112, 10 Or. 410, 411; *People v. Salorse*, 62 Cal. 139; *Birch v. Hale*, 99 Cal. 299.)

301. Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise matter of these contradictions and the

time and place of the contradictory statements must be brought to the knowledge of the witness on cross-examination. (*Baker v. Joseph*, 16 Cal. 173.)

Cited 48 Cal. 188.

302. In order that a witness may be impeached by evidence that his previous statements were inconsistent with those made upon the trial, the attention of the witness must be drawn with particularity to the circumstances surrounding the making of the statements and his mind directed to the very statements themselves. The proper course to be pursued when the impeaching witness is produced is to ask him the direct question, "Did the party make such statement at the time and place mentioned?" (*People v. Nonella*, 99 Cal. 333.)

303. A witness was asked, "Did you not state, in the month of September, in the presence of William Knowles and James Robinson, on the way between town here and the racetrack, that you would go into court and swear anything at all that would injure the Thomases?" to which he answered, "No." Held, that the question was sufficiently definite to lay the foundation for an impeachment of the witness. (*People v. Turner*, 65 Cal. 540.)

304. Upon the cross-examination of a witness as to statements made by him upon a former trial, he has the statutory right to have such previous statements presented to him and read, if in writing. (*People v. Lee Chuck*, 78 Cal. 317.)

305. Where the plaintiff, in an action of assumpsit for goods sold and delivered, testified, upon cross-examination, that upon a date prior to the action, when the defendant entered the premises and ousted him, he did not claim to be in possession of the premises under a lease, because there was no lease, it is not error for the court to refuse to permit the defendant to introduce in evidence a transcript in a former action, wherein the plaintiff had recovered from the defendant damages for the entry, for the purpose of showing a former admission of the plaintiff that he was in possession as a tenant, if the witness had not been asked what he had admitted or alleged in the former action, and his attention had not been called to the transcript. (*Salle v. Mayer*, 91 Cal. 165.)

306. The plaintiff was examined as a witness on his own behalf, and testified fully in relation to the matters in controversy. On cross-examination he was asked as to certain statements on the subject claimed to have been made by him as a witness in another case. This was objected to on the ground that the record in the case had not been produced. The court overruled the objection. Held, that the production of the record was unnecessary, and that the objection was properly overruled. (*Moran v. Abbey*, 63 Cal. 56.)

307. On a trial for robbery a witness cannot be impeached by showing that he had made statements on the preliminary examination inconsistent with his statements on the trial, unless his testimony given on the preliminary examination, if reduced to writing, be first

shown to him. And, in the absence of any evidence to the contrary, it will be presumed that the testimony given on the preliminary examination was in writing. (*People v. Ching Hing Chang*, 74 Cal. 389.) Cited 78 Cal. 322.

308. If a person not a party to an action is examined as a witness, letters written by him cannot afterwards be put in evidence by the party not calling him, unless, when examined as a witness, his attention is called to them, and the other party is afforded an opportunity of cross-examining him in relation to them. (*Leonard v. Kingale*, 50 Cal. 628.)

309. When the witness sought to be impeached by his prior written statements cannot read, or where the writing is in a language to him unknown, he is entitled to have it read to him before it can be used for the purpose of impeachment. (*People v. Ching Hing Chang*, 74 Cal. 389.)

310. The question of the admissibility of evidence offered for the impeachment of a witness, by showing that after his testimony was given he had made contradictory statements, is not raised by an objection that no proper foundation had been laid for impeachment, if the objection was expressly limited to evidence of prior contradictory statements. (*Clavey v. Lord*, 87 Cal. 413.)

4. Impeachment on Collateral Matters.

311. A qualification of the rule governing the impeachment of witnesses by proof of contradictory statements elsewhere made by them is, that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relative to the issue being tried. (*People v. Devine*, 44 Cal. 452; *People v. Furtado*, 57 Cal. 345, cited 70 Cal. 121, 75 Cal. 112.)

312. A witness cannot be impeached by contradicting him upon collateral matters. (*People v. Dye*, 75 Cal. 108.) Cited 84 Cal. 627, 655; 86 Cal. 489; 89 Cal. 573.

313. A witness cannot be impeached by evidence of contradictory statements as to a matter which is wholly irrelevant to any material issue. (*Young v. Brady*, 94 Cal. 128.)

314. It is not permissible to impeach a witness by contradicting his statement in regard to a purely collateral matter brought out on cross-examination. (*Barkly v. Copeland*, 86 Cal. 483.)

Contradiction of witness on collateral matters. See ante, 276.

315. A party cannot cross-examine his adversary's witness upon irrelevant or collateral matters for the purpose of eliciting something to contradict or impeach him; and the court should stop the inquiry there, if such matters are drawn out, and not allow contradictory evidence to be introduced in rebuttal. (*People v. Tiley*, 84 Cal. 651, cited 89 Cal. 162; *People v. McKeller*, 53 Cal. 65, cited 53 Cal. 120, 6 Wash. 569; *Evans v. De Lay*, 81 Cal. 103.)

Collateral matter, what is not. See post, 831.

316. Where a question is put to a witness as

to a matter collateral or irrelevant to the issue, his answer is conclusive upon the party asking the question, and it cannot be used as a foundation for impeachment. (*Pierce v. Schaden*, 59 Cal. 540, cited 94 Cal. 130; *People v. McKeller*, 53 Cal. 65, cited 6 Wash. 569; *People v. Bell*, 53 Cal. 119, cited 6 Wash. 569.)

317. Where a witness for the defendant, after he had been examined and cross-examined, is recalled by the prosecution for further cross-examination, in order to lay a foundation for his impeachment, the answers of the witness given on his further cross-examination concerning matters collateral to the issues are binding on the prosecution, and as to them he cannot be contradicted. (*People v. Webb*, 70 Cal. 120.) Cited 75 Cal. 112.

318. The rules, that a witness cannot be cross-examined as to a matter which is irrelevant to the issue merely for the purpose of contradicting him by other evidence, and that, if a question is put to a witness on cross-examination which is irrelevant, his answer cannot be contradicted by the party who asked the question, do not apply when the question asked calls for a response in respect to a matter which the party asking the question would have the right to prove as an independent fact. (*People v. Chin Mook Sow*, 51 Cal. 597.) Cited 66 Cal. 605; 75 Cal. 388.

319. It is not irrelevant to inquire of a witness on cross-examination, for the purpose of impeaching him, whether he has not on a former occasion given a different account of the matter. (*People v. Robles*, 29 Cal. 421.)

320. Where a witness for the plaintiff denies on his cross-examination that he offered to procure testimony in the case for the defendant if paid therefor, the defendant may impeach him by evidence to the contrary. (*Lewis v. Seiger*, 68 Cal. 200.)

321. When a witness is asked on his examination in chief as to whether he had received a grant, for the purpose of strengthening his testimony as to having seen and being capable of recognizing papers pertaining to the Mexican grant in controversy, it is competent to cross-examine him as to whether the grant he had received was a Mexican grant, and to contradict him by showing that no such grant appeared in the Mexican archives. (*Davis v. California Powder Works*, 84 Cal. 617.)

322. In an action for slander, committed in charging that plaintiff participated in a theft, where the convicted thief, on cross-examination by the plaintiff's counsel, testified that he was told by a third person while under arrest that the whole matter of the stealing had been settled, and that plaintiff's name was mentioned in the conversation, such third person cannot be called for the plaintiff to contradict the statement thus brought out. (*Barkly v. Copeland*, 86 Cal. 483.)

323. If the testimony tending to impeach a witness is immaterial, it cannot be held to have injured the party calling him, if it does not appear that the testimony impeached was material. (*People v. Murray*, 85 Cal. 350.)

324. Where a mechanical engineer, employed as port engineer, testified for the defendant that he had regulated the quantity of coal taken on a steamship each trip, and identified a certificate as to the quantity of a kind of coal consumed ordinarily by the steamship upon its trip, and as to the relative quality of that and a different kind of coal, it cannot be an error prejudicial to the defendants, in whose favor a finding was made upon the question involved, to allow the plaintiff to offer such certificate in evidence while the witness was upon the stand for the purpose of contradicting his previous evidence as to the relative value of the two kinds of coal, though the contradiction was not material. (*Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490.)

Impeachment on immaterial point. See Criminal Law, 1157.

Impeachment, immaterial error. See Appeals, 2081.

5. By Statements of Third Persons.

325. Evidence of statements made by one person are inadmissible for the purpose of contradicting another. (*Jepsen v. Beck*, 78 Cal. 540.)

6. By Evidence of Specific Immoral Acts; or Arrest or Conviction for Misdemeanor or Felony.

326. A witness cannot be impeached by evidence of particular wrongful acts. (*People v. O'Brien*, 96 Cal. 171; *Evans v. De Lay*, 81 Cal. 103; *Jones v. Duchow*, 87 Cal. 109.)

327. A witness cannot be impeached by evidence of specific wrongful acts for the purpose of showing that the witness is destitute of moral qualities; nor can the witness be questioned on cross-examination as to such acts. (*Barkly v. Copeland*, 86 Cal. 483.)

328. A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness as to such matters on cross-examination. Thornton, J., reserves his opinion. (*Sharon v. Sharon*, 79 Cal. 633.)

Cited 81 Cal. 105; 84 Cal. 627, 653; 86 Cal. 487, 490; 87 Cal. 114.

329. Upon the trial of a defendant accused of burning insured property, if the keeper of a house of ill-fame has testified to certain damaging statements made by defendant at her house both before and after the fire, and the defendant, when called as a witness in his own behalf, denied the statements, while admitting that he may have been at such house at the dates testified to, he cannot be asked on cross-examination, for the purpose of discrediting him and degrading his character, whether he did not remain all night at that house upon a certain date, some six months after the fire. (*People v. Tiley*, 84 Cal. 651.)

330. Witness cannot be impeached by evidence that she had been guilty of bigamy. (*Evans v. De Lay*, 81 Cal. 103.)

331. A witness may be asked, on cross-examination, for the purpose of discrediting his testimony, and laying a foundation for impeachment, whether he had not, on a previous occasion, made a collateral agreement with or proposition to another party

for a consideration to suppress the very testimony given in the case. Such evidence does not fall within the rule that a witness cannot be impeached by evidence of particular wrongful acts not bearing upon the matter in issue, nor within the rule that a witness cannot be impeached in regard to a purely collateral matter. (*Barkly v. Copeland*, 86 Cal. 483.)

Impeachment of witness by evidence as to moral character. See post, VII, 7.

332. Where, to impeach a witness, a question as to a particular wrongful act is asked, but no answer is required or given, no available error is committed. (*Sharon v. Sharon*, 79 Cal. 633.)

333. The record of a conviction of a misdemeanor is not admissible for the purpose of discrediting a witness, unless it is shown that the offense involved moral turpitude or infamy. (*People v. Carolan*, 71 Cal. 195.)

334. A witness cannot be asked on cross-examination, for the purpose of affecting his credibility, whether he had been arrested and convicted of a misdemeanor, and had been incarcerated in the county jail. Under section 2051 of the Code of Civil Procedure, evidence of such a character is limited to convictions for felonies. (*People v. Carolan*, 71 Cal. 195.)

335. It is not proper to ask a witness, for the purpose of impeachment, whether he had been arrested, pleaded guilty, and paid a fine for beating, bruising, and battering a woman of the town. (*Jones v. Duchow*, 87 Cal. 109.)

336. An objection to such question, on the ground that it did not tend to impeach the witness, and that the record was the best evidence, is specific enough to invoke the rule which does not permit a witness to be impeached by evidence of particular wrongful acts. (*Jones v. Duchow*, 87 Cal. 109.)

337. Where a defendant in a criminal case is under cross-examination as a witness in his own behalf, the fact of his former conviction of a misdemeanor cannot be proved by his oral testimony. The record of conviction is the best evidence, and is indispensable. (*People v. Schenick*, 65 Cal. 625.)

338. In order to discredit a witness by showing his conviction of an offense, the best evidence of the conviction is requisite. (*People v. McDonald*, 39 Cal. 697.)

Cited 65 Cal. 626; 13 Or. 145.

339. It is not competent to prove by parol conviction of witness of an infamous offense, in order to discredit his testimony. The record of the conviction is the best evidence. (*People v. Melvane*, 39 Cal. 614.)

Cited 13 Or. 145.

340. Since the amendments of 1880 to the Penal Code, a defendant indicted for a felony, if he be a witness, may be asked the question whether he has previously been convicted of a felony, but such question only goes to the credibility of the witness. (*People v. Johnson*, 57 Cal. 571.)

Cited 78 Cal. 94; 100 Cal. 482, 483.

341. A witness, on cross-examination, may be asked if he has not been convicted of a felony, and the party asking the question may also introduce the record of his conviction.

tion. (*People v. Chin Mook Sow*, 51 Cal. 597.)
Cited 61 Cal. 544; 13 Or. 145.

342. When the defendant testifies in chief about his birth, parentage, education, and business, he may be asked, on cross-examination, whether he had ever been arrested before. (*People v. Fong Ching*, 78 Cal. 169.)

343. The party seeking to impeach a witness may ask him on cross-examination whether a judgment and sentence had been pronounced against him for a felony. (*People v. Rodrigo*, 69 Cal. 601.)

344. If a defendant, who is on trial for a larceny, becomes a witness in his own behalf, a question put to him on cross-examination, as to whether he has not been previously arrested for another larceny, is not objectionable on the ground that the defendant cannot be shown to be guilty of the offense charged by showing that he had been accused of another crime. (*People v. McCauley*, 45 Cal. 146.)

345. When a witness called by the people in a criminal case, on his cross-examination, testifies that he is in jail, and, for the purpose of affecting his credibility, is then asked if he is not in jail charged with house-breaking, it is in the discretion of the court either to overrule or sustain an objection to the question; and if there are no facts which show an abuse of this discretion, a new trial will not be granted. (*People v. Ah Who*, 49 Cal. 32.)

346. On a trial for murder, where the defendant has been called as a witness on his own behalf, a question as to whether or not he has been previously arrested for shooting at certain individuals cannot be allowed on cross-examination for the purpose of impeaching him under section 2051 of the Code of Civil Procedure; nor can he be asked as to his knowledge of the unlawful character of the business carried on at a house where he was employed as doorkeeper, and frequented by the deceased. (*People v. Hamblin*, 68 Cal. 101.)
Cited 79 Cal. 673, 696; 81 Cal. 105; 96 Cal. 180.

347. The defendant was asked, over the objections of his attorneys: "Were you convicted of an assault with intent to kill, in San Mateo county? If so, when?" Held, it is not necessary to decide whether the question was a proper one or not. It is sufficient that the fact of the former conviction of the defendant was proved by a certified copy of the record, as well as by the evidence of a witness, and there was no evidence to the contrary. But on this point see *People v. Chin Mook Sow*, 61 Cal. 600. (*People v. Rolfe*, 61 Cal. 540.)

Oredibility of witness who has been convicted of felony. See post, IX, 5.

7. By Evidence of Character or Reputation for Truth and Veracity.

348. A defendant who has been a witness in his own behalf may be impeached by evidence as to his general reputation. (*People v. Bentley*, 77 Cal. 7.)

349. If a defendant in a criminal case offers himself as a witness, the prosecution may introduce testimony to show that his general reputation for truth, honesty, and integrity is bad. (*People v. Beck*, 58 Cal. 212.)
Cited 66 Cal. 604; 78 Cal. 94.

350. An inquiry into the character of a witness for the purpose of impeaching his testimony must be restricted to his character for truth and veracity. (*People v. Yalas*, 27 Cal. 630.)

351. For the purpose of impeaching a witness, the inquiry is not confined to his reputation for truth and veracity, but may extend to his general reputation for truth, honesty, and integrity. (*Heath v. Scott*, 65 Cal. 548.)

352. When it is sought to impeach a witness by attacking his reputation for truth, honesty, and integrity, the inquiry and answer must be as to his general reputation. (*People v. Markham*, 64 Cal. 157.)
Cited 89 Cal. 573.

353. It is not error of which the defendant can complain for the trial court to charge the jury that the defendant, when a witness in his own behalf, having introduced no evidence of his good character, is not to be assailed by the prosecution being permitted to introduce proof of his general bad character. (*People v. Dolan*, 96 Cal. 315.)

354. For the purpose of impeaching the veracity of a witness, it is not competent to base belief on personal knowledge as distinguished from general reputation. (*People v. Methvin*, 53 Cal. 68.)
Cited 56 Cal. 538; 89 Cal. 574.

355. Where a witness for the defense was asked, for the purpose of impeachment of the prosecuting witness, whether he knew his general reputation, in the community where he lived for honesty, truth, and veracity, and the witness answered that he only knew from what he heard people generally say of him, it is error for the court to rule that he could only testify as to what he knew of his reputation of his own personal knowledge. (*People v. Webster*, 89 Cal. 572.)

Who may testify to good reputation. See post, 387.

356. A witness who is called to impeach another may answer that he would not believe such other witness on oath. This has been the uniform practice in this state, and no injury has resulted from such practice. (*Stevens v. Irwin*, 12 Cal. 306.)

357. It is not essential to the impeachment of a witness to prove by the witnesses called for that purpose that from his or her general bad reputation for truth and veracity they would not believe him or her under oath. (*People v. Tyler*, 35 Cal. 553.)

358. Where the defendant introduces witnesses to impeach the credibility of one of plaintiff's witnesses, it is not an abuse of discretion in the court to limit him to eight witnesses, provided the plaintiff introduces no witnesses to sustain his credibility. (*People v. Murray*, 41 Cal. 66.)

359. Testimony to impeach a witness should not be confined to his character for truth and veracity, but should extend to his entire moral

character, and a witness may be impeached by testimony showing that his general moral character is bad. (*People v. Yslas*, 27 Cal. 630.)

360. Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness. (*People v. Yslas*, 27 Cal. 630.)
Cited 65 Cal. 551; 11 Nev. 331.

361. If the evidence of a witness, introduced by the people in a criminal case, shows that she is a prostitute, the defendant is not injured by a refusal of the court to allow him to prove that she is reputed to be a woman of that character. (*People v. Reed*, 48 Cal. 553.)
Cited 62 Cal. 310.

362. A witness, with a view to impeach him, was asked certain questions affecting his moral character. Held, that they were rightly ruled out. (*Hinkle v. San Francisco etc. R. R. Co.*, 55 Cal. 627.)
Cited 79 Cal. 673; 81 Cal. 106.

Remark of judge sustaining character. See post, VII, 11.

8. By Showing Animus, Motive, or Hostility of Witness.

363. The rule as to evidence of contradictory statements applies equally to evidence of declarations or acts of hostility or ill-feeling on the part of the witness. There is no distinction between admitting declarations of hostility of the witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned. (*Baker v. Joseph*, 16 Cal. 173.)
Cited 27 Cal. 68.

364. It is always competent for the party against whom a witness is called and testifies to show that the witness entertains feelings of hostility and prejudice toward him. (*People v. Wasson*, 65 Cal. 538.)
Cited 67 Cal. 292.

365. The party against whom a witness is called may cross-examine him for the purpose of showing his hostility. (*Hartman v. Rogers*, 69 Cal. 643; *Silvey v. Hodgdon*, 48 Cal. 185.)

366. The state of mind of a witness as to his bias or prejudice, his interests involved, and his hostility or friendship toward the parties, are always proper matters for investigation by the adverse party, upon cross-examination. (*People v. Thomson*, 92 Cal. 506.)

367. A witness for the prosecution in a criminal case may, on his cross-examination, be interrogated as to any matter which may tend to show that he is biased against the party conducting the cross-examination, or that he has an interest in the result adverse to such party. (*People v. Benson*, 52 Cal. 381.)
Cited 65 Cal. 540; 66 Cal. 604; 70 Cal. 229.

368. The defendant in a criminal case is entitled to cross-examine a witness for the prosecution, for the purpose of showing his hostility to the accused; and the refusal to permit such cross-examination is error, unless it appear as a matter of law that the answers of the witness to the questions asked

could have no tendency to show bias on his part. (*People v. Lee Ah Chuck*, 66 Cal. 662.)
Cited 92 Cal. 510.

369. If a witness is a very material one for the party introducing him, and has been intimately associated with him in relation to the matters in suit, the opposite party has a right to test his credibility on cross-examination by any questions calculated to illustrate his attitude to the parties, even if the questions are not strictly speaking cross-examination. (*Harper v. Lamping*, 33 Cal. 641.)
Cited 66 Cal. 667; 71 Cal. 32; 1 Ariz. 136.

370. This hostility may be established by proof of the acts or declarations of the witness, provided his attention is first called to the particular acts or declarations proposed to be proved, with sufficient minuteness as to time and circumstances. (*Silvey v. Hodgdon*, 48 Cal. 185.)

371. Where a witness testified favorably to the defendant, in his examination in chief, it is competent to ask, on cross-examination, whether he had not made statements out of court tending to show his friendly feeling toward the defendant, and whether he had not expressed an intention to suppress facts within his knowledge that would injure defendant's case; and such statements may be proved to impeach the witness if he denies making them. (*People v. Murray*, 85 Cal. 350.)

372. A witness for the prosecution in a case of murder may properly be asked, in his cross-examination, whether he had agreed to be present, and to aid the deceased in the expulsion of the defendant, who committed the homicide while an attempt was being made to expel him from premises claimed by the deceased. (*People v. Furtado*, 57 Cal. 345.)

373. On the trial, one of the plaintiffs, when testifying as a witness in his own behalf, was asked on cross-examination if he had not on a certain night gone with shotguns upon the premises in controversy, while the defendants were in the peaceable possession thereof, and forcibly dispossessed them. The court disallowed the question. Held, that the question was proper as tending to show that the witness was biased or entertained ill-will against the defendants, but that its rejection was without prejudice, as the witness had previously admitted entertaining ill-will toward one of the defendants. (*Anderson v. Black*, 70 Cal. 226.)

374. Where a witness has testified to matters material to the issues, the party against whom he has testified may, on cross-examination, show that the witness is hostile to or prejudiced against him, and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses; but this can only be done when the witness has testified to material matters. (*Luhre v. Kelly*, 67 Cal. 289.)

375. If married women testify as witnesses for the people in a criminal case, the defendant cannot, for the purpose of affecting their credibility, introduce testimony to prove a conspiracy on the part of their husbands to

falsely prosecute him and obtain his property. (*People v. Parton*, 49 Cal. 632.)

376. Where the testimony of a witness for the prosecution, on cross-examination, discloses prejudice against the family of the defendant on account of what was heard about their character, the particular reason for the prejudice is immaterial, and a question as to what the character was which the witness speaks about may be ruled out without prejudicial error. (*People v. Goldenson*, 76 Cal. 328.)

377. If it is proposed to assail credibility of witness by letter in which hostility is shown to the party against whom he is called, and the letter is shown to the witness, and he denies writing it, the handwriting may be proved by other witnesses. (*Silvey v. Hodgdon*, 48 Cal. 185.)

Impeachment on denial of offer to procure testimony. See ante, 320.

9. By Showing Impeachment on Former Trial.

378. Witness cannot be discredited by asking him if he had not been impeached as a witness upon the trial of another action. (*Cockrill v. Hall*, 76 Cal. 192.)

Credibility of impeached witness. See post, IX, 5.

10. Want of Religious Belief.

379. A witness cannot be impeached by evidence showing him to be a person without religious belief. (*People v. Copsey*, 71 Cal. 548.)

11. Objection to: New Trial for; Remarks of Judge, What Improper.

Impeachment, evidence, objection to. See Appeals, 2368.

General objection to impeaching evidence. See Appeals, 2788.

Evidence contradicting witness as ground for new trial. See New Trial, IV, 21, g.

380. A remark of the judge upon the cross-examination of a witness, upon which it was attempted to show a discrepancy between her testimony at the trial and that given by her at the preliminary examination, that he could not see any discrepancy in the testimony, though improper, is not prejudicial error if there was in fact no discrepancy. (*People v. Elliott*, 80 Cal. 296.)

381. If character of a witness is called in question during a trial, and the judge makes a remark from the bench indorsing his respectability, it is good cause for a reversal of judgment if the testimony of the witness is material. (*McMinn v. Whelan*, 27 Cal. 300.) Cited 92 Cal. 490; 7 Nev. 383; 13 Nev. 512.

VIII. Sustaining Reputation or Character of Witness.

382. Where a plaintiff in rebuttal introduces evidence in contradiction of the witnesses of the defendants, it is competent to the latter, after the plaintiff has rested, to support their credibility by the introduction of additional testimony. (*Wade v. Thayer*, 40 Cal. 578.)

Cited 6 Col. 259.

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383. If the defendant proves that a witness, called and examined by the prosecution, has been convicted of a felony, it is an assault upon the character of the witness for integrity and truth, and the prosecution may, in rebuttal, examine witnesses to prove that the reputation of the witness for truth and integrity is good in the community where he resides. (*People v. Amanacus*, 50 Cal. 233.)

384. If a defendant introduces evidence on a trial for murder tending to show that one of the people's witnesses was suborned, and had been paid for his testimony, the prosecution in rebuttal may introduce testimony to show the good character of the witness for truth and veracity. (*People v. Ah Fat*, 48 Cal. 62.)

Cited 13 Or. 186.

385. Evidence of the good character of a witness cannot be given until his character has been attacked by evidence that his reputation for truth, honesty, and integrity is bad. (*People v. Bush*, 65 Cal. 129.)

386. Evidence is not admissible to prove that the character of a witness for truthfulness is good unless the opposite party has tried to impeach him by showing that his general reputation is bad. (*People v. Cowgill*, 93 Cal. 596.)

387. It is error to strike out the evidence of a witness called to sustain the reputation of another witness for truth, honesty, and integrity against an attempted impeachment thereof, on the ground that the witness had never heard such reputation discussed, or talked with any one about it, if he states that he has known the witness personally for twenty-seven years, and knows what his reputation is, and that it is good. (*First Nat. Bank of Oakland v. Wolff*, 79 Cal. 69.)

388. A witness, introduced to sustain the character of a witness whose reputation had been attacked, was asked (by the district attorney) the question: "From what you know of him, would you believe him under oath?" Held, that the question was improper, but as it was asked and answered without objection, there was no error. (*People v. Ramirez*, 56 Cal. 533.)

389. When an attempt is made to impeach a witness, by proving former statements made by him in conflict with what he has stated before the court, his credit cannot be sustained by proof that he made to other persons before being called as a witness, the same statement detailed in his testimony. (*People v. Doyell*, 48 Cal. 85.)

Cited 74 Cal. 4; 88 Cal. 398.

390. Such statements made by the witness may, however, be admissible in contradiction of evidence tending to show that the statement made by him under oath is a fabrication of a late date, if the statements were made before their effect could be foreseen; and perhaps in other peculiar cases. (*People v. Doyell*, 48 Cal. 85.)

391. Where an attempt is made to impeach a witness by showing that his testimony was given under the influence of some motive prompting him to make a false statement, evidence is admissible to show that he made

prior similar statements at a time when the imputed motive did not exist; and the admission of such prior statements before any evidence tending to impeach his motives has been introduced is not a prejudicial error, if such impeaching evidence is subsequently given. (*Barkly v. Copeland*, 74 Cal. 1.) Cited 88 Cal. 398.

392. The impeachment of the attachment debtor, who has testified as a witness for the plaintiff to the validity of the sale, by evidence on the part of the defendant of statements made by the witness inconsistent with his testimony, and by showing that his reputation for truth was bad, cannot be rebutted by proof on the part of the plaintiff that the witness had made prior statements consistent with his testimony at a time so far remote as to preclude the idea of fabrication. (*Mason v. Vestal*, 88 Cal. 396.)

393. Refusal to allow witness to testify to good reputation of the defendant for truth, honesty, and integrity is not a prejudicial error if he and several other witnesses have previously testified substantially to that effect, and their evidence is not contradicted by the prosecution. (*People v. Kalkman*, 72 Cal. 212.)

Corroboration, evidence admissible in. See *Common Carriers*, 130.

IX. Credibility of Witnesses.

1. General Rules as to; Credibility is Question for Jury.

394. It is province of jury to decide on credibility of witnesses. (*Wing Chung v. Los Angeles*, 47 Cal. 531; *People v. Clark*, 84 Cal. 573.)

395. Where the value and weight of evidence depend upon the credibility of the witnesses, it is a matter peculiarly for the jury to determine. (*People v. Cesena*, 90 Cal. 381.)

396. *McB.*, the accomplice, swore to the larceny by the defendant. The court instructed the jury "that though the witness *McB.* was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony. Held, that the instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. (*People v. Eckert*, 16 Cal. 110.)

397. Positive testimony of witnesses may be overcome by circumstances showing that they are mistaken. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims of belief. (*Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34.) Cited 87 Cal. 574; 11 Mont. 273.

398. In its instructions, the court charged the jury, in reference to the evidence of certain witnesses, as follows: "You should carefully determine the amount of credibility to which their evidence is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." Held, that the instruction was

proper. (*People v. Ching Hing Chang*, 74 Cal. 389.)

399. The court charged the jury as follows: "When facts are testified to by witnesses who are not impeached, and there is no inherent improbability in the statement, the jury are bound to take that evidence as proving the particular fact; and the jury have no right capriciously to disregard evidence where it is not controverted, and the character of the witnesses is good, and the story is probable." Held, though there should be no necessity for such an instruction, still as a matter of law the instruction is correct. (*Hayward v. Rogers*, 62 Cal. 349.)

400. An instruction to the jury, requested by the defendant, that "every witness, the defendant included (if called as a witness) is presumed to speak the truth, and the jury are bound to remember such presumption in determining the facts admitted to them for their consideration," is properly qualified by the court by adding that "this presumption is a disputable one, and is not conclusive upon you. You are the sole and exclusive judges of the credibility of the witnesses and of the weight to be given to the testimony of each. In determining the weight of the testimony, you have the right to take into consideration the interest, if any, which the witness may have in the result of the trial, his conduct on the stand, his general appearance and demeanor before you, and whether or not it is such as convinces you that he is speaking the truth, or otherwise." (*People v. Dolan*, 96 Cal. 315.)

401. An instruction as to the credibility of witnesses quoted in the opinion, reviewed, and held misleading. (*People v. Edson*, 68 Cal. 549.)

Instructions as to witness false in part. See post, IX, 2.

Instruction as to credibility of defendant testifying. See post, IX, 3.

Credibility of is for jury. See *Criminal Law*, 1910, XVIII, 14, u; *Instructions*, 115.

Defendant testifying, credibility of is for jury. See *Criminal Law*, 1955.

Instructions as to credibility of relative. See post, IX, 4.

Credibility of witness, review of on appeal. See *Appeals*, XI, 19.

Children as witnesses, discrepancies. See *Criminal Law*, 2608, 2609.

Number of witnesses does not conclude. See *Instructions*, 103, 104.

2. Witness Falsely Swearing in Part.

402. Jury may reject whole of testimony of witness who has willfully sworn falsely as to a material point. (*People v. Soto*, 59 Cal. 367.) Cited 67 Cal. 403; 69 Cal. 238.

403. Distrust which is cast upon witness willfully false in a material part of his testimony is a presumption of law for the court, with which the jury have nothing to do, except to receive and act upon it. It is a rebuttable presumption, however, and may be overcome by facts and circumstances of which they are the sole judges. (*White v. Disher*, 67 Cal. 402.)

404. The rule that a witness who testifies falsely in one thing is to be disbelieved in all things applies only to cases where a witness willfully testifies falsely, and does not apply to cases where the witness is innocently mistaken. (People v. Strong, 30 Cal. 151.) Cited 53 Cal. 494; 67 Cal. 403; 12 Mont. 241.

405. The maxim that "a witness false in one part of his testimony is to be distrusted in others" does not apply to false testimony given in some other action or proceeding. A witness may be impeached by showing that he has testified differently in regard to the same matter in some other action; but a jury would be justified in believing his second instead of his first statement. The court did not, therefore, err in refusing to instruct the jury that, if E. believed at the time of filing a petition in insolvency that he owned the property in controversy, it was his duty to include it in his schedule, and his willful and intentional neglect so to do made his oath attached to said schedule false; that when a witness has intentionally perjured himself in a judicial proceeding, the jury must regard his whole testimony with suspicion, and discredit it, except in such particulars as it is corroborated by other circumstances. (Carroll v. Sprague, 59 Cal. 655.)

406. Under section 2061, subdivision 3, of the Code of Civil Procedure, a witness false in one part of his testimony "is to be" distrusted in others, and an instruction to the jury that such a witness "may" be distrusted is error. (White v. Disner, 67 Cal. 402.) Cited 71 Cal. 397.

407. Under section 2061 of the Code of Civil Procedure, the court may instruct the jury to distrust or reject in its entirety the testimony of a witness who has willfully testified falsely in regard to any one person or any particular fact in the case. (People v. Flynn, 73 Cal. 511.)

408. It is not error to instruct the jury that "if any witness has, in their judgment, sworn falsely in any material respect, he is to be distrusted in all others, and his testimony is not to be accepted and acted on without great caution." (People v. Righetti, 66 Cal. 184.) Cited 12 Mont. 241.

409. An instruction that if the jury "believed any witness had, upon the stand, willfully sworn falsely in respect to any matter material to the issue on trial, they should disregard his testimony altogether," was properly refused. (People v. Hicks, 53 Cal. 354.) Cited 67 Cal. 403; 69 Cal. 238.

410. An instruction in a criminal prosecution, to the effect that if the jury should believe that any witness had sworn falsely as to any fact in the case they were at liberty to entirely disregard the testimony of such witness, is not erroneous. (People v. Ah Sing, 95 Cal. 654.)

411. It is not error to instruct the jury that if they believe any witness has willfully testified falsely to any material fact, it is their duty to discredit him. The verbs "discredit" and "distrust" have substantially the same meaning. (People v. Clark, 84 Cal. 673.)

412. It is not error to refuse an offered instruction—"a witness false in one part of his testimony is to be distrusted in others"—when an instruction is given in these words: "A witness willfully false in one part of his testimony is to be distrusted in others." (People v. Sprague, 53 Cal. 491.)

Cited 53 Cal. 355; 59 Cal. 389; 66 Cal. 185; 67 Cal. 403; 69 Cal. 238; 73 Cal. 516; 84 Cal. 583; 8 Col. 453; 12 Mont. 241.

413. An instruction that "a witness false in one part of his testimony is to be distrusted in other parts" is not erroneous, although the word "willfully" is not inserted immediately before the word "false" in the instruction. (People v. Treadwell, 69 Cal. 226.)

Cited 73 Cal. 516; 95 Cal. 656.

414. Where a certain witness has testified falsely upon a particular point, the court need not specifically direct the attention of the jury to such evidence, or instruct them that it is material, and if they believe it to be false, to distrust the entire testimony of the witness. A general instruction to distrust the entire evidence of any witness whom they find to have willfully sworn falsely upon any material point is sufficient. (People v. Demouset, 71 Cal. 611.)

3. Party as Witness, Credibility of.

415. The defendant in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness. It is only by virtue of a provision of the code that he is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected. It is not error, therefore, for the court to call the attention of the jury to that circumstance. Sharpstein and McKee, JJ., dissenting. (People v. Morrow, 60 Cal. 142.)

416. Where the defendant in a criminal prosecution has been examined as a witness in his own behalf, it is not error to instruct the jury that he had a right to do so, and that they were to consider his testimony as they would that of any other witness; but that they should bear in mind the position of the defendant, the manner in which he would be affected by their verdict, and the very great interest he must feel in the result of the trial, and how it might affect his credibility or color his testimony. (People v. Faulke, 96 Cal. 17.)

417. Where a defendant is a witness in his own behalf, it is not error for the court to instruct the jury that in weighing his evidence they must consider the circumstances under which he testified, being the defendant in the case, and having such important interests dependent upon the result. (People v. Wheeler, 65 Cal. 77.) Cited 20 Nev. 409.

418. A charge to the jury that while the defendant and two other persons, who were also charged with the same offense, were allowed to testify, yet their testimony is not entitled to the same consideration as the testimony of persons not charged with crime, if not error, is at least on the verge of error,

where it appears that only the prosecuting witness had testified against the three, and his testimony is subject to unfavorable criticism. (*People v. Murray*, 86 Cal. 31.)

419. It is an invasion of the province of the jury so to instruct them as to give a different rule for weighing the evidence of the witnesses for the defendant generally from that which was applied to the prosecuting witness, and discriminating against the former as to the probability of their evidence. (*People v. Murray*, 86 Cal. 31.)

420. Where the court instructed the jury in respect to the weight and effect proper to be given to defendant's evidence, who had testified at the trial in his own behalf that "in addition to noticing his manner and the probability of his statements, taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, and the consequences to him relating from the results of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. . . . If convincing, and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." Held, that there was no error. (*People v. Cronin*, 34 Cal. 191, cited 60 Cal. 147, 148, 62 Cal. 522, 67 Cal. 379, 86 Cal. 35, 9 Nev. 130, 15 Nev. 54, 16 Nev. 38, 19 Nev. 141, 20 Nev. 409, 2 N. M. 130, 4 Utah, 62, 6 Utah, 179; *People v. Morrow*, 60 Cal. 142, cited 65 Cal. 78, 67 Cal. 379, 19 Nev. 141, 20 Nev. 409, 8 Col. 454; *People v. Nichols*, 62 Cal. 518; *People v. O'Neal*, 67 Cal. 378, cited 20 Cal. 409.)

421. An instruction to the jury in a criminal action, directing their attention to the fact that the defendant had offered himself as a witness on his own behalf, and saying to them that in considering the weight and effect to be given to his evidence, in addition to noticing his manner and the probability of his statements, they could consider his relation to the case, and the circumstances under which he gave his testimony, the consequences to him resulting from the verdict in the case, and all the inducements and temptations which would ordinarily influence a person in his situation, having been sanctioned under the old constitution, must be considered as a part of a similar provision of the constitution of 1879, and cannot be held erroneous. It would be better, however, to entirely omit such instruction from those asked and given on behalf of the prosecution in the future. (*People v. O'Brien*, 96 Cal. 171.)

422. On the trial the defendant testified as a witness in his own behalf. The court instructed the jury that in weighing his testimony they should consider his position, the manner in which he might be affected by the verdict, and the very grave interest he must feel in it, and whether this position and interest might not affect his credibility and color his testimony; but that they should weigh the testimony fairly, and give it such credit as they thought it ought to receive. Held, that the instruction was proper. (*People v. Knapp*, 71 Cal. 1.) Cited 20 Nev. 409.

Party as witness, credibility. See Criminal Law, 838.

Instructions as to credibility of defendant testifying. See Criminal Law, XVIII, 18, i. Credibility of accomplice. See Criminal Law, 805, 806.

4. Where Relatives of Party Testify.

423. In a criminal case, where a son of the defendant testifies in his behalf, evidence of their relationship is admissible, and the court may instruct the jury that they may consult their general knowledge and experience in life as to whether or not a son would be apt to favor his father in giving his testimony. (*People v. Wong Ah Foo*, 69 Cal. 180.) Cited 71 Cal. 608.

424. Where certain near relatives of defendant have testified in his favor, on a trial for murder, the court may instruct the jury to bear in mind their relationship to the defendant, the manner in which they might be interested in the verdict, and the very grave interest they must feel in it, and to consider whether their position and interest might not affect their credibility or color their testimony. (*People v. Bush*, 71 Cal. 602.)

5. Impeached Witness; Witness Convicted of Felony; Inmate of Low Resort.

425. The evidence of a witness who has been impeached may be disregarded by the jury, and the court may so instruct. (*People v. Phillips*, 70 Cal. 61.)

426. The court below did not err in refusing to instruct the jury that "a witness who has been convicted of the crime of burglary, and served out a term of imprisonment for such crime, is not entitled as a witness to full credit at your hands." (*People v. McLane*, 60 Cal. 412.)

427. Where certain witnesses were inmates of a low theater where actresses were employed to serve drinks, attend the boxes, and solicit patronage for the bar, it is error to instruct the jury that as the law allows and licenses such places, "it is submitted whether it is justifiable to charge its inmates with want of veracity unless accompanied with other proof." It is for the jury to determine whether or not such fact ought to influence them in passing upon the credibility of the witnesses. (*People v. Wallace*, 89 Cal. 158.)

Instruction as to credibility of impeached witness. See ante, 396.

X. Exclusion of the Witnesses from the Court.

428. Trial court may make order excluding from the courtroom all the witnesses but the witness under examination. (*People v. Sprague*, 53 Cal. 491.)

429. The exclusion of witnesses from the courtroom is within the discretion of the court. (*People v. Sam Lung*, 70 Cal. 515; *People v. Hong Ah Duck*, 61 Cal. 387.)

430. The exclusion of the witness on the part of the prosecution, on the motion of the defendant, in a criminal action, is not a matter of absolute right, but rests in the discre-

tion of the court. (*People v. Garnett*, 29 Cal. 622.)
Cited 70 Cal. 517; 3 Utah, 145.

431. A party in interest, though not a party of record, should be allowed to be present at the trial, and should therefore be excepted from an order excluding witnesses from the courtroom during the trial. (*Chester v. Bower*, 55 Cal. 46.)
Cited 14 Or. 177.

432. The circumstances of a witness in a criminal action having remained in court and heard the evidence of other witnesses, in disobedience to an order of the court excluding him from the courtroom while other witnesses were under examination, is no ground for rejecting his testimony. The witness in such case may be punished for contempt in disobeying the order; but a party cannot, without fault on his part, be deprived, for such disobedience, of the testimony of the witness. (*People v. Boscovitch*, 20 Cal. 436.)

XI. Expenses and Fees of.

433. The district court has jurisdiction, when a witness is poor, or has come from a place out of the county, and has attended as a witness on behalf of the people, to make an order directing the county treasurer to pay the witness a sum to be named in the order for his expenses. (*Sargent v. Cavis*, 36 Cal. 552.)

434. If the venue of such action is changed, the order should direct the sum allowed to be paid by the treasurer of the county where the indictment was found. (*Sargent v. Cavis*, 36 Cal. 552.)

435. The question whether an order made by the court for a county treasurer to pay a witness his expenses should be presented to the board of supervisors, to have the sum therein allowed audited by them, before the treasurer is compelled to pay the same, not decided. (*Sargent v. Cavis*, 36 Cal. 552.)

436. A party in whose favor judgment is rendered, who voluntarily attends the trial without being subpoenaed by the opposite party, and while there is called as a witness by the latter, is not entitled to witness fees or mileage. (*Beal v. Stevens*, 72 Cal. 451.)

437. The fact that the court ordered the clerk to retain in his possession until further order the amount ordered to be paid by the plaintiff to the clerk for witness fees cannot be objected to by the plaintiff, as he is not injured thereby. (*Bohnert v. Bohnert*, 91 Cal. 428.)

Fees of. See Costs, III, 4, a.

Prosecuting witness, allowing costs against. See Costs, I, 4.

WORDS AND PHRASES.

See Definitions.

1. When a word has two meanings in law, differing in degree merely, it will be understood in its larger sense wherever it occurs in legal proceedings, unless it appears to have been used in its narrower sense. (*Miller v. Miller*, 33 Cal. 353.)

2. The expressions "according to" and "ac-

cording to the true intent and meaning of," mean the same thing. (*Bassett v. Enwright*, 19 Cal. 635.)

3. There is no rule of construction which limits the application of the term "aforesaid" to that which immediately precedes it; nor is there any rule, where there is nothing in the nature of the case or in the subject to which it refers to indicate the contrary, which would justify passing over an intervening general designation of property to which the term "aforesaid" refers, to limit its application to a special designation of particular property in a previous portion of the clause. (*Estate of Pearsons*, 98 Cal. 603.)

4. The words "testamentary executor" are a correct translation of the Spanish word albacea. (*Emeric v. Alvarado*, 64 Cal. 529.)

5. The word "recovery" in its general use signifies a recovery had by process and course of law; though in a special case it may mean collected or obtained without suit. It has its ordinary and popular meaning of payment compelled by action, as used in the title of the Political Code establishing the revenue system of the state. The words "collect" and "collection" as used in that title are employed to designate the obtaining of money without suit, and nowhere signify recovery by action, except where such meaning is manifested by the context. (*People ex rel. Attorney General v. Reis*, 76 Cal. 289.)

6. "Enter," meaning of. (*Oakland Paving Co. v. Tompkins*, 72 Cal. 5, 7.)

7. The words "grant" and "seised in fee," as used in the stipulation of counsel, admitting certain facts for the purposes of the trial, filed in this case, do not, *ex vi termini*, import a perfect grant with specific boundaries in favor of defendant's grantor, or that the grantee in said grant received juridical possession from the Mexican government. (*Seale v. Ford*, 29 Cal. 104.)

8. The use of the pronouns "he" and "his" in a written instrument, in referring to a person whose Christian name is designated therein by a mere initial, is not conclusive that the person referred to is a male; and in an action founded on such instrument, parol evidence is admissible to show that the person intended is a female. (*Berniaud v. Beecher*, 71 Cal. 38.)

9. "Herein," as used in a legal phraseology is a locative adverb, and may refer to a section, or to the entire instrument in which it is used, and its meaning and application are to be determined by the context. (*Estate of Pearsons*, 98 Cal. 603.)

10. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural persons. (*Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 304.)

11. The word "purchase" includes every mode of acquiring an estate, except by inheritance. (*Greer v. Blanchard*, 40 Cal. 194.)
Cited 18 Nev. 47.

12. The word "sold" does not necessarily mean that a conveyance must be made or

- that the title must pass. (*Eaton v. Richeri*, 83 Cal. 185.)
Cited 87 Cal. 463; 92 Cal. 85.
13. The word "year," when used in a contract, does not necessarily mean a calendar year. Its meaning is to be determined from the connection in which it is used, and from the subject matter of the contract. (*Brown v. Anderson*, 77 Cal. 236.)
- Abbreviations. See Evidence, 410.
- Absent from the state. See Executors and Administrators, 51.
- Accident. See Insurance, 226; New Trial, 156.
- Acknowledge. See Legitimacy, 19, et seq.
- Actual. See Fraudulent Conveyances, 77.
- Adverse parties. See Appeals, V, 5, e, C.
- Adoption. See Counties, 45, 46.
- Adopts. See Legitimacy, 13.
- "Agent." (*Sayre v. Nichols*, 5 Cal. 487.)
- Aggrieved party. See Sheriffs, 82; Statute of Limitations, 286.
- Agreed. See Mortgages, 626.
- Agreed to. See Judgments, 117.
- All cases in equity. See Receivers, 3.
- "And," when means "or." See Streets, 230.
- Annually. See San Francisco, 25.
- Appeal. See Public Lands, 298.
- Appointment. See Offices and Officers, 17.
- Appointment and election. See Offices and Officers, III, 1.
- Approval. See Mandamus, 31.
- Appurtenances. See Deeds, 296.
- Assessing and collecting. See Taxation, 459.
- Assessment. See Jurisdiction, 110; Streets, 399; Taxation, 8, 378.
- Assignment. See Sales, 44.
- Assumed. See Mortgages, 626.
- At. See Offices and Officers, 20.
- Bailee. See Criminal Law, 2305.
- Belief. See Pleading and Practice, 321.
- Block. See Definitions, 3; Mortgages, 473.
- Bonded indebtedness. See Corporations, 360.
- "By right." See Deeds, 296.
- "Cancel" not equivalent to "rescind." See Rescission of Contracts, 4.
- Cannot. See Statutes, 195.
- Cashier. See Corporations, 649.
- Cedo. See Mexican Lands, 142.
- Children. See Estates of Deceased Persons, 506.
- "Children," when means "grandchildren." See Wills, XI, 6.
- Chinese subjects. See Immigration, 2.
- Civil action. See Pleading and Practice, 13.
- "Civil cases." See Appeals, 49.
- Claim. See Estates of Deceased Persons, 153; Statute of Limitations, 359.
- Claimant and claim. See Estates of Deceased Persons, 50.
- Claim or demand. See Estates of Deceased Persons, 22.
- Claimants. See Watercourses, 255.
- Commerce. See Constitutional Law, 35, 36.
- "Common property" does not mean "separate property." See Wills, 211.
- Compensation. See Offices and Officers, 7.
- Competent. See Executors and Administrators, 39.
- "Concealed." See Criminal Law, 1743.
- "Confession." See Criminal Law, 696.
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 Misplacement of words, effect of. See Criminal Law, XIV, 7, h.
 Use of word "evidence" for word "defendant" in instructions. See Watercourses, XIV, 2, k.
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 Use of "pro rato" for "pro rata." See Wills, 252.
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Appropriation for. See Constitutional Law, VIII, 10.

WRITS.

See Writs of Error; Writs of Possession; Writs of Restitution.

In issuing prerogative writs the supreme court and the several superior courts are peers, each having original jurisdiction; whether the judgment of each is final, it is not necessary in this case to decide. *Semble*. (*Santa Cruz etc. Co. v. Board of Supervisors of the County of Santa Clara*, 62 Cal. 40.)

Assistance, writ of. See Assistance.
 Attachments. See Attachments.
 Certiorari. See Certiorari.
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 Ne exeat regno. See Ne Exeat.
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 Quo warranto. See Quo Warranto.
 Scire facias. See Scire Facias.
 Power of district courts to issue. See Jurisdiction, XI, 1, b.
 Power of supreme court to issue. See Appeals, I, 2.
 Appealability of orders and decrees on petition for. See Appeals, II, 8.

WRITS OF ERROR.

See Appeals, V, 2.

To supreme court of United States. See Appeals, XIV.
 County court may issue, when. See Appeals, 3281.

WRITS OF POSSESSION.

See Assistance; Ejectment.

A person cannot be dispossessed of his property under an order of a court, proceeding *ex parte* on the statement of the plaintiff, and without citation or notice to the defendant. *Per Bennett, J., C. J. Hastings* dissenting from the conclusion to which the majority of the court arrived. (*Ladd v. Stevenson*, 1 Cal. 18.)

Quieting title, writs of possession in. See Quieting Title, III, 16.
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 Appealability of orders granting or refusing. See Appeals, II, 25.

WRITS OF RESTITUTION.

See Ejectment, XXI; Forcible Entry and Unlawful Detainer, VI, 16.

Restraining writs of restitution. See Injunctions, II, 2, f.
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YEAR.

Meaning of. See Words and Phrases, 13.
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 Fiscal. See Taxation, V, 5.

YOLO COUNTY.

Coupons on road bonds of, bear interest. See Bonds, 56.
 Road bonds of, time for payment of. See Bonds, 60.

YOSEMITE VALLEY.

1. By the act of Congress of June 30, 1864, the United States granted the Yosemite Valley to the state of California, and, in accepting the grant, the state assumed certain obligations in the nature of a trust; but the act and the statute of the state accepting the grant did not operate as a gift for charitable uses, such as may be regulated, directed, and enforced by a court of equity; nor can the

obligations of the state be enforced by the courts of the state. (*People v. Ashburner*, 55 Cal. 517.)

2. Congress having, in 1864, granted to the state of California the Yosemite Valley in trust for certain purposes, and with a proviso that it should remain inalienable forever, the state legislature has no power to make an unconditional and absolute grant of it to a third person in violation of such trust. (*Low v. Hutchings*, 41 Cal. 634.)

3. The act of April 15, 1880, "for the management of the Yosemite Valley, and the Mariposa Big Tree Grove," is not unconstitutional. (*People v. Ashburner*, 55 Cal. 517.)

4. The act of February 20, 1868, granting certain lands, held in trust by the state in Yosemite Valley, to Hutchings and Lamon, being in terms not to take effect until after its ratification by Congress, cannot, in the absence of such ratification, have any force, or serve as a muniment of title, or protect the contemplated grantees against an ejectment brought by the commissioners appointed to manage the property. (*Low v. Hutchings*, 41 Cal. 634.)

5. The commissioners to manage the Yosemite Valley and the Mariposa Big Tree Grove are mere agents of the state, and persons thus clothed with functions affecting the public, assigned to them by state laws, are officers of the state, and their terms of office

expired four years after their appointment. (*People v. Ashburner*, 55 Cal. 517.)

6. The roads laid out within the grant made by act of Congress to the state of California of the Yosemite Valley and Mariposa Big Tree Grove, under the authority of the board of commissioners provided for in the act, are the property of the state, subject to the exclusive jurisdiction of such board of commissioners, who have general power to make leases thereof, not exceeding ten years, and may renew a lease thereof for the same period. Such roads do not fall within the jurisdiction of the supervisors, or become free public highways by the expiration of the first ten year lease, by operation of section 2619 of the Political Code. (*Yosemite Stage etc. Co. v. Dunn*, 83 Cal. 264.)

Purchase of unexpired lease of Yosemite and Wawona road. See Constitutional Law, 410.

YUBA COUNTY.

Term of office of county treasurer. See *Offices and Officers*, 176.

Vacancy in office of county physician, power to fill. See *Offices and Officers*, 229.

County physician, how appointed on vacancy. See *Offices and Officers*, 229.

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